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TRANSCRIPT OF PROCEEDINGS




PARLIAMENTARY COMMISSION OF INQUIRY

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

TRANSCRIPT OF PROCEEDINGS

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

Continued from 22.7.86

Secretary to the Commission

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SIR G. LUSH: Mr Gyles?

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

> Office holders who have a tenure during good behaviour . . . . . necessary incident of judicial office.

We refer there to an article by Shetreet in a recent International Legal Practitioner, and at the back of that article footnotes 31, 32 and 33 provide some interesting parity of material. The particular one that I draw attention to just to make this point is footnote 33 where the author looks at the various provisions in the United States.

> 45 states were removed due to . . . . . moral turpitude.

So it cannot be argued the notion that there must always be some criteria, rather like those set out in the allegations which we have been given here, of conduct contrary to accepted standards of judicial behaviour. Merely to contemplate that is to appreciate the force of what is put in our submission 10. Once the test becomes the accepted standards of judicial behaviour, one asks, accepted by whom and in what respect. Is it meant behaviour on the bench, for example, of a judge who chooses not to wear a wig? Is that contrary to the standards of accepted judicial behaviour? It could be argued to be so.

When one contemplates off bench behaviour, it is a most extraordinary notion that one judge would presume to know or to say what another judge does or should do in his private capacity. I mean, it is in a sense impertinence to suggest that one judge or any group of judges, or any one politician or group of politicians, can say what is the accepted behaviour of judges in private lives.

But consider the scope for oppression which lies within that concept. If there is a judge who persistently, because of a conviction as to the law, finds a particular way, contrary to the views of the governing party or contrary to the interests of a pressure group, however large or small; they then put a private inquiry agent to investigate the judge's conduct and then make allegations, well or ill-based as to his conduct and his associates, then publishes that in a newspaper and then, of course, it is said, well, of course there is a slur upon the judge and it must now be dealt with,

and the judge is called upon to face some sort of inquiry into it. A more pernicious method of interfering with the independence of the judiciary could not be imagined and, of course, it was for that reason that the framers of our Constitution ensured that that would not happen.

Paragraph 11 of our outline of argument:

> The effect of a submission to the contrary of the foregoing . . . . . "proved" must mean "proved by conviction."

The role which the Houses of Parliament have in relation to misbehaviour not in office is to judge whether the conviction is of an offence sufficient to warrant removal. It is my respectful submission that the key to this whole question really lies in paragraph 11. Yesterday during the course of argument reference was made to an opinion by Mr Pincus. I went back and had a look at that opinion last night. I am not sure how I should deal with that. It is an opinion by counsel upon the very matter. It is arising out of these circumstances.

SIR G. LUSH: I do not suggest how you should deal with it, Mr Gyles, but you may think it appropriate simply to face the fact that the members of the commission have seen that and the two opinions of the Solicitor-General as well. The Solicitor-General's first opinion, as with Mr Pincus, was in the first Senate report, and the Solicitor-General's second opinion was in Hansard.

MR GYLES: In any event, I do face that fact. My submission is that it is one thing to refer to opinions given by law officers of the Crown prior to 1900, because that is a safe guide or maybe at least one of the safe guides to what the view of the law which was then current was; it is quite another to have regard to opinions of counsel on the very matter in question. As far as the Solicitor-General's opinion is concerned, that is entitled to some respect as the executive government is bound by it, and normally we would suggest parliament is.

SIR R. BLACKBURN: Not bound by it, Mr Gyles, surely?

MR GYLES: The executive government - - -

SIR R. BLACKBURN: Not bound by it. The Attorney-General may take it or reject it.

MR GYLES: With respect, I accept that. He is entitled to reject it. If he does not, the Solicitor-General's opinion will bind the executive government.

SIR R. BLACKBURN: It is not binding. Suppose the Attorney-General is not in cabinet but cabinet contains a couple of other lawyers and they persuade cabinet that the opinion of the Solicitor-General is not worth tuppence halfpenny, there is nothing illegal about that.

MR GYLES: We are not suggesting it is illegal but as a matter of constitutional convention I would have thought that the Attorney-General would have to resign if that was the case.

SIR R. BLACKBURN: I would be very surprised if that were the case but you may be right.

MR GYLES: It is perhaps an error - - -

SIR G. LUSH: Perhaps it is not very fruitful.

MR GYLES: It is an arid debate.

SIR R. BLACKBURN: You are saying it is entitled to more weight because it is binding on the executive government.

MR GYLES: Certainly a great deal more weight than the Pincus opinion.

HON A. WELLS: Coming down to Mr Pincus's opinion, it cannot be put any higher than this; simply it is an opinion roughly equivalent to a carefully expressed opinion in a law journal and people are entitled to consider it. Even counsel can put it up in debate with the court and say, I adopt this argument, I adopt this exposition, and so on. Is there any other way in which the Pincus opinion could be used?

MR GYLES: That is the highest use it can be put to.

HON A. WELLS: It is simply a convenient way of expressing a point of view, is it not?

MR GYLES: Yes. In any event, there it is and I will deal with it. The fundamental fallacy in Mr Pincus's opinion is that he appears to completely misunderstand the position after the Act of Settlement. He seems to take the view that the position which pertained by which the Crown might remove upon address to the Houses of Parliament was the procedure chosen by the Constitution. That, as I have endeavoured to put in our very first paragraph, is a constitutional heresy of the first order. Because however there has reference been made to this opinion I must take a little more time perhaps to spell that out.

I think it would be correct to say that in many of the references I have already given to the commission - the true position post-1700 would be well understood. That is, that the parliament in addressing the Crown for the removal of a judge was not bound by the conditions of tenure of the judge. In other words, it was not limited to those causes which would be a breach of good behaviour or, put another way, would be misbehaviour. Parliament could address the Crown for any cause which it thought proper and the Crown could accede to that address even though the basis for the address would not have warranted the removal of the judge by virtue of breach of the condition of tenure. I will not re-read the references which relate to that point that I have already dealt with but I will go to some other passages from Shetreet which put the position very clearly.

SIR G. LUSH: Are you going to that same article?

MR GYLES: The book, Judges on Trial. From page 90 to 95 there is a discussion as to whether the address for removal was exclusive, and Shetreet dealt with the interpretation of the Act of Settlement at those pages. I do not read them but in our respectful submission that is an account which we adopt. At page 104 to 105 - this is also extracted in the same bundle - the learned author at page 105, first paragraph, says:

> The result is that parliament is not subject to any statutory limitation . . . . . justifies removal from office.

SIR G. LUSH: There is an assumption there that there must be an allegation of misconduct. Where does that derive from in the Act of Settlement?

MR GYLES: There is none. There must be a cause assigned, that is all.

SIR R. BLACKBURN: Does it say that - there must be a cause assigned?

MR GYLES: No, but a fuller account appears from page 90 to 95.

SIR G. LUSH: Is the Act of Settlement actually quoted here? I think it is probably quoted in the Pincus opinion but I have not got it here.

MR GYLES: It is in curious places.

SIR G. LUSH: I think it is quoted in the Pincus opinion. On page 4 of the opinion which appears at any rate in the typewritten version of the report to the Senate in August 1984 the words in quotation marks are, "But upon the address of both Houses of Parliament it may be lawful to remove them". If that is correct, there is no reference to cause or allegations or anything else.

MR GYLES: No. That is the point.

SIR G. LUSH: Are you looking for the passage in the Pincus opinion, Mr Gyles? It is under the heading, England.

MR GYLES: If I could read what I believe to be the position:

> Judges commissions be made . . . . . . . . . . it may be lawful to remove them.

That is at page 10 of Shetreet. There will no doubt be other sources for that. The present English clause which is the replacement for that - if I could read it onto the transcript:

> All the Judges of the High Court and the Court of Appeal with the exception of the Lord Chancellor shall hold their offices during good behaviour subject to removal by His Majesty on an address to His Majesty by both Houses of Parliament.

The Judicature Act 1873-1875 had an equivalent provision. That was probably the provision current in 1900.

Shetreet's point, if I may put it this way - without reading in detail all he says about it because it is in the passages - is that there is no limit on the power of parliament to address the Crown for removal. It is the Crown of course which does the removing, not parliament. The conventions which have grown up about the addressing have the consequence that it is custom or conventional to have a cause assigned. The act itself leaves it at large.

SIR R. BLACKBURN: That is only what people have said because it has only happened once, has it not? You could hardly call it a convention.

MR GYLES: There has only been one address successful but there have been many addresses.

SIR R. BLACKBURN: Addresses to both Houses of Parliament? What has happened to them - the Crown refused to act on them or what?

MR GYLES: Well, perhaps I have answered a little quickly. There have been many - - -

SIR G. LUSH: Motions for - - -

MR GYLES: Many motions for - - -

SIR R. BLACKBURN: Motions for address?

MR GYLES: It may be correct that there has only been one to the Crown, although from the colonial courts there have been addresses.

SIR R.BLACKBURN: But that was quite different.

MR GYLES: Quite different, yes. In any event, the parliamentary manner of dealing with it is spelt out in detail in various sources which I have not here reproduced.

SIR R.BLACKBURN: It is said by people in books that parliament is bound to conduct a quasi judicial inquiry but it does not really go any further than that, and they did that in the case of Sir Jonas of Barrington.

MR GYLES: Yes, but I think it is correct to say there have been a number of proceedings in parliament which would test that proposition although the further proposition that the ultimate address must contain a cause or will contain a cause is probably not tested beyond that case, although the form of the motion which brings the matter before the parliament would, one imagines, be a safe guide. In any event, that is not critical to my submission to Mr Shetreet's point and indeed our point is that there is no limitation upon parliament's power or parliament's ability to seek removal and it is certainly not limited to grounds which would permit the Crown to otherwise remove. Before passing to the question of colonial judges and a further visit to Pincus, may I refer the commission to a case of ex parte Ramshay 8 QB 183 118 ER 65. We have reproduced certain passage pages from this report (1852) 18 QB 173.

SIR R.BLACKBURN: I thought you said 192.

MR GYLES: Did I say 192?

HON A. WELLS: Yes.

MR GYLES: I was wrong. It is (1852) 18 QB 173.

HON A.WELLS: 192 is the passage.

MR GYLES: 192 is the passage I have had reproduced. If I could read from the headnote.

MR CHARLES: We have the whole report here.

MR GYLES: Very good. As will be seen from the headnote, application was made for a quo warranto against a County Court judge on the relation of a person who had held the office immediately before him and who had been removed for inability and misbehaviour by the Chancellor of the Duchy of Lancaster under the statute. Perhaps if I read on:

> It appeared that on a memorial address to the Chancellor . . . . . decision of the Chancellor being therefore final.

It is a case really of judicial review, the circumstances under which the court will intervene, and as the headnote shows, the substance of the decision was that provided the person had been heard and provided that the facts were capable of constituting misbehaviour or inability, then the court would not intervene. Of course, we do not quarrel with that approach to the matter. At pages 192 and following there is reference to some earlier decisions which are of significance. Perhaps if I could pick it up at 193:

> Sir Fitzroy Kelly relied much on Regina v Owen . . . . . no question arose as to the right and so on.

Then there is reference to the Parish Clerk case which is not relevant for present purposes. That analysis of Regina v Owen is absolutely correct, as one would assume. It was a case in which the clerk was, it was alleged, unable to pay his debts but there was no suggestion that that had affected his conduct as a clerk. The authority of Owen, which we have not had copied, but appears as - - -

MR CHARLES: I have copies.

MR GYLES: That would be helpful, thank you. My learned friend has had this copied. Reading from the headnote:

> A County Court clerk removed . . . . . and the relator was entitled to judgment.

The case again is, of course, primarily a judicial review case as to the circumstances when a court will intervene. Can I take the commission to page 543 of the English report, 484 of the original report, to adopt as being put in language more apt than I can think of this point. The Attorney-General in reply put to the court:

> What is inability or misbehaviour within the meaning of the statute . . . . . insolvency per se is not inability.

It follows, of course, that neither is it misbehaviour. It was argued inability rather than misbehaviour for the very good reason that one cannot imagine that being held to be misbehaviour. The Lord Chief Justice:

> You must look at the facts found by the jury . . . . . must be for the relators.

Mr Justice Erle was of the same opinion:

> The County Court judge has . . . . .
> . . . . . constitute inability within
> the meaning of this statute.

We submit that these two decisions very much place into context the Montagu point that I was putting yesterday, that there may well be circumstances where bankruptcy or pecuniary embarrassment might lead to misbehaviour in office but the mere fact of pecuniary embarrassment does not.

SIR R.BLACKBURN: There is all the difference in the world between a superior judge and a clerk of a County Court. I would have said they were in different spheres, Mr Gyles. Bankruptcy may well be a disqualifying characteristic for a person performing judicial offices but not for a person performing administerial - - -

MR GYLES: I think it is difficult to deal with, except to say that we respectfully disagree, and that there can be no such distinction drawn. The principle which is enunciated in Ramshay and Owen is that you must find inability or misbehaviour in office, and that is the question.

SIR R.BLACKBURN: Yes, but what is the office? Inability relates to the office, surely. What may be inability in one office is not necessarily so in another.

MR GYLES: Conceding that to be so, the question to be asked is why for relevant purposes is a judge any different to a clerk qua pecuniary embarrassment? Indeed the history of the courts of this country, if anybody reads the biographies of them, will show that many judges were in a state of pecuniary embarrassment, and acute pecuniary embarrassment. Indeed I will bring back some references to those circumstances. It simply is not right to suggest that pecuniary embarrassment has ever been regarded, apart from the argument in Montagu as being a ground for removal of a judge.

SIR R. BLACKBURN: Suppose for the moment it is not in itself - it was not the point in the Montagu case, the judge was being harried by a large number of creditors and he was putting them off all the time and he was in public disrepute for that reason; whereas if a judge is severely pecuniarily embarrassed but it is kept in the background so that it never becomes a matter of public scandal, that is a totally different matter.

MR GYLES: No, but your Honour is with respect reading something into that. This notion of public scandal is something that comes only from that argument in Montagu; it is found nowhere else.

SIR G. LUSH: That may be so, Mr Gyles, but if you are asking yourself the question whether what produces inability in a clerk of a court will necessarily produce inability in a judge, or, rather, the converse, what will not produce inability in a clerk cannot produce inability in a judge; are you under an obligation to look at the principle that the judge must be seen to be discharging his duties in accordance with the traditions of his office where the clerk discharges his duties in the privacy of his room presumably.

MR GYLES: I must confess for the moment whilst I do not put the proposition - - -

SIR G. LUSH: It becomes a question of fact in each case really, does not it; although I would concede that in the question I have just put to you there is the additional element that what affects the judge's public stature would conceivably be regarded as producing inability.

MR GYLES: That is the point of departure. I do not put a submission that for all purposes when considering misbehaviour, or inability if that be relevant, that one equates necessarily a county court judge's clerk with a judge. I do not put that proposition. What I do put, however, is that whether it be judge, clerk, chairman of the Reserve Bank board, or whatever, that one is considering, the question of misbehaviour is misbehaviour in office; and it does not mean

inability, and it does not mean loss of stature. People may lose stature for all sorts of reasons good and bad and it will be destructive of the independence of the judiciary if a judge who was performing his function as a judge with no criticism at all was to be hounded out of office by reason of some other factor which some people thought lowered his dignity in the eyes of others. There is no distinction between a judge and any other high office holder or low office holder in relation to that matter.

SIR R. BLACKBURN: Why does parliament so often make bankruptcy a disqualifying condition for a public statutory office?

MR GYLES: Because many statutory office holders handle money, that will be one good reason; there may be others.

SIR R. BLACKBURN: You mean the argument is that a man who is bankrupt has a greater temptation to peculation, to fraudulent conversion of the money?

mR GYLES: No, not necessarily fraudulent conversion; that is not the normal cause of bankruptcy. It is imprudence, financial imprudence is the normal cause. But the fact is that in relation to federal judges there is no disqualifying feature of bankruptcy. It does not matter whether we think it is right or wrong; parliament cannot do it, neither can this commission. The Constitution governs this, not somebody's idea of what parliament may have thought is a good policy, or what any people in this room might think is a good policy. There is simply no disqualification of a federal judge because of bankruptcy; nor could any statute impose that qualification; it would be unconstitutional to do so. And as to calling it misbehaviour, that with respect borders on the absurd, or is absurd. In Owens case it was not even suggested that it went to misbehaviour. It was suggested to go to inability. And we know from Ramshay that the court said there was no imputation of inability or misbehaviour in his office; and no inability or misbehaviour in his office appeared. Now Ramshay was a case also about a judge, was it not, a county court judge. To say that Owen was an inappropriate analogy - - -

SIR R. BLACKBURN: What if a judge while not having his estate sequestrated makes an arrangement with his creditors, a voluntary arrangement with his creditors?

MR GYLES: Yes.

SIR R. BLACKBURN: You would say that is not misbehaviour?

MR GYLES: That is certainly not misbehaviour. How can it be misbehaviour? Misbehaviour must imply some moral

turpitude. The fact that a person happens to be bankrupt may be the result of the imprudence of his relatives who he has guaranteed. In one well known case where a former chief justice of the High Court had been bankrupt apparently because he guaranteed and met the obligations of a member of his family. True he had been discharged before taking office. I am not suggesting that is a particular analogy but would it be any different if it had happened during office? As I understand it occupations continue during bankruptcy except for some limited classes of occupation where people are handling money. Of course, parliament in various places may choose to, as we know, make bankruptcy a disqualifying feature for certain offices but the Constitution does not do that. It would be certainly in our submission not misbehaviour on any view - on any view not misbehaviour, query incapacity. I would submit that for the reasons in Owen and Ramshay it would not be incapacity. But that is the heading under which insolvency would be argued I would suggest with respect, rather than misbehaviour.

SIR R. BLACKBURN: Yes, it could be.

MR GYLES: Even if I am wrong about it, that is probably the - - -

SIR R. BLACKBURN: Certainly.

MR GYLES: May I come to deal with the memorandum - - -

SIR R. BLACKBURN: Mr Gyles, I wonder if I could mention a point.

MR GYLES: Yes.

SIR R. BLACKBURN: Leave it for the moment if it would take you off your track; but there is another possibility which as far as I know never occurred. What if it had occurred that a judge in the first place - this is after the Act of Settlement but before the creation of the divorce court in 1857 in England - the judge had been the unsuccessful defendant in an action of crim con, in other words had adultery proved against him in a court with the consequence that his wife was able to divorce him by act of parliament. Or, after the creation of the divorce court, that a judge had had adultery and cruelty proved against him in the divorce court. Are you saying that that would be an open and shut case? There is no question that that could not possibly be misbehaviour? Or what? Because looking at what occurred to other notable political figures against whom adultery was proved in the latter part of the 19th century, namely, they were by public opinion absolutely removed from the political sphere altogether. Now, of course, I know nowadays it would not happen probably; but what

do you say about that?

MR GYLES: First of all may I put to one side - it is a little difficult to answer simply because after the Act of Settlement parliament were entitled to seek removal on that ground. And the Crown were entitled to remove on that ground if there was an address from both Houses. So that it is unlikely to have actually arisen in the form we are now putting it. However, assume that parliament did not for one reason or another take any action, could the Crown have done something - could the Crown have removed the judge for that reason? That is the way the point would arise.

SIR R. BLACKBURN: I suppose so, yes.

MR GYLES: Now that would depend upon whether there was a conviction. As I recall it - and I am afraid my history is not very good about this - adultery was a criminal offence, was it not, in those days?

SIR R. BLACKBURN: I do not think so.

SIR G. LUSH: Ecclesiastical.

MR GYLES: Ecclesiastical only, yes.

SIR R. BLACKBURN: But quite obsolete; no one has been prosecuted for adultery for centuries, long before the 19th century.

MR GYLES: I do not know whether there has been any discussion as to whether an ecclesiastical offence would be, but I will assume not for the moment. It would follow from my argument that the judge in those circumstances could not be removed by the Crown. They might be removed by the Crown after address but not by the Crown itself and indeed it rather points up the fact that the public opinion is not the litmus test of misbehaviour in office. Indeed as I have endeavoured to put in various ways, that in a sense is our point, that the public popularity or unpopularity, or even public view as to propriety which shifts and changes perhaps year by year, is not the touchstone by which misbehaviour in office is to be judged. It can be in the normal way dealt with by the address of both Houses of Parliament under our particular system but that is where the Constitution deliberately says federeal judges are in a different position from that of the state judges, or the imperial judges.

SIR R. BLACKBURN: So your whole argument amounts to this, that proved misbehaviour in section 72 means behaviour such that at common law it would have been sufficient ground for the grantor of an office held during good behaviour to terminate the office?


(Continued on page 231a)

MR GYLES: Quite.

SIR R. BLACKBURN: And you say that has to be read into the words "proved misbehaviour"?

MR GYLES: I do not say it has to be read into; I say that is the proper construction of those words bearing in mind the common understanding of all at that time and indeed subsequently. Whether or not Lord Mansfield and company were correct is really beside the point. We of course suggest that they were, but it is really beside the point. By 1900 the meaning of misbehaviour, judicial misbehaviour, or misbehaviour in office was very well established and indeed was, as I have said on more than one occasion, read to the people participating in the debate itself by Mr Isaacs. More importantly it just cannot be overlooked that the Constitution Act is an act of the Imperial Parliament in 1900 choosing particular words with a particular meaning.

SIR G. LUSH: They were accepted. History shows, does not it, that the Imperial Parliament exercised no choice over the words?


(Continued on page 232)

MR GYLES: I am picking up both limbs, if I may. I am putting that all of the common law world had the common understanding as to what misbehaviour meant, both the Australian participants and the Imperial Parliament. There is no distinction between the common law position whether it be in Australia or England at that time. I am reminded that the words used by Sir John Downer were, "I think misbehaviour has always been the word and that is all that is necessary". It was not a populist document, and that ultimately is where Mr Pincus misconceives the position when he says you look at it as a piece of English and say what would I say misbehaviour means. He does not even cope with the fact that it is misbehaviour in office.

SIR R.BLACKBURN: Sir John Downer said that, what he did not say was it must be misbehaviour and only misbehaviour will do because we are trying to insert the common law as regards the termination of an office by the grantor.

MR GYLES: But every commentary at the time said that. It was said and it was read to them by the unsuccessful advocate for the other point of view. He wanted the Act of Settlement maintained, he wanted the Act of Settlement maintained so parliament would have the control untrammelled by the legal questions which arise on misbehaviour. But the convention did not accept that. They took misbehaviour and they took it and explained why because of the very special position of the federal judges, otherwise, you would have governments of all types in a position to embarrass a judge who made unpopular constitutional decisions, and, of course, the addition of the word "proved" adds special force to that submission.

SIR R.BLACKBURN: You have not really dealt with that, have you, the particular effect of the word "proved"?

MR GYLES: No, I have put a submission that at least in relation to matters out of office it reinforces the submission we are now putting.

SIR R.BLACKBURN: I suppose it does. If we look at the Solicitor-General's opinion, it appears to me - I am not sure - that he relies on the word "proved" to support his contention that proof of a conviction is not necessary, mere proof of the commission is enough.

MR GYLES: I know, and perhaps I should face that fact, too, in due course. Without meaning disrespect, we would suggest that the Solicitor-General squibbed the position when he finally got there. All of the reasoning leads inevitably to the conclusion that

conviction is required,and for some reason which I at least have the gravest difficulty following, he said, oh well, it does not have to be, it can be proved aliunde. But I will deal with that, or endeavour to.

Can I go then to that old memorandum from the Lords of the Council on the removal of colonial judges which appears in 6 Moore New Series page 9? Mr Pincus did refer to it although I do not think it was set out, and I am afraid I now realise it has not been copied. My learned friend reminds me it was handed up yesterday. It is headed Appendix, Memorandum of the Lords of the Council.

SIR G.LUSH: It is page 9 in the appendix, is it?

MR GYLES: Yes. I am not so sure that is right, perhaps it has been transposed from where it would have otherwise appeared. I will not read it all, but can I make the following points about it? The first is that it was a document which is dated in or about 1870. That is certainly the date of Lord Chelmsford's observations. Secondly, that it related to the removal of colonial judges generally and was not restricted to nor did it restrict itself to an amotion under Burke's Act. That was only one of the procedures which was relevant to the position of certain colonial judges but not all by any means. That much is clear from page 10 in the middle. There is a reference to the Boothby case which was an address of the colonial legislature. Then the memorandum goes on:

> All the forms of suspension or removal which are in use . . . . . being provided by the statute itself.

Then there are the various other alternatives. So that when on pages 11 and 12 reference is made to:

> Gross personal immorality or misconduct with corruption . . . . . and it must be borne in mind -

and so on. The first point to notice is that Mr Pincus stopped his citation of that passage at "judicial functions", and that does somewhat change the sense of it. But be that as it may, with colonial judges the methods of removal were not restricted to amotion under Burke's Act and, indeed, encompassed other forms of removal, and so it is possible that those other forms of removal could have been utilized for the removal of colonial judges without having to prove misbehaviour in office

under Burke's Act. That is assuming that this memorandum is at all talking about purely personal conduct unassociated with office. It probably is when talking of gross personal immorality.

HON A.WELLS: Would it be confined to that though? It would include, would not it, immorality in a much wider sense, usually the case, that affects his ability to retain the confidence of the colony in judicial matters?

MR GYLES: Let me accept that dealing with this memorandum it says gross personal immorality or misconduct with corruption or irregularity of pecuniary transactions. My point is that that on the face of it at least appears to be wider than misbehaviour in office.

HON A.WELLS: Oh, yes.

MR GYLES: And I am endeavouring to point out that the methods of removal would permit that wider area to be encompassed in the case of colonial judges, and the fact that in this memorandum there is a reference to those grounds for removal throws no light at all upon the meaning of misbehaviour in office either under Burke's Act or under our Constitution. One way or another all of those matters got to the Privy Council either by law or by special leave of the Privy Council or by the Crown referring it.

Also, the opinions of the Honourable Stephen Lushington and the Honourable Sir Edward Ryan and, indeed, the memorandum itself and the observations of Lord Chelmsford indicate that these are administrative opinions rather pointing to what should be an administrative procedure. The position of colonial judges was examined extensively by Todd in his book Parliamentary Government in the British Colonies. We have extracted portions of that.

This is a very long extract and I will not read all of it, but may I start by reading:

> As long as judges of the Supreme Courts of law in the British colonies . . . . . appointments during pleasure.

Then there are references to various acts which affect tenure, including Burke s Act, and the commission can read for itself these various passages. There is a reference to Montagu's case at page 831, which is neutral, I think, to this point, the other cases of Sanderson and Beaumont, the Ionian Islands, Ceylonese judge, and then at page 836 there is an opinion which I would read:

> The law officers of the Crown in 1862 advised the secretary . . . . . other exigencies which may arise.

We, of course, stress there the words "legal and official misbehaviour and breach of duty." Todd is speaking of 22 George III.

Then at page 838 and following, there is set out the material relating to the Barry matter in Victoria, and again without reading all of that, may I highlight some aspects of it. It starts at 838. At 840 there is reference to an opinion by the Minister of Justice and Attorney-General. The first question is:

> whether the act 15 Vic. No 10 . . . . . . . . . . . is really consistent with the tenure of good behaviour.

We respectfully submit that again that is a very convenient summary and short statement of the position as it then existed. Pleasure of parliament in effect because of the ability to address or removal for misbehaviour in office sufficient to constitute a legal breach of the condition of his patent - that is consistent with the 1862 opinion which I read to the commission yesterday, and would be a very safe guide as to the view of the Australian law authorities at that time. This, of course, was a very public controversy and all of these matters were in public.

Then at 842, a petition from the judges was forwarded to the governor with a report of the law advisers, to show:

> The judges had altered their ground . . . . . before a court of competent jurisdiction.

So it was the view of Victorian judges at the time.

> If so, it was contended that there was no such inconsistency . . . . . as the judges had asserted.

The view that was taken was that there was in fact no power of suspension in Victoria at the time. The balance of the material, including particularly the case of Boothby, is interesting historical background, including much as to the appropriate practice in relation to addresses, but I think is not directly in point in the - - -

SIR G. LUSH: Mr Gyles, my memory fails to bring up the answer to this question: what judge did the 1862 opinion refer to?

MR GYLES: I believe it was Barry, I think it is the start of that controversy. Can I just check that?

SIR G. LUSH: That is what I was thinking, but the account which you have just given us refers to the events beginning in 1864. Perhaps Barry in 1864 precipitated a crisis that had not quite eventuated in 1862.

MR GYLES: Perhaps so - this may be my fault. The opinion was 1864. I think I have misled everybody. I probably said 1862. It was 22 August 1864.

SIR G. LUSH: Is that then the same opinion as is quoted in Todd?

MR GYLES: I think it must be.

SIR G. LUSH: The Attorney-General in the letter to Governor Darling of August 22, 1864 - that letter in the next paragraph on page 840 is referred to as "this opinion."

MR GYLES: Yes, it looks to be the same. I did at one stage look at the detail of the judge's position, the petitions and the like. I will perhaps dig those up and make them available to the commission.

I referred yesterday to the case of Terrell v Secretary of State for the Colonies, and we only reproduced part of that decision. I hand up the whole of it. The short point of the case is that colonial judges in the absence of some special provisions were appointed at pleasure, and I think that I need not read the whole of the decision. It is available there.

The significance of it is that it puts into context the memorandum which Mr Pincus referred to. That memorandum is dealing with a situation where in general tenure was at pleasure, and I have said

that the ability to remove did not depend in many cases upon Burke's Act. What I would then propose to do is to go to the opinions to which reference has been made. I see it is nearly half past eleven. That might be a convenient time to break.

SIR G. LUSH: We will resume sitting in a quarter of an hour.

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SIR G.LUSH: Yes, Mr Gyles?

MR GYLES: Before turning to the Pincus opinion, may I just mention briefly one matter that I referred to on several occasions yesterday. It will be recalled that in Cruise's Digest, paragraph 99, under the title Officers, it is said:

> Officers of every kind are not only subject to forfeiture for treason or felony like other real property but -

and I suggested that that was the source of the Richardson statement about conviction of infamous crime. Overnight I have endeavoured to find a convenient reference to the effects of conviction of treason or felony. I have not been able to find anything which is succinct and comprehensive about it but the law of attainder and forfeiture was plainly that which the author or Cruise's Digest had in mind.

That was a concept which was abolished in the United Kingdom in 1870 by the 1870 Forfeiture Act, but even after that time and under that act a person convicted of treason or felony forfeited any civil office under the Crown or any other public employment. I do not wish to go into all the complications of that branch of the law except to say that that is very probably the source of the jurisdiction which is exercised. May I then go to Mr Pincus's opinion. As far as the United States position is concerned, I do not propose to take time on that. There is a great variety of legislation and practice in the United States and a great deal of interesting commentary there upon the English position, and it would be a treatise in itself to analyse it.

As it happens, we say that it supports our view, but that there is so much direct authority in England on the point and so many direct commentaries on the point, we think we need not be troubled by the American situation. Nor, I think, does Mr Pincus really suggest that he gets any support from America.

As fas as his analysis of the English position is concerned, it is notable for the fact that, as I put before morning tea, he treats as the body of applicable law of precedent that which has been the subject of addresses or the possible subject of addresses of both Houses of Parliament. He cites, it will be seen, Mr Shetreet's work concerning Kenrick J. We agree with Mr Shetreet's summary of that case and the effect of it, and it will be appreciated because of the passages that the commission

has read from Mr Shetreet's work that he, in our submission, correctly draws a sharp distinction between the position where there is an address for removal which can be on any ground and the ability of the Crown to remove for misbehaviour, so that that is a particularly inapt example, to analyse the position or the meaning of good behaviour or misbehaviour.

A parliamentary motion for removal has absolutely nothing to do with misbehaviour. It is also true, or can be accepted as true, that in the removal cases after the Act of Settlement there is no notion that they were restricted to the previous position. Of course that is so. Indeed, that is our very point and Shetreet's very point. The comment that:

> If the draftsman of the constitution . . . . . intention was unclear.

is,with respect, a most remarkable statement. When the words of the Act of Settlement are contrasted with the words of section 72, the difference is apparent and deliberate. Then, the passage in the middle of the page in which the writer of the opinion ventures the view that:

> If this passage was intended to convey that a judge might misbehave as scandalously as he pleased in matters not concerning his office without risking that office, it is hard to believe that it could be correct.

Again, with respect - - -

SIR R.BLACKBURN: Which page are you referring to now?

MR GYLES: Does the commission have an opinion which starts with a No 12 on the bottom?

SIR G.LUSH: Yes, the seventeenth page of that numbering, I think.

MR GYLES: Yes, the seventeenth page. I was reading from the middle of the page.

SIR R.BLACKBURN: Yes, I have it.

MR GYLES: May I just examine that a little more carefully. First of all, the passage from Coke's Institute Reports and many other quotations to the same effect were not in incautious language.

They expressed the notion of what misbehaviour in office means and meant. Conduct outside office always depended upon conviction, we would suggest originally of treason and felony, and then nextly of an infamous crime, if that be an extension. That is if there could have been in those days an infamous crime which was not a felony which I would take leave to doubt. It is not surprising, indeed it is in accordance with ordinary principles, that conduct of a person should be dealt with by the normal law and the normal courts. That should not be surprising to anybody, indeed it should be surprising that the contrary should be suggested. The best, and we would submit the only safeguard as to what is infamous behaviour is conviction of that infamous behaviour in the way which the law provides for. And it is by no means surprising that that should be so.

I pass over what is said about Richardson's case. That debate has been extensive here and my friend will no doubt make some submissions about that himself. The colonial judges, I think we have one way and another dealt with that. The convention debates; in my submission he has just plainly misread those debates and in particular has misread Mr Isaacs as he then was. As to his general commentary, I do not state a debate. We will listen to my learned friend's submission on that point. But there was one case to which he did refer, I am just looking for the passage.

HON A. WELLS: Mr Gyles, while you are looking for that, I just want to make sure I am following the general trend of this argument - - -

MR GYLES: Yes.

HON A. WELLS: Fundamentally as I understand it what you are saying is this, that the learned author has confused the ambit of the ground upon which an address for removal can be presented with the grounds that are available for a strict application of the judicial process.

MR GYLES: Yes.

HON A. WELLS: Does that fairly sum it up?

MR GYLES: That is the critical defect.

HON A. WELLS: Right.

MR GYLES: There was one other - I am just looking for a reference which I cannot pick up. I thought Mr Pincus had referred to Stanley Burbury's decision - I must be wrong about that. As far the Solicitor-General's opinion is concerned, or opinions are concerned, as the commission will know his first opinion of 24 February 1984 adopts, if I may say so with respect, an analysis

of the English position and of the convention or the position that was relevant in 1900 and of section 72 which accords completely with ours, save for the fact that he rejects conviction as a necessity. He says it is serious criminal conduct. I would like to put some submissions about that. I should also refer to Henry v Ryan to which he refers in paragraph 20, if I could hand up copies of that decision.

All I wish to say about Henry v Ryan is that the plaintiff was convicted of the charge and appealed, so it is a curious procedural situation. He was charged before a court of summary jurisdiction with an act of misconduct against the discipline of the police force by discreditable conduct, etcetera. It is not a case of removal of an office holder, and thus what is said about the position in this case is purely obiter dicta and not directed at all to the question as to removal from office of an office holder. It may well be apparent from the submission which I have put already and will in due course put that the notion that misbehaviour in office within the authorities to which we have referred encompasses conduct short of conviction of an infamous crime is - I put that badly. This case does not establish, nor is it aimed at the question as to whether conduct short of conviction for an infamous crime is a ground for removal of a public office holder where the test is misbehaviour in office. It will be apparent to the commission that our submission is that otherwise than by conviction in such a fashion there is no wider test and no wider application of any such principle.

SIR R. BLACKBURN: I am sorry, Mr Gyles, I do not really follow that. Would you put that again?

MR GYLES: Yes, the case of Henry v Ryan was not a case of dismissal of an office holder for misbehaviour in office. It was a charge under the police regulations. Thus it is not directed to, nor does it establish that the grounds for removal of a public office holder for misbehaviour in office include conduct outside office, which are not the subject of conviction of an infamous crime.

HON A. WELLS: I do not really read the learned Solicitor-General's submission to mean that that is how he was - - -

MR GYLES: No. To so read it would be inconsistent with his view. All I do is simply draw the commission's attention to it as it is - - -

SIR R. BLACKBURN: All he is relying on is the dictum of the Chief Justice, is not it?

MR GYLES: Yes. Sir Garfield Barwick, whose opinion is referred to also - - -

SIR G. LUSH: This seems by the date to have been a private opinion.

MR GYLES: Yes, it was; I can say it was - it was an opinion given to the Crown by Sir Garfield when he was at the bar.

SIR G. LUSH: Not when he was Attorney-General?

MR GYLES: Not when he was Attorney-General.

SIR R. BLACKBURN: Given to the Crown? It looks as though it was more likely given to the banks.

SIR G. LUSH: History would suggest that, too.

MR GYLES: No, it was not, it was given to the Crown. When I say the Crown, that is a loose use of the word. It was given, I think, to the Commonwealth Crown-Solicitor instructing him on behalf of the Reserve Bank.

SIR R. BLACKBURN: I see, nothing to do with the bank nationalization.

MR GYLES: No, I do not think it was.

SIR R. BLACKBURN: That was much earlier.

MR GYLES: As I read the Solicitor-General's opinion, it is paragraph 21 that makes the assertion that in matters not pertaining to office the requirement is not conviction for an offence in a court of law:

> Inasmuch -

he says -

> as parliament considers the matter, the question is . . . . . the parliament acting on power -

and so on. That all, if I may say so, assumes the correctness of the statement in the third sentence; and the assertion is repeated in paragraph 23. That goes back to paragraph 15.

SIR G. LUSH: Paragraph 15 is the operative paragraph of the opinion on this point.

MR GYLES: Yes; and the operative part of that clause is obviously:

> Proved misbehaviour must be established in parliament and whatever the offence such proof is not predicated upon anterior conviction in a court of law.


(Continued on page 243a)

With respect I just cannot follow why he says that. If as Quick v Garran accepts, Todd is correct when he says - let me assume for the moment that our submissions here are correct and that the framers of the Constitution intended to pick up by the use of the word "misbehaviour" what I would call a common law definition of that word. Let us make that assumption for a moment. In conduct out of office, that requires conviction of a crime of the requisite quality.

MR GYLES: That is proved by proving the conviction and, no doubt, parliament would have to be satisfied that there had been such conviction. Upon proof of the conviction parliament would have to then be satisfied that the crime was of the requisite quality. That being so it does not in any sense derogate from the role of parliament in the matter, it simply avoids the rather absurd result that it is parliament which tries a crime. In other words, you prove your conviction before parliament and then it is parliament's decision as to whether or not that is proved misbehaviour. The mere fact of a conviction does not prove misbehaviour, it is the nature or quality of the crime in the way discussed yesterday. So, with respect to the Solicitor-General, it appears to us that he has rather missed the point there.

HON A. WELLS: Is not he simply saying proved means proved to the satisfaction of the parliament?

MR GYLES: Yes, but what is proved? If we are correct and if he, with respect, is correct, he has said he adopts the analysis of the position that we put forward, that is, that proved misbehaviour, or that misbehaviour is intended to pick up that learning which attached to the removal by the Crown, not removal on address from parliament.

HON A. WELLS: I understand that is your basic argument, I am simply saying is not that what he did? If you go to page 10, he seems to reinforce that by quoting Todd about 10.5 in which he, in effect, says notwithstanding what courts may have said or tribunals, parliament has to do it.

MR GYLES: Yes.

HON A. WELLS: That is how I understood him to be arguing.

MR GYLES: My answer to that is that accepting the substantive analysis which we make and he makes, there is no difficulty in giving parliament the job by saying prove your conviction and then prove it is misbehaviour by looking at the nature of the crime.

HON A. WELLS: Quite.

MR GYLES: May I also inquire whether the commission has the Solicitor-General's supplementary opinion?

SIR G. LUSH: Yes, we have.

MR GYLES: I think I can do little more than commend that opinion to the commission, save that insofar as it perpetuates the error that it is up to parliament to try the crime, and I adopt as part of my argument - - - .

SIR G. LUSH: I am not sure that your last proposition is as simple as it sounds. The concept of misbehaviour is in the description a mixed question of fact and law, is not it?

MR GYLES: Yes.

SIR G. LUSH: What facts are parliament to look at, the fact of conviction or the facts constituting the crime which may never have been admitted, or what else?

MR GYLES: Well, I put yesterday and I would maintain the submission that what is first requisite is proof of the conviction.

SIR G. LUSH: Misbehaviour lies in being convicted.

MR GYLES: Being convicted of the particular infamous crime, particular crime. The starting point is to prove the conviction and see what the conviction says about the conduct. That does not preclude argument being adduced before parliament by the person the subject of the motion to argue that it is nonetheless not something for which removal should be the result, and presumably he would be at large in what he put forward, but it could not rise above that the prosecution, to take a description, could not rise above the conviction. If it is a conviction for negligent driving, you cannot call evidence to say it was a particularly negligent bit of driving, and that is the nature of the crime, that is the nature of the charge.

SIR G. LUSH: Suppose the judge says this was really only very slightly negligent and it might have happened to all of us?

MR GYLES: That would be a submission which has the potential - not the accused but the person who is subject to the disciplinary procedures, I would not argue against his ability to put that to parliament.

SIR G. LUSH: There are two alternative positions in the kind of hypothetical case we are discussing. One is that the argument of the judge before parliament would be - I was never guilty of misconduct and analysed the conviction does not show it. The other would be that the judge before parliament is saying - I admit that I am convicted, I admit that I am therefore guilty of misbehaviour, but the consequences of forfeiture should not follow.

MR GYLES: It is an isolated example, or something.

SIR R. BLACKBURN: Or that it is a very minor example of the offence.

SIR G. LUSH: As soon as he does that he goes back to the first position, does not he?

MR GYLES: But as far as the defendant is concerned - I use that word for the moment - he can put anything he likes to parliament, parliament can listen to him or not listen to him as the case may be, but what is the precondition to the exercise of the ability of the Crown to remove ultimately is that the address should be for proved misbehaviour. It is the Crown that does the removing, they have got to have an address which does provide for proved misbehaviour.

It is an essential to that that it will have been proved that there was a requisite conviction. That having been proved it is a matter for parliament to decide whether or not to address the Crown. There may also be there a question of law for the High Court as to whether or not the crime is of such a character as to disqualify. As in that case of the County Court this morning, he analysed it and said there is a question of law involved in what misbehaviour is but you have got a question of fact as to whether the facts amount to it in the particular circumstances.

SIR G. LUSH: The county court clerk.

MR GYLES: I think, with respect, that is right. It was the clerk's case that they said that - Owen.

HON A. WELLS: I am afraid I cannot see myself that you can avoid going into the substance of the matter. Supposing the defendant, to use the same phrase, says, "Look, really I was convicted but look at the circumstances", and he goes into all the evidence. That for a start would not be improper, I would say it is entirely proper. If there was someone else talking about it in parliament, might they not also go into the facts and say, "Yes, but that is a misreading of the facts, they are so and so, the inference is this"? Do they not have to canvass the whole weight and effect of what the evidence was?

MR GYLES: Maybe it depends on the circumstances. It may be that there would be cross-examination of the judge.

HON A. WELLS: Quite. It could happen.

MR GYLES: But our simple point is that it is a necessary element, it is a prerequisite that there be a proof of conviction. Whatever else there may be is not to the point. Now, in many cases that will mean that the circumstances of the case will be either not queried at all or queried only in certain essentials or certain elements. The extent to which parliament would permit the challenge to a conviction is, of course, a matter for it. It cannot say there was no conviction but it may say well, having heard all the circumstances we will not address the Crown for removal, but it does mean that parliament is not trying the offence. Whatever else it is doing, it is not doing that, that has

been done by the courts of the land, and it is exercising its own jurisdiction to decide whether to address the Crown.

That puts the position in its proper perspective. A body of that sort, as with other disciplinary type bodies, can consider the effect of conviction, and so on, but it should not be the prosecuting authority in matters outside office.

I think I have drawn the attention of the commission to all the sources that we are aware of, and we have put our submissions as to the general principles. Applying those to the allegations, it is our submission that in the events which have happened none of the allegations so far advanced will satisfy the necessary criteria because they do not pertain to the conduct by Mr Justice Murphy of his office as a judge, and they do not reveal, nor is it alleged that there is any conviction. Thus on what has been so far alleged, there is no point in proceeding further to decide any facts in relation to them, it would be best to bring this matter urgently to an end by reporting to parliament and enabling the matter to be disposed of according to law.

SIR G. LUSH: Mr Gyles, before you sit down, have your researches involved a study of Professor Sir Harrison Moore's - I think he was knighted - essays on the Constitution before 1900 in his book The Australian Constitution of 1902?

MR GYLES: I can recall reading something of Professor Harrison Moore's. I have not got it with me and I do not recall what he said, to be quite frank.

SIR G. LUSH: I have only seen some references to it in an article in Current Law, and it is the suggestion of the author that Harrison Moore's opinions were ambivalent, but I find it difficult to grasp what the professor had in mind in some of the things that he is simply quoted as saying. I have not seen the entire works at all.

MR GYLES: As I say, I am nearly sure that at one stage I looked at one of his books, but I will have to check.

SIR G. LUSH: There are references to it in an article by a man called Thompson in Current Law, and that is the only source of my information. I have not got my copy of that article here at the present time.

It is a long article in two parts. A great deal of it is footnotes.

MR GYLES: Current Law - I am showing my ignorance. Is that not - - -

SIR G. LUSH: I did see the word Butterworth at the bottom of it.

MR GYLES: Yes, that is the one I had in mind. I regret to say I am not aware of Mr Thompson's article either, so I will check both of those.

SIR G. LUSH: The reference to Professor Harrison Moore's views is at the beginning of the second article, or the second part of the article.

MR GYLES: We will certainly check that.

SIR R. BLACKBURN: I am worried about the possibility that the distinction between misbehaviour in office and misbehaviour not in office is more subtle and complicated than you have allowed for in your argument. Let me take an exaggerated case. [redacted]

What if a High Court judge who holds views about the way a case should be decided which is currently being heard by an inferior court, gets in touch with the judge or magistrate hearing that case and says, what you ought to decide in this case is so-and-so, do not forget that the law is so-and-so and do not make the mistake of deciding it as if the law were something else. Is that misbehaviour in office or misbehaviour not in office?

MR GYLES: And I take it that he would be in the same judicial hierarchy.

SIR R. BLACKBURN: Yes. He is automatically in Australia if he is a High Court judge.

MR GYLES: I am sorry, yes - High Court judge. Well, I put the submission that it is out of office because it is not in the conduct of his judicial functions. If that distinction is not the correct distinction, then it may be a question, or is a question of fact, I suppose, as to whether or not that was truly exercising his function as a High Court judge, superior in the judicial hierarchy, to that judicial officer. It would be a crime, of course, as well, but that does not meet what has been put to me.

SIR R. BLACKBURN: Contempt of court.

MR GYLES: Well, it would be perverting the course of justice.

SIR R. BLACKBURN: Would it?

MR GYLES: No. I have too readily said that. That probably would not, if it reflected his genuine view of the law.

HON A WELLS: He would be commending a view of the law, which is the law.

MR GYLES: Quite. I withdraw that comment. I can see that that might be thought to be - a tribunal of fact might take the view that that was within the scope if the simpler approach chat we submit is the right one is not accepted.

SIR R. BLACKBURN: So that it would be different if an appeal had actually been instituted to the High Court and the High Court judge rang up the judge who had decided the case in the first place for information about why he decided it as he did, and secondly, added the comment that he should have decided it in such-and-such a way. That would put it on the other side of the line.

MR GYLES: Yes, it would.

SIR R. BLACKBURN: So to be misconduct in office, it has to relate to an actual proceeding in the High Court.

MR GYLES: That would be one view, yes. I quite see the point that is being made, but one can ask other questions. What if a judge who has decided a case at first instance speaks with a judge, an appeal judge, about the case. Is that conduct in office? We would say plainly not. It is private conduct.

What if the judge below rings counsel who is going to argue the case and says, I think you ought to argue such-and-such and so on; again, he has performed his role, he is no longer acting as a judge. I think that is the best way I can answer the question.

SIR R. BLACKBURN: Well, it is a form, I suppose you could say, of abuse of the judicial office.

MR GYLES: Yes.

SIR R. BLACKBURN: I expect I know your answer to this question. What if, and this has no resemblance whatsoever, as far as I know, to any of the allegations before us, the judge attempts to persuade somebody to give him some special advantage, shall we say particularly

good seats at the opera, by saying, you had better give me these goods seats, otherwise I will make things uncomfortable for you on any occasion that I can; I am a judge of the High Court. Is that misbehaviour in office or out of it?

MR GYLES: In general our answer would be out of office, but again I can conceive of circumstances where it might on one view of it qualify, if you had a litigant with a case before the court - - -

SIR R. BLACKBURN: Yes, if the person whom he attempts to persuade is a litigant, that makes it pretty clearly misbehaviour in office, I suppose. What if he is not?

MR GYLES: I would submit not because - if that is within the arena, any time a judge who sits in the jurisdiction deals with anybody in a matter of commerce or - he does not have to say it; he has to ring up and say, I want a ticket to the opera and I am very anxious to go with my wife, I have got my mother down here and I am terribly anxious that she go. I would submit that that sort of thing is really beyond the scope of misbehaviour in office. It is not carrying out the judicial office - - -

SIR R. BLACKBURN: But if he uses the fact that he is a judge to add weight to his persuasion, that is misbehaviour out of office?

MR GYLES: Out of office.

SIR R. BLACKBURN: And on your argument it would be not really misbehaviour at all of any kind?

MR GYLES: That is so. You see, there are all sorts of common law misdemeanours that exist, and I have not been through them all to find out to what extent abuse of office in that sort of way might be a common law misdemeanour. I suspect it might be, but it is not, in our submission, misbehaviour in office.

SIR R. BLACKBURN: It would follow very clearly then on your argument that if he takes part in an active electioneering campaign for a political party, that is certainly not misbehaviour.

MR GYLES: It is certainly not misbehaviour.

SIR R. BLACKBURN: It is not in office - - -

MR GYLES: It is not a crime.

SIR R. BLACKBURN: And it is not in any way - - -

MR GYLES: No. Indeed, this raises the whole question very squarely, which appears perhaps most plainly from Mr Shetreet's work, where he devotes several chapters to what is and what is not, as it were, acceptable judicial conduct, the extent to which one can participate in politics, the extent to which one can do this and do that.

It is our submission that that is all irrelevant so far as Australian federal judges are concerned, for better or worse, that the Constitution adopts a certain course and that puts federal judges in a very particular position, which does not exist in the states and does not exist in England.

SIR R. BLACKBURN: The founding fathers of the Constitution must be taken to have been quite happy with that possibility, that a judge could not be attacked on that ground.

MR GYLES: Yes, well, that was the decision - there are all sorts of evils involved and all sorts of choices to be made. The choice they made was to prefer independence of a judiciary to a well-mannered judiciary.

SIR G. LUSH: It is deeper than that. Your argument is that they preferred independence of the judiciary to control of the judiciary by parliament?

MR GYLES: Yes, that puts it, I think, fairly insofar as I would - control by parliament except for what they do in office or what they are convicted by outside of office. It removes the controlof parliament in extra-judicial activities save for conviction. Of course, that choice was by no means unusual, bearing in mind the American experience where high crimes and misdemeanours were the grounds for removal of a Supreme Court judge in the United States.

SIR R. BLACKBURN: That was by impeachment.

MR GYLES: By impeachment, but nonetheless high crimes and misdemeanours by impeachment. It is not for us to debate whether or not the choice which was made was the correct one. I would argue strongly that it is, that the independence of the judiciary, of the High Court, and that is what the Constitution is primarily concerned with, although not entirely concerned with, is such that there should be no ability in a constitution with the division of power between centre and state to have the central parliament exercising undue control over the judges or having the ability to put pressure on the judges, or having people in the community who are affected to be able to put pressure on judges by saying, we do not like your Franklin Dam decision, we will therefore put pressure on you for such-and-such reasons, which may

be quite spurious - they may be spurious, they may be correct, but irrelevant, and yet place enormous presure on the judge concerned.

In my respectful submission, of course, that is precisely what has happened in this matter, that insofar as any wrongdoing out of office is concerned, it is only a matter for the criminal law, and that the pressures which are being placed upon this judge are such that should not be there.

What is also avoided, of course, by our submission is the complete discretion which is otherwise given to parliament. We made that point this morning, and perhaps I should repeat it in conclusion, that the view contrary to ours really equates our Constitution with the Act of Settlement, and commits to parliament really a completely unfettered discretion in the matter.

Picking up what was said about participation in politics, there is no a priori reason why judges should not be in politics, provided that if a case comes before them which involves a matter which they have been involved in in politics, they cannot sit on that case. There is no reason a priori why judges - - -

SIR G. LUSH: This may be true enough of common law judges, but it is a little difficult in the present context, is it not?

MR GYLES: These may be excellent reasons why no judge does or will. It is no necessary ground for his removal. For example, should judges be directors of companies? It might be said, oh, that is a dreadful thing, he cannot possibly do that. It is the same as being in politics. Mr Shetreet at least says that in days gone by, and indeed in this century, judges were directors of companies.

SIR R. BLACKBURN: Public companies.

MR GYLES: Yes, business activities, and their names were advertised in connection with the companies, page 334 of Mr Shetreet.

SIR R. BLACKBURN: Certainly Lord Birkenhead was in his somewhat disreputable old age, and he was a judge of the House of Lords, which is such an anomalous - - -

MR GYLES: Yes. In any event, our point is that so far as conduct outside of your judicial function is concerned, which is after all what it is all about - I mean, the notions of judicial etiquette and public


(Continued on page 252a)

participation, of probity and the like, are really only a means to the end, and the end is the proper conduct of judicial functions.


(Continued on page 253)

The choice that the Solicitor-General and we put is that that choice has been made, it has been made in the constitutional forum and that is really the end of it.

SIR R.BLACKBURN: I should have said, if I may just take this up, and I am possibly wasting time - you say there is no a priori reason why a judge should not engage in politics provided he disqualifies himself in any case in which a political issue arises but does that not overlook the importance of the judge not appearing to be politically committed when a party comes along - the judge does not know what political party he belongs to but a party who is disappointed by the judge's decision and is a member of the opposite political party is likely to think that the judge is biased because he knows that the judge is a member of the opposite political party.

MR GYLES: That says that one really cannot have an ex-politician as a judge. The fact of the matter is that more than half of the High Court have been politicians. It is not assumed that people who are sufficiently convinced by the correctness of the cause to actually devote their life to that party will cast aside those principles upon appointment to the bench. Nobody in their right mind would suggest that anyone who has been a member of the Liberal Party will not remain of that persuasion. The fact that one may not be a card carrying member is irrelevant. It is well-known to litigants that judges have personal political views. Indeed, all judges no doubt have political views. The fact you do not know them does not mean they are not biased.

SIR R.BLACKBURN: You draw the line somewhere I suppose is the answer and the line is usually requiring the judge to cease membership of a political party.

MR GYLES: Who requires that? That is the question. The sort of things a great majority of judges may think is a proper way of conducting themselves is really not the test. It is a very dangerous test in my sub-mission. What about the first judge who decideed not to join the Adelaide Club? That may sound today a silly example but it may well have been regarded very seriously, that a judge would not join the Adelaide Club, or the Melbourne Club. One can think of all sorts of examples of what all judges or most judges at a particular time would think appropriate or inappropriate. It is a very unsafe guide as to for what conduct a judge should be removed.

As drunkenness may lead to murder, so active membership of a political party may lead to judicial

misbehaviour because if the judge, having actively participated in agitation for example about a particular matter then has some litigation involving that matter and sits on it, that would be or may be judicial misbehaviour. However, we know that judges sit on boards of hospitals, on boards of educational institutions; they have farms. Judges have been the president of the Australian Conservation Foundation. Judges are in all sorts of activities which have the potential for litigation and the potential for bias. The range of judicial involvement will vary from day to day, from court to court, from man to man.

Judges are on senates of universities and universities are involved in litigation. It is a very slippery slope to start applying one's own instinctive notion of what a judge should do and saying, any judge who disagrees with me or my friends is therefore beyond the pale. A justice of the United States Supreme Court in a case I read protested very much at the notion that judges should ride herd on other judges for that very reason. It will lead to judicial conformity, it will lead to judicial timidity; unless there is a breach of the law involved, best leave it to the proper selection of judges, to the peer pressures which exist and to the community pressures which might exist.

SIR G.LUSH: Thank you, Mr Gyles. Mr Charles?

MR CHARLES: If the commission pleases. I would start by saying that if my friend's submissions are right, if the Constitution has preferred independence to a well-mannered judiciary or has preferred independence to control by parliament, [redacted] However, if one can take the submissions to their logical conclusion, it would also follow that a judge who had committed murder whilst overseas in a country with which Australia had no extradition treaty, who had returned to Australia and of course was not prepared to return to that other country, who had publicly admitted in Australia his guilt of that murder, would not be guilty of misbehaviour and could not be removed from the bench. Secondly, if the judge had been tried for murder, had been found not guilty by reason of insanity - - -

SIR G.LUSH: Is this still the foreign murder?

MR CHARLES: No, your Honour. On this occasion we have a murder committed in Canberra.

MR GYLES: What about of another judge?

MR CHARLES: He has been found not guilty by reason of insanity but his insanity was fortunately temporary; he has recovered; he is therefore not now suffering incapacity; he cannot be removed from the bench. Thirdly, the judge has committed a murder but did not give evidence at all. He is acquitted for lack of evidence. He later admits to a variety of people that in fact he was guilty of the murder but cannot now be re-tried. Not having given sworn evidence, he has not committed perjury. He in turn cannot be removed from office.

Suppose that the judge has been tried for a serious offence - call it one of infamy - in Australia and convicted. Suppose that the conviction is quashed on appeal or suppose that at trial the judge was acquitted either because the necessary consent to prosecute had not been obtained or because a limitation period had expired. Let us assume that it is clear that the judge has admitted he was guilty of the offence in question; again, he cannot be removed from office. Let us assume finally that the judge has been tried for a serious offence involving dishonesty.

SIR G.LUSH: A recent Victorian Giannerelli case gives some point to that last example - a recent and continuing point.

MR CHARLES: It causes barristers to move uneasily at the bar table, but your Honour, suppose, fifthly, that the judge has been tried in a serious offence involving dishonesty by a court which has power to grant an adjourned bond without proceeding to conviction. In that fifth situation also the judge, let us say, has been found guilty of the offence but a conviction is not recorded. That judge also cannot be removed. If my friend's arguments are right, in each of those five cases we have just put to the commission it must inevitably follow that that judge may remain a member of the High Court and no steps can be taken to remove him from it.

May I take the position a step further. Let us assume for the moment that we are treating what I might call the Griffith view as the correct one. Suppose that it is said that a conviction is not required but that a criminal offence of a sufficient degree of infamy must be involved. It would then follow that in these situations, also a judge could not be removed from office. Firstly suppose that the judge has since his appointment endorsed a political party, accepted a position as its patron

or president and publicly campaigned for its election to office. Secondly, suppose that the judge has engaged in discussions with other persons which are clearly preparatory to a conspiracy to commit a serious crime but falls short of establishing that conspiracy.

Suppose, for example, that the judge is heard discussing with another the possibility of hiring someone to commit a murder or discussing the possibility of importing heroin, but again at a stage which is preparatory to rather than the actual commission of the offence. Suppose thirdly that the judge has set in train a course of conduct which would amount to the commission of a serious offence. Suppose that the judge by way of example tells another that he proposes to burn down his house to claim the insurance. He is found approaching the house with a container of kerosene, he makes full admissions as to his intent but in law his acts are still preparatory to the commission of the offence and he cannot be convicted of it.

Fourthly, suppose that the judge has attempted to commit a crime in circumstances where it was impossible for him to do so. Suppose, for example, that the judge shot his wife intending to kill her and his wife had, immediately before the shot, had a heart attack and died and it was her dead body into which the bullet entered; no offence has been committed. Suppose the judge attempted to manufacture drugs by a process which, unknown to him, could not bring about that result.

Fifthly, suppose that the judge has habitually consorted with known criminals and engaged in joint business with them but in a state in which the offence of consorting has been abolished. By way of analogy, suppose that a judge of the United States Supreme Court was constantly seen in the company of Al Capone.

Sixthly, suppose that the judge has, in a state in which prostitution is legalized, been a partner in the ownership and running of a brothel. Seventhly, suppose that the judge has habitually used marihuana and other drugs in a jurisdiction which has decriminalized such use.

Eighthly, suppose that the judge has frequently been sued for non-payment of his debts and deliberately avoids paying his creditors. Ninthly, suppose that the judge has frequently been sued for defamation and required to pay damages; or tenthly, suppose that the judge conducts a number of business enterprises through a corporate structure for which the judge has repeatedly with his companies been involved in proceedings under the Trade Practices Act and in consequence of which the judge has repeatedly been found to have made false and misleading statements.

In each of those ten situations, the Griffith view, if I may again so call it, would lead to the conclusion that no steps can be taken to remove the judge under section 72 of the Constitution from office. Of course, a priori it must follow, on my friend's submissions, that in those circumstances no step can be taken to remove the judge from office. My friend may be right, but if so one is forced to the conclusion that that is what the framers of our Constitution intended. There may be another view which we may raise at 2 o'clock.

SIR G. LUSH: Thank you, Mr Charles.

LUNCHEON ADJOURNMENT

SIR G. LUSH: Mr Charles?

MR CHARLES: If the commission pleases, before lunch I had been dealing with my friend's submission as to the desirability of independence rather than a well mannered judiciary. I have put a number of examples to the commission of what we say must follow from my friend's submissions. The conclusion in our submission is that if my friends are right it would follow that the desirability of independence was thought so great that not only was parliament relinquishing control but that parliament was prepared to contemplate the continued existence of a corrupt judiciary, not simply an ill mannered one. When I say continued existence, I mean not that the judiciary was corrupt at that time, the contrary, but that a state of affairs becoming known indicating clear corruption would be allowed to continue; indeed no steps could in the circumstances I have put to the commission be taken to right that situation.

We would submit that that conclusion would come as a surprise to the framers of the Constitution and I desire shortly to take the commissioners to the convention debates which my friend has opened to the commission for the purpose of going through them because we would submit that the conclusions here asserted could be drawn from the debate are not clearly apparent and that indeed a careful reading of them suggests a number of alternative possible contentions,

Your Honours, before I go further I should say that we did have prepared an outline of argument and if I can now hand that up to the commission. The outline has suffered in utility since it was first prepared because it was prepared before my friend's argument had been delivered and in our answering argument we propose to follow the one that was put by my friends so that I do not propose to read or to refer in detail to our outline of argument. We simply leave it with your Honours and now turn to other matters.

May I now invite the commission's attention to the parliamentary debates, those at Adelaide and Melbourne.

SIR G. LUSH: We got these yesterday, did not we?

MR CHARLES: They were the third and fourth documents, Mr President, that my friend handed to the commission. The Adelaide debate are both of April 1897 and they begin at page 944.

SIR G. LUSH: Yes, I was just trying to locate the reference to them in Mr Gyles' outline because my documents happen to be grouped according to - - -

MR CHALRES: The reference, Mr President, was made to them at the point in argument which I think was in paragraph 3 on the second page. They are not referred to specifically in the outline of argument. The Melbourne debate, your Honours, is the one that took place on 31 January 1898 and begins at page 308. Before turning to the debates themselves, we would submit this, that it is perfectly clear that Dr Todd would have said in relation to a judge involved in each of the 15 situations we put to the commission before lunch that that judge, if I can call him Judge Z, should unquestionably have been removed from office. And equally we would submit a careful reading of the convention debates suggests that the framers of the Constitution would all have taken precisely the same view. In our submission it is not possible to find one member of the convention debates who would have taken a different view.

SIR R. BLACKBURN: It would have been easy for Todd, of course; he would simply have said that parliament would have gone ahead.

MR CHARLES: Indeed so. We would submit that if one is attempting to distil a number of propositions which might be seen as the general view of those taking part in the convention debates, they might come to something like this - and,of course, we recognise the difficulty of a process of this kind. Some of the debate was as Mr Justice Pincus put it - murky and confused. But we would submit that it is possible to see some lines of argument appearing and receiving apparent acceptance. I will come to what reliance one might place on this later but we would submit that these propositions canbe seen to have some support.

The framers of the Constitution firstly intended to guarantee independence to judges of the High Court. That was the keystone of the federal arch. They were not to be removable at the whim of the executive or parliament. We would say, secondly, it can be seen that the judges were intended to be and to remain persons of the highest quality and character from whom very high standards of behaviour would be expected. And we would submit that there was no question in the minds of anyone present that the judge from Van Dieman's Land, Mr Justice Montagu, was properly amoved.

Thirdly, the framers plainly wished to depart from the prevailing position in England where parliament could without reason address the Crown calling for removal. Now fourthly, they wished to provide a single means of removal, by which I really

mean exclusive means of removal of a High Court judge, permitting that to occur only if, firstly, both Houses in a single session determined to address; secondly, on the ground of misbehaviour or incapacity; and, thirdly, which had been proved. And we would say that implicit in that last proposition was that there should be an appropriate allegation of misbehaviour or incapacity; and, secondly, proof of it; and, thirdly, that the judge had been given an opportunity of answering the complaint.

The next and fifth major proposition from the debates is we would submit that the framers wished to maintain the ability to remove from office a judge whose behaviour had brought the office into disrepute. Sixthly, they wanted to leave that decision in the hands of parliament, and included in that decision was the decision as to what was misbehaviour and whether it had been proved, and that that was to be free from challenge.

If I can now turn to the Adelaide Convention debates and take the commission to them. Starting at page 945 and beginning with the right-hand column, 945 point 7, in the speech of Mr Wise. After reference to the impeachment process in the United States, Mr Wise says:

> The power of removing upon an address from both houses . . . . . something of the same power exists here.

May I underline in passing the reference to the fact that it was a power of removing upon an address from both houses for misbehaviour. Plainly that cannot be misbehaviour in the sense that my friend has been asserting because the address from both houses, part of the Constitution of New South Wales and Victoria, was a completely broad entitlement not necessrily related in terms to misbehaviour in the sense suggested. So that Mr Wise is using the word in a different sense. Mr Douglas also:

> And in Tasmania . . . . . but there was no doubt that the judges were properly removed.

He is referring, of course, among others, to Mr Justice Montague, and we would submit that it is perfectly clear, and Mr Wise who was a barrister and former Attorney-General of New South Wales obviously knew the circumstances in which Mr Justice Montague had been removed, and which included as one of the two asserted reasons impecuniosity, financial embarrassment. There was no doubt that the judges were properly removed.

Carrying on down the page to what Mr Kingston has to say, he starts:

> I think we should be at great pains - - -

SIR G. LUSH: That is properly removed under the powers of address though, it is not properly removed for breach of condition of tenure.

MR CHARLES: I accept that, but what I seek to put by that is that Mr Wise's view put to the convention was that a

judge ought to be removed in those circumstances. The view that my friend is seeking to put is that in the interests of independence a right to remove in those circumstances was apparently being given up.

SIR R. BLACKBURN: Montague was under Burke's Act whch contains the words, "for misbehaviour therein".

MR CHARLES: Yes. Mr Kingston after asserting that we should be at great pains to secure the absolute independence of the judges of the Federal Court and that it would be a glaring mistake if we do not protect them from ill-considered action refers to the "during good behaviour" epxression, and continues:

> That is a most excellent principle to lay down . . . . . although his behaviour is everything that could be desired.

In other words, it was to remove the entitlement of the Houses of Parliament to remove a judge who had been behaving properly that amendments were being suggested. Then continuing on the right-hand side, Mr Kingston says at 946 point 4:

> It strikes me that if you pass that the effect will be . . . . . whether or not he has been guilty, and that should not be so.

Again it is the entitlement that the other provision would have given to remove a judge who had been behaving with perfect propriety that was the concern.

Then we come to the insertion of misbehaviour. Mr Kingston suggests the alteration and the inclusion of, "should be removed for misconduct, unfitness or incapacity".

SIR G. LUSH: Just immediately after the last passage you read from Mr Kingston, Mr Barton says you must read sections 1 and 3 together, which may imply that he was taking the view of misbehaviour that is put against you, if you read 1 and 3 together, and the point of reading 1 and 3 together seems to be that 3 becomes operative to terminate the good behaviour tenure granted by 1. It may be, and for all I know it may suit your purposes, but it certainly may be that Mr Barton is expressing Mr Gyles' view in that line and a half.

MR CHARLES: He was, indeed, possibly doing so, but he was doing so in a way which would not have been consistent with the views expressed by the Victorian law officers because their view is certainly that although persons

held offices during good behaviour there was an entirely separate right provided on the part of the Houses of Parliament to address for removal. But, in any event, Mr Barton is certainly pressing that view. Mr Kingston then suggests insertion of the phrase, "may be removed for misconduct, unfitness or incapacity", and Mr Simon suggests substituting misbehaviour for misconduct. Mr Kingston says:

> I am inclined to think that that would require . . . . . as far as ever I possibly can.

Mr Wise wants to leave out unfitness. Mr Kingston says:

> I think there is a class of cases . . . . . independent of any misbehaviour.

Then near the bottom of that column in Mr Kingston's speech, the closing words of it, he says:

> I believe there will be a general desire . . . . . they may feel secure in their office.

Then we have the long speech of Sir Isaac Isaacs, and my friend has read most of this to the commission so I will not repeat it. The then Mr Isaacs was putting the view that if you departed from the position that had been found in the Victorian and other state constitutions you would be producing a situation that it would be very difficult to control judges and providing all sorts of potential for a most unsavoury situation to arise, and it should not be allowed to happen. Sir John Downer says:

> There is a balance of risks which we might well take together.

Then Mr Isaacs continues and reads, as my friend said, the passages from Todd to the convention but in circumstances which require some careful examination because the passages from Todd start with the fact - at the top of the right-hand side of 948 - the good behaviour provision and the right to address.

Mr Isaacs said:

> A judge holds office . . . . . .
> the will of the people in that respect.

Then Mr Isaacs continues with the legal effect of a grant of an office. Mr Higgins asked:

> Does that include ordinary unfitness
> . . . . . incapable because of age.

Then Mr Isaacs continues with the reference to the passage on which so much reliance is placed by my friends. Then there is reference to:

> The legal accuracy of the foregoing
> definitions . . . . . non-
> performance of the condition.

May I stress to the commission in reference to the kind of misbehaviour by a judge that would be a legal breach, implicit in that is that there may be other kinds of misbehaviour. Then there is reference next to:

> But in addition to these methods of procedure
> . . . . . or legal consequence
> thereof.

Again going back to the start of that last paragraph:

> This power is not in a strict sense
> judicial. It may be invoked upon occasions
> when the misbehaviour complained of would not
> constitute a legal breach.

In other words, the word is here being used and Todd was using it to cover both situations of the misconduct that would entitle a person to claim forfeiture of an office, and also the misconduct that would justify the Houses of Parliament presenting an address to the Crown - misbehaviour in both cases.

That is why we submit that it cannot be said that misbehaviour as a noun has a technical meaning limited in the way my friends have suggested. One has twice on this very page and twice out of Todd found explicit reference to misbehaviour in a context which quite clearly shows that misbehaviour there is being used generically to cover the sort of misconduct that would justify the removal of a judge in one or other way.

Then Mr Isaacs goes on to continue his argument on the right hand side of 949 point 5:

> It is quite right that the judges should hold their offices . . . . . salary of the judges should be beyond reach.

At the bottom of the page Mr Isaacs thinks it would be a very great mistake:

> if it were departed from the lines that have worked so well for nearly two centuries under the British Constitution.

Then on page 950 Mr Symon takes up the propositions Mr Isaacs has been putting forward, and on the left hand side of 950 point 5, says:

> It seems to me that my honourable friend Mr Isaacs . . . . . that already exists in constitutional law.

He takes him to task, and turns to the federalists and to the quotation from Hamilton, and he then read and justifiably stressed the passage on the right hand side on the bottom half of the page. Then on page 951 Mr Symon makes reference, at the bottom of the speech before Sir John Downer intervenes:

> It would be introducing an element of great uncertainty . . . . . misbehaviour and incapacity.

Sir John Downer says:

> I think misbehaviour has always been the word. . . . . exercise its power of removal.

Again, we would submit that the clear reference back is to the circumstances in which Mr Isaacs and Todd have pointed to the operation of attempts to remove judges in contra distinction to situations where attempts might be made to remove a judge who is acting properly. Mr Symon then says:

> The two words suggested are exhaustive of the conditions . . . . . I think it is a distinct improvement.

Then there is reference in Mr Barton's speech - he does not accept what Mr Isaacs has put, which is interesting, because in the second debate he does to some extent turn to the Isaacs view. On page 952 on the left hand side - - -

SIR G. LUSH: Are these rather, apparently rather loosely expressed amendments exactly what we are dealing with at page 951, was that amendment to insert in what is called section 3 - that is in fact clause 70(3) -

the words, "on the grounds of misbehaviour or unfitness," or something like that?

MR CHARLES: I believe so, Mr President. I had assumed - - -

SIR R. BLACKBURN: The amendment is shown on page 950.

MR CHARLES: And at page 946 point 5, right hand side. Mr Barton, continuing on page 952, points to the matter of which the view opposed to Isaacs is really placed. At 952 point 6, left hand side:

> The Canadian Constitution amounts to an attempt to place it . . . . . I agree with Mr Symon in that respect.

Then Mr Isaacs comes back to his point:

> Who would be the judges of misbehaviour . . . . . so long as both houses concur.

I have been reading from the bottom quarter of the left hand column of 952 and the first third of the right hand column. So that again, we submit that what is plain is that those who opposed the Isaacs view simply wanted cause to be inserted and later proved, and were not attempting to limit the area of misbehaviour.

Then on page 953 we have a series of - firstly, I should say before Mr Higgins enters the fray, Mr Barton at 953 point 6 on the left hand side, quite agrees with:

> any honourable member who will endeavour to amend this clause . . . . . guilty of incapacity or misbehaviour he should be removed?

Answer: "Yes." It is the opinion of parliament on the matter. It is not some strictly technical settled and received meaning that is being looked at here, again in the context of what has been said from Todd. Mr Higgins:

> Then the end of it all is to leave it to the two Houses of Parliament.

Then Mr Higgins continues, and he obviously does not accept that this is going to be the effect of the amendment. At 953 point 8, right hand side:

> May I point out to Mr Kingston . . . . . that there has been misconduct.

And this is a man who is going to become a High Court judge, a very skilled lawyer, referring to misconduct, not misbehaviour.

Misconduct or incapacity . . . . .
. . . . . salary.

He says he has to vote against the amendment.

Then Mr Fraser, who turned out to be a thoroughly pugilistic debater in these proceedings says:

> If the removal of a judge . . . . . . . . . . Therefore Parliament is the Supreme Court in this case.

Near the bottom of the page we get the interventions of Mr Dobson who was described shortly afterwards as a radical, revolutionary firebrand. He says:

> It is rather difficult to answer the well-put arguments of Mr Kingston . . . . . has been guilty of misconduct or incapacity.

Again misconduct:

> There will be caused an enormous amount of litigation . . . . . that judge ought to be removed.

There is an interchange with Mr Symon. Then Mr Dobson said:

> A judge will not be found guilty . . . . . he brought the administration of justice into disrepute and contempt.

The relevance of that is simply that this very fact situation was brought to the attention of the members of the convention, not the fact that he had misused his office to stop his creditors succeeding but the second of the two situations put to the court by Sir Frederick Thesiger in argument:

> It is much better to leave with the Federal Parliament . . . . . unless misconduct -

Again misconduct:

> or incapacity were proved as facts . . . . . If he is found guilty of misconduct, either moral or judicial, he ought to be removed.

Here is the person arguing strongly against the Isaacs amendment but insisting that moral misconduct was a proper basis for removal of a judge:

> These are questions of fact . . . . . fearless in doing their duty -

That submission is in the context of a man who wants a judge removed from office for moral misconduct. Sir John Downer, Mr Symon and Mr Barton think Mr Dobson's sentiments are radically wrong and revoluntionary. A firebrand, even a Tory, according to Mr Douglas. We would submit that in so doing they were not traversing the suggestion that the judge had been properly removed in Tasmania. What they were opposing was his view that there should be a complete breadth of entitlement in parliament without cause given for the removal of a judge. Sir John Downer continues:

> But as far as this particular part of the Bill is concerned . . . . . no possible relation to what we are doing now?

Then Sir John Downer on page 956 on the lefthand side at point 8:

> What is provided here? . . . . . or something else -

"or something else", your Honours:

> but there is no method prescribed as to how they have to find this out . . . . . . . . . . diminish the independence of its members.

Before reading on, can I forewarn your Honours that Sir John Downer was about to suggest an amendment introducing impeachment:

> The Americans required two things to be done, and their custom has worked well. I think we had better do the same. They require an impeachment to be made by one House and a trial by the other.

Near the bottom of the page at 956,point 8, Sir John Downer says:

> We ought to surround the removal of the judge . . . . . They will represent the same class in both Houses.

Then he suggested impeachment. Sir John near the bottom of the lefthand side of page 957 says:

> I think this is a matter well worthy of the serious consideration of honourable

> members. We should make our Supreme Court so strong and powerful that no Government will be able to set the Constitution at defiance owing to the presence of a majority in either House.

The Sir William Zeal who quite plainly was not a lawyer, on the righthand side said he wants to put forward the popular view of the matter:

> Honourable members, particularly of the legal profession, have discussed this question at great length -

I do not think Sir William Zeal was concerned with distinctions between misbehaviour and misconduct because he says in the middle of page 957:

> Are honourable members going to suppose . . . . . Let us go to work and try to complete this Federal Constitution.

At the bottom of the page:

> If a judge does wrong, punish him, but if he does that which is right we shall all of us honor him. I trust members will take a sensible and practical view of the question.

Small concern for the technical meaning of misbehaviour, we would say. At page 959, after the redoubtable Carruthers who can always be relied upon to defend us, we have on the righthand column of 959 Mr Kingston who talks of altering his proposed amendment:

> I have altered the amendment . . . . . at the will and pleasure of the Executive and of the Parliament.

Mr Isaacs again:

> Who will be the final judge . . . . . in such way as they see fit.

Then there is some further discussion but little I think that bears any necessity for reading, unless my friend wishes me to. Reference to this part is completed at the top of page 961 lefthand column:

> Subsection as amended agreed to.

We would say that it is absolutely impossible from that expanded reading of the debate at the Adelaide


(Continued on page 270a)

convention on section 72 to find any concern to limit the definition of misbehaviour or the entitlement of parliament to remove to the circumstances my friend has called for. Indeed, in so far as one can gain assistance from the convention views we would submit that every indication is to the contrary. There is not one person at that debate who can be shown to be suggesting that a judge who is, we would say corrupt in the circumstances we have opened our argument here was intended to remain a judge of the High Court. Independence was important but not to bought at that price.

Turning next to the Melbourne convention, commencing at page 311 - - -

SIR G.LUSH: I suppose that last proposition is true but was not Isaacs J originally at least saying, if you depart from the draft which was initially before them, you will be creating a situation in which corrupt judges may stay in office? Nobody said, "Yes, we are" in those terms or even in oblique terms.


(Continued on page 271)

MR CHARLES: At page 948.6, Sir Isaac Issacs was saying:

> If we depart from the present British practice . . . . . that is a position we ought not to court.

What Sir Isaac was arguing, as we follow it, was that by removing the broad entitlement of parliament to act without cause stated, you are giving the judge a series of procedural arguments which he could take that there was not technical misbehaviour stated; he was entitled to go to the courts; it had not been proved.

We would say it does not follow from that that it was being suggested that any particular received definition of misbehaviour was involved because one then comes to the references in Todd to misbehaviour used both in what my friend would call its technical meaning and in a wider meaning covering an occasion for removal of misconduct on an address of parliament under the Constitution, and in circumstances where Sir Isaac then accepts later that if parliament is to be the judges of misbehaviour, then that removes his complaint. That is at page 952.

We see what appears to be acceptance by acclamation of that view. We would submit insofar as Sir Isaac Issacs had his doubts on this score, they were being taken away both on that page, 952, and in the later intervention in debate that arose at page 959, right hand column, point 7.

If I could then come back to the Melbourne convention debates and start at page 311, the relevant passage goes from page 311 to page 318, and one finds the redoubtable Mr Issacs rising to the defence of the Victorian position again in the left hand column at 311.2. The amendment had been suggested by the Victorian Assembly, again attempting to reinsert the right of both houses to pray for removal. Mr Issacs says:

> I would like to explain why the Legislative Assembly of Victoria suggests the insertion of these words in the United States.

Then there are two very testy interjections indicating that at least some members found Mr Issacs a pest. Then Mr Issacs goes on:

> I have no doubt that the Honourable Member's knowledge of Canada . . . . . during good behaviour -

SIR G. LUSH: Which page are you reading from?

MR CHARLES: I am sorry, your Honour, 311 in the left hand column at point 5. Mr Fraser has had quite enough about the United States; he says he knows all about it:

> In the United States Constitution it is provided that judges shall hold their office . . . . . a judgment in favour of a state as against the Commonwealth.

Obviously Mr Issacs regarded that as open and he is simply saying that the parliament would do it:

> Mr Symon: do you contend that a judge should be removed . . . . . as it is left in the colonies.

Then at page 312, left hand side, point 2:

> I should say that every precaution should be taken . . . . . he would have the right to appeal.

Then there is discussion about how you can attempt to avoid that. Mr Issacs at page 313.6, left hand column:

> To remove any misconception these words should be added . . . . . misbehaviour or incapacity.

Then there is a discussion about how this can be done. Mr Issacs says:

> I am quite prepared to accept the suggestion of Mr Reid -

that is the one in the middle of the page:

> - what I desire to do is to prevent such a calamity . . . . . to be final and unchallengeable.

He is quite willing to accept what Mr Reid suggested. Mr Kingston then takes the matter up at page 313.6, left hand side:

> I think the intention of the convention at Adelaide was this, to prevent the judges being removable at the whim and caprice of both houses of the legislature -

not to limit misbehaviour in the way my friend has suggested:

If you give to the federal
parliament the uncontrolled
power . . . . . .
shall not be challenged in the
slightest degree, well and good.

Mr Isaacs again supports what Mr Reid has suggested. Mr Kingston says at 314.4, left:

> I would suggest that if we add after the words "misbehaviour and incapacity" . .. . . . . . or insert similar words -

and this, of course, your Honours, is clearly the origin of proof -

> and in express terms state that the findings . . . . . Federal Parliament unchallangeable and without appeal.

And, your Honours, "behave themselves in the best sense of the term" in our submission does not again lend itself to the assertion of a settled technical meaning in the way my friend has suggested. Now Mr Fraser, who is, my friend is right in asserting, from Victoria, goes on that both houses might produce false evidence; evidence could be trumped up by a cabinet anxious to get rid of a judge; and Mr Barton then starts to indicate that he has been converted by what Mr Isaacs has had to say. And this all becomes apparent in the course of the next two pages.

He wants to put the amendment in a different place; Mr Isaacs says he does not care where, so long as it is inserted. And then a form of amendment is suggested by Mr Barton at page 314.7, right hand side. And it is quite clear that what Mr Barton, the leader of the convention, was trying to do, was to accommodate the Isaacs view. Mr Barton at the top of page 315, left hand column:

> I may say that in the convention in Adelaide, in 1897 . . . . . . . . . . if we were to impose such a task upon it.

Again, your Honours, as a judge having committed some misdeed, not an offence, not criminality, not criminal conviction, but as having committed some misdeed.

Then at page 316 we have got at the bottom of the left-hand column Mr Kingston saying:

> I understand that the proposal is this - that whilst you provide . . . . . final finding.

Mr Fraser is still at it:

> If parliament has to decide on misbehaviour . . . . . mere subterfuge.

At which there is a horrified interjection from Mr Isaacs. Then we have Sir George Turner:

> I have heard so many statements lately . . . . . creating a parliament at all.

Then at page 317 we have Mr Fraser complaining at the top of the page:

> It is only a majority in either house, and the majority may be only one in either house.

And Sir George Turner:

> It is a matter for the majority in both . . . . . no provision of this kind in the bill.

Then Sir George Turner at the bottom of the page - I should go back one interjection. Mr Reid:

> And if a judge lost his brain, he would be the last man to believe it.

And Sir George Turner:

> There is no doubt of that, because many of those . . . . . if we make the clause read - - -

And he sets out his view. And:

> That will make it perfectly plain that a judge is not to be . . . . . to finally determine the matter.

Your Honours, twice in that passage Sir George Turner has indicated a view which is not one of technical misbehaviour. He has spoken, firstly, 317, left-hand side at point 9, "such gross misbehaviour", and 317, right-hand side at point 2, "some misbehaviour - reckless misbehaviour that will mean - - -". Now that is not a received view of misbehaviour. Then Mr Barton at the middle of 317, right-hand side:

> I should like to know whether it is or is not . . . . . into any mistrial of the matter.

That is the desire to ensure a hearing in fairness to the judge. Then Mr Symon at the bottom of the page:

> I shall be found supporting the amendment as indicated by my friend . . . . . perfectly content to leave the final decision to them.

And they are still concerned that the judge should have a right to defend himself; and there was thought to be an implied power of suspension; and Mr Symon says:

> I am satisfied that Federal Parliament would give an accused judge . . . . . . . . . of defending himself.

Then Mr Barton, right-hand side, 318.3, moves the amendment upon the grounds of proved misbehaviour or incapacity. Mr Kingston:

> We want to make it perfectly clear that the decision . . . . . shall be conclusive.

And there is reference to what form the amendment should take and Mr Isaacs then says:

> I understand that the drafting committee will not be . . . . . . . . . . shall be unchallangeable.

Now, your Honours, that is as far as the debates went and we would submit that there is nowhere in the debate in either place any justification for it to be asserted that any person taking part in those debates had a view of misbehaviour confined to criminal conduct of an infamous nature resulting in a conviction. It simply is not there.

SIR G. LUSH: It is misbehaviour outside misbehaviour in the duties of the office?

MR CHARLES: Yes, we would say it is perfectly clear that what was being talked about was misbehaviour, or misconduct, or gross misbehaviour, or reckless conduct - a variety of different expressions are used which follow from the first description of


(Continued on page 276a)

the situation by Mr Isaac Isaacs where misbehaviour is used twice in reference to two quite different types of conduct: those that would entitle the person to move in the narrow sense that my friend has referred to, and also those that would be proper to be taken into account by the Houses of Parliament in England as a basis for praying for removal.

Now what the real argument was was how the situation could be left in the hands of parliament safely so as to secure independence. It was to be left in the hands of parliament and there had to be an allegation of misbehaviour and that had to be proved. And in that way the judge knew what was being complained of against him and was given an opportunity of answering it and also, because that did not entitle them, parliament, to act on mere whim or caprice. It did not entitle parliament to seek to remove a judge who was behaving with perfect propriety. And we say that it was in that context that the independence of the judiciary was seen to be protected.


(Continued on page 277)

SIR R. BLACKBURN: Am I right in saying what you are contending against is not merely that misbehaviour out of office cannot be limited to misbehaviour shown by a conviction but much wider than that, misbehaviour referred to in section 72 is not limited by the common law rules about the misbehaviour which would entitle the grantor of an office to terminate the office?

MR CHARLES: Indeed, your Honour.

SIR R. BLACKBURN: You do take that wider?

MR CHARLES: I do. My learned junior tells me that the Fraser in question was the former prime minister's grandfather. Obviously a man of determined streak who may have passed on certain characteristics to his grandson. We would say that there is simply in the convention debate no justification shown for what my friends have sought to derive from it in argument.

SIR R. BLACKBURN: There is one other possibility, of course, that although the founding fathers may not have had that intention, it is the only one which you can properly read into the words they have used.

MR CHARLES: That would only be the case if it were clear beyond argument that the words mean that or that misbehaviour could only be seen in a particular light at that time, and I am going to turn to that argument next.

We would submit that as to the first point, the general meaning of the words, the debates suggest in the strongest terms that the members did not have a clear view of what misbehaviour was. What they were saying was we cannot judge it now, we are going to have to leave it to parliament as the will of the people to decide from time to time, but there must be misconduct of some kind, it cannot be whim or caprice. They were, we would submit, preserving for parliament a right to define misbehaviour having regard to the circumstances alleged, and no notion whatever, we would respectfully submit, of conviction surfaces at any time in the debates from start to finish, apart from the reference that Sir Isaac Isaacs made to the definition in Todd where one talks of the condition upon which an office can be forfeited.

We would submit on the meaning of the expressions used that neither word that is in the phrase "proved misbehaviour" readily gives rise either to the Bennett or Griffith view, if I can so describe them, in deference to Dr Bennett, Queens Counsel, rather than the Dr Bennett present view as stated in the opinion which your Honours have. I am told to describe them as submissions rather than opinion.

The natural meaning of misbehaviour, we would submit, as a matter of definition would cover a

judge whose conduct had brought his high office into disrepute, and we would also submit that the word, "proved", suggests something entirely different from conviction. A conviction may or may not stand, and witness the very events which took place earlier this year. We find a conviction at the first trial, an appeal, and an acquittal on the second trial. We say it is also clear enough from the form of debate at the convention that the framers expected by use of the word, "proved", that there would be some form of proof tendered to parliament, not that one looked at a conviction obviously outside parliament.

The Bennett view requires the conclusion that those who framed the Constitution intended for the purpose of securing the independence of the judiciary both a new procedure for removal which clearly was contemplated but also to relinquish the right to remove a judge who had disgraced his office in the ways suggested at the start of this argument before lunch.

SIR R. BLACKBURN: Where do we get the Bennett view? You have referred to it more than once. The Pincus view I understand, the Griffith view I understand.

MR CHARLES: If your Honour looks at the report to the senate of the Senate Select Committee of August 1984, your Honour will find three things included. One of those is the opinion of Mr Justice Pincus, the last is the opinion of Dr Gavin Griffith, and immediately preceding that is a series of submissions on the inappropriateness of interrogation of a judge, and in the course of that will be found what is the basis for the Bennett view, page 44.

HON A. WELLS: While you pause there, I just want to make quite sure that I am following that part of your submission which says that broadly speaking the convention finally decided to leave the matter of what was misbehaviour to parliament. I suppose theoretically there are two ways of interpreting that. One way would be to attribute to parliament the right to expand or contract the legal content of what was proved misbehaviour properly interpreted so as to make it suitable to these circumstances or those circumstances. That would be one possibility. The other possibility is to say that proved misbehaviour has a general generic character and its application depends upon matters of fact and degree, and to that extent parliament would have it in their hands to decide what is in application proved misbehaviour. To my mind those are the two alternatives that present themselves. Do you espouse either one of those two, or another, or some mixture?

MR CHARLES: I really espouse neither because I say that what the framers intended but which they may not in law have been able to achieve was to leave it entirely to parliament to say what was misbehaviour, what was misconduct, which would justify the removal of a judge.

HON A. WELLS: The justification for removal is the sole criteria?

MR CHARLES: Yes, but there had to be some form of justification in the form of misconduct stated in the intention of the framers of the Constitution. we will come later to the question of whether in law they may successfully have achieved that because we will submit that the High Court would not permit such a situation to exist, that there is an area in which curial review is possible and, indeed, under the Constitution would necessarily have to exist, but the thrust of our submission on this is that the whole context of this debate was one pointed in a quite different direction from that which has been suggested by my friends.

They have suggested that those taking part in the debates had in mind a settled meaning of misbehaviour. We have submitted that as a proposition that is wrong as the extract from Todd itself shows and, secondly, that the framers of the Constitution in section 72 intended to depart from the area of misconduct which might in the past have permitted a judge to be removed, and to limit that right in the interests of independence to a very very much narrower area of misbehaviour, and what we say is that it is quite plain that neither of those two things was in the minds of any of those debating, that their concerns were entirely different. They wanted judges who were heard to have their debts outstanding and with bailiffs waiting at their front gate and disgracing their office in that way, they wanted them removed just as much after the Constitution had been implanted in Australia as before. It would not have entered anyone's head, with respect, that it was going to be suggested that any conduct outside office no matter how disgraceful, that a conviction was required for a criminal offence before removal could take place.

We would submit that reading those debates that would have been treated with scorn and derision by those present at these functions if suggested to them at that time.

SIR G. LUSH: They were afraid of without cause removal. They may or may not have been afraid of trumped up removal if, indeed, the distinction is relevant.

MR CHARLES: Some such as Mr Fraser were concerned with this possibility, the majority, we would say, were taking the view clearly enough that parliament exercising the will of the people and being bicameral could be trusted, provided that there was to be misbehaviour stated and provided it was to be proved, that those safeguards were sufficient to ensure that a person could not be removed for mere whim because, let us say, he had opposed the government once too often.

SIR G. LUSH: At one stage in the passages which you read there was a suggestion put forward, in effect, that all that should be required was that the address itself should contain the words, "upon the ground of misbehaviour or incapacity" and, "proved" was apparently inserted to make sure, as one of the endeavours to make sure that parliament's decision was final. I referred when I was speaking to Mr Gyles this morning to some references to Harrison Moore, and I will not repeat what I said then about the insufficiency of my reading of the book, but one of the extracts suggest that Professor Moore took the view that even in its final form section 72 was capable of permitting an address which merely made an allegation and which had no substance to it. It may have been a cynical approach, indeed, it may not have been the professor's approach at all, but it does appear by the footnotes to the article.

MR CHARLES: We will come to the writings of Mr Harrison Moore later, your Honour, but certainly that very learned gentleman did take the view that in 1897 and in 1910 judicial review was possible.

SIR G. LUSH: Yes he did, but it was not only that. The footnote in the article to which I am referring is that he said at the end of all this the judges here were not a scrap better off than they were in England. That certainly would have disappointed those who took part in the debate that has been read to us in the last two days.

MR CHARLES: It certainly would.

SIR G. LUSH: Are you leaving the debates at this stage?

MR CHARLES: Not quite.

SIR G. LUSH: Perhaps you would tell me when you are.

MR CHARLES: I have just got to deal briefly with the extent to which one can use the comments in these convention debates. There are limits to the extent to which it is permissible to have regard to them. It is plainly proper to do so for the purpose of seeing what was the evil to be remedied.

MR CHARLES: I wanted to take the commission briefly to two cases for that purpose. The first of these is the Municipal Council of Sydney v The Commonwealth, 1 CLR 208. The relevant passage is at pages 213 and 214. The commission will see at page 213 point 2:

> Counsel then proposed to quote from the convention debates . . . . . evil to be remedied.-

and so forth. In the second case, The Queen v Pearson ex parte Sipka, 152 CLR 262, the reference is in these terms, in the joint judgment of the Chief Justice and Mason and Wilson JJ, at the top of the page:

> It is unnecessary for present purposes to consider the extent . . . . . what was the evil to be remedied.

The convention debates are referred to as showing that the apprehended mischief which section 41 was designed to prevent was that the women of South Australia might be deprived of the federal franchise of the Commonwealth parliament.

We would say that you cannot count heads for or against a particular view. What is clear, we would submit, as one of the evils to be remedied, was that parliament was not intended to be at large in its address to the Governor-General. We would say that in the interests of federation, the position in the United Kingdom was to be departed from, having regard to the special position of the federal courts, in particular the High Court, in a federation, and for the better protection of the judge some formality was to be imposed on the proceedings by the use of the word "proved", but equally again, what mischief was to be remedied, we would say that if one found a corrupt judge in office, and by corrupt I mean someone guilty of misconduct in what I put is the wider sense of the term, parliament was to be the tribunal of fact in what was misbehaviour.

HON A. WELLS: I suppose, rather ironically, to put that within the mould with your basic proposition, the evil to be avoided was the position in the United Kingdom.

MR CHARLES: Yes, certainly. Mr President, I am about to leave the position of the debates.

SIR G. LUSH: When did subsection (1) drop out of this clause? In both the Adelaide and Melbourne debates the proposed clause contained the words "shall hold their offices during good behaviour." When did that drop out?

MR CHARLES: Obviously it does not seem to have occurred at any stage during Adelaide or Melbourne. Do members of the commission have in the copy of the Melbourne debates an attachment, which is the last two pages, draft of a bill? I have a copy which may have been produced out of my office rather than my friend's, which indicates draft of a bill.

SIR G. LUSH: What we have ends at page 318.

MR CHARLES: Well, can I hand up one copy at this stage and read from my own copy which I will hand up to the commission in a moment. The commission will recall that the Melbourne debate took place on 31 January 1898. I have a two page document headed, "Copy of Federal Constitution under the Crown as finally adopted by the Australasian Federal Convention at Melbourne on 16 March 1898." It is headed, "Copy of a Bill", and that shows that section 72 did not have the former subsection (1) so at some stage within the two months, or indeed the six weeks, between the Melbourne debate and the next convention, also in Melbourne, that first subsection had dropped out.

HON A. WELLS: I suppose, like many of these things, it may have been done in the quiet back rooms of the draughtsman.

SIR G. LUSH: There is an express reference by Mr Isaacs in the debate to the fact that their wording was sent off to the draughtsman to be dealt with further. This draft, you say, appeared in March?

MR CHALRS: It is headed at the top of the page, your Honour, 16 March.

SIR G. LUSH: What I had in mind was that it might have been the subject of some discussion in the debates, but that is evidently not so.

MR CHARLES: I have not been able to find any, if such a discussion existed. May I simply remind your Honours that on page 316 of the Melbourne debate the adoption of subsection (1) appears to have been agreed to at 316 point 2. Subsection (1) was agreed to, and then subsections (1) and (2) were transposed, and the chairman said:

> The question now is that subsection (2) stand part of the clause . . . . . to carry out the intention.

I do not think I can point to any other reference in that debate until one gets to Mr Isaacs's suggestions that the drafting committee:

> is not to be bound by the form of words adopted by us then, and that they are to frame the clause using such language as they think will meet our intention.

That is at page 318 on the right hand side near the bottom.

SIR G. LUSH: Does its omission have any effect on the meaning of the words that remain?

MR CHARLES: With respect, we would say no. The view of tenure during good behaviour certainly resulted in it being asserted that there was some form of, in effect, feudal tenure with a provision for forfeiture. That would not have been consistent with the scheme that was produced by the remainder of the bill, because there was no suggestion or intention that there be forfeiture. What was intended was that in the event of misconduct, the parliament, and only the parliament, should have the right to address, stating the cause and proving it.

If there had been retained the provision for tenure during good behaviour, that would have opened the possibility of some person moving for writ of sci fa to say that some form of conduct had occurred,

the position had been forfeited and seeking to oust the judge from his bench.

SIR G. LUSH: Yes. I had thought that you might answer my last question, the question whether the omission made any difference to the interpretation by saying that it tended - it could not be decisive, but that it tended to emphasie a divorce between the word "misbehaviour" remaining and the traditional "during good behaviour" which had been there originally. The argument against you might have had more force if the conjunction between "good behaviour" and "misbehaviour" had been maintained. I thought you might answer me along those lines, but one way or another I do not suppose it is a consideration that could carry very much weight.

MR CHARLES: I am reminded that it has been held that the judges in fact hold office during good behaviour, authority for which is the Waterside Workers Federation of Australia -v- Alexander, vol.25 CLR434. It is unlikely that we would have offered an answer to the presiding members question in the way suggested because we would submit that there were not in fact two divisions between the differing meanings of behaviour, that it is just a generic meaning of misconduct: only when one was concerned with a forfeiture of office because of a failure to act in good behaviour was it possible - possible not necessarily right - that one could move only for certain types of misconduct of types of misbehaviour.

SIR R. BLACKBURN: I do not really see the meaning of the statement, "The judges hold their office during good behaviour". If the section 72 method is the only method of getting rid of them, it seems to be an empty formula. Perhaps if I read that case, I will see what the point was.

MR CHARLES: May I in conclusion this afternoon draw the Commission's attention - we have discovered in the course of wide ranging researches that a student at Monash University last year was completing an honours thesis on the interpretation and application of section 72.

SIR G. LUSH: If I was still in charge I might say, and what is your next authority?

MR CHARLES: The particular value of this is not so much the arguments, although it happens that they coincide with many of the arguments we put to the commission and I hope they are not the worse for that, but because of some helpful footnotes which the student has included in them. May I draw to the Commission's attention what Sir Winston Churchill said, referred to at page 23 in the English Parliamentary Debates:

> The form of life and conduct
> . . . . . appearance
> of impropriety.

And what then follows. Likewise, page 24, what was said by Jackson and lastly, may we refer to the passage from Sir Robert Peel in the House of Commons in Barrington's case set out at the top of page 25, talking of Burke's Act, where Sir Robert said:

> The act that renders our judges
> . . . . . the address to
> Crown for his removal.

I simply put this document forward. I do not seek to use it other than simply to say that some of the footnotes are helpful and that the passages just referred to bear on the extent of the demands that society makes on judges and which we would submit are relevant to a contention we will come to that there is a standard of conduct which is regarded as generally acceptable for judges and which, despite what my friend says, is observable and applicable.

SIR G. LUSH: It did not disclose the name of the author.

MR CHARLES: I believe that the author is a person called Sheridan. I really cannot claim to attach significance to the opinions stated in it.

SIR G. LUSH: I was not expecting that but if it is to be referred to it ought to be acknowledged.

MR CHARLES: I understand that the student referred to is one Sheridan. I cannot even say of which sex.

SIR G. LUSH: What is the chapter 4 of?

MR CHARLES: My understanding again is that what happens is that the honours theses are printed at the end of each year and this may be either one chapter of a thesis - indeed I suppose it must be having regard to the pagination. The whole is contained in a bound volume which the university puts - - -

SIR G. LUSH: The heading, interpretation and application of section 72 implies that at least the other three chapters were dealing with the constitution. Something has gone.

MR CHARLES: And that there are the previous 19 pages.

SIR R. BLACKBURN: Presumably the fact that it is printed indicates it was accepted as warranting the admission to the degree?

MR CHARLES: Again, I assume so, your Honour.

SIR G. LUSH: You cannot say more than it was typed.

MR CHARLES: Very little more at this stage, your Honour. I succeeded in catching the document before it had been sent off for printing to be included in the bound volume.


(Continued on page 286a)

SIR G. LUSH: We shall adjourn until 10 o'clock tomorrow morning.

AT 4.05 PM THE MATTER WAS ADJOURNED
UNTIL THURSDAY, 24 JULY 1986

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# TRANSCRIPT OF PROCEEDINGS



**Transcript-in-Confidence**

PARLIAMENTARY COMMISSION OF INQUIRY

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

TRANSCRIPT OF PROCEEDINGS

AT SYDNEY ON THURSDAY, 24 JULY 1986, AT 9.50 AM

Continued from 23.7.86

Secretary to the Commission

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

Telephone: (02) 232 4922

SIR G. LUSH: Mr Charles, do you wish to say anything about the arrangements of the hearings next week?

MR CHARLES: Yes, Mr President; with the consent of my friend we were both concerned, if we could raise the matter, to ask the commission to consider when again evidence should start in the light of the fact that argument will proceed we think at least throughout today. We hope it will finish today on the question now being argued. The commission may have a view as to how long it would take to produce a report. I think I speak for my friend when I say that both of us would regard it as desirable that the opinion of the commissioners on this aspect be delivered before the High Court hearing. Is that fair - - -

MR GYLES: I think our concern is to have it delivered before there is any evidence led, having got as far as we have. Because if we succeeded in our argument that means that evidence led really is irrelevant. I also agree it would be desirable to have it before the High Court hearings but our primary concern is to have the commission's ruling on the substantive aspects of the matter. We do not see this as a sort of introduction or preliminary to a High Court case; we are here primarily to have the commissioners' own views.

SIR G. LUSH: Yes. The present plan, of course, is to sit next Wednesday for evidence. If we postpone the start of evidence until the following Monday I think that it should, unless some misfortune intervenes, be within the commission's capacities to deliver its views on the current matter at the end of next week.

MR CHARLES: I am told, Mr President, that that Monday, which would be 4 August is a public holiday in New South Wales - - -

MR GYLES: No, I have been reminded it is Bank Holiday.

MR CHARLES: - - - and that the courts usually do not sit on that day.

SIR G. LUSH: At any rate we need not pursue the matter. Time is obviously valuable today from what you have already said, but if inquiries can be made during the day or at lunch-time and if it is agreed that we postpone the start of evidence until the first available day that week, that will do for present purposes, will not it?

MR CHARLES: Yes. Can I indicate to assist my friends that unless it is inconvenient to them for some reason, the case I would propose to proceed with first is the Thomas allegation in that week, and that unless they are unprepared, I would propose to commence with that, which is allegation number 1, on the Monday or Tuesday, whichever day turns out to be convenient, in that week.

MR GYLES: Perhaps all I should say about that is that I have indicated to my learned friend that is one of the allegations which, if they are to be pursued, we would like more time to prepare. He has taken that into account and he still says he wants to do that first. We will have to do our best. It seems to us there are a number of other allegations that could be pursued before that.

SIR G. LUSH: Maybe, we have ten days. You will need more than that - or twelve days, if it is Tuesday.

MR GYLES: Because time is valuable, I do not propose to elaborate upon the point at the moment.

SIR G. LUSH: Yes. Mr Charles, we will proceed with the argument.

MR CHARLES: I have been asked yesterday questions about the tenure on which members of the High Court are thought to hold office, and I have referred the commissioners to Alexander's case. Can I give four short references to Alexander's case. I think I have given your Honours the citation of the case: (1918) 25 CLR 434. The first reference is that of the Chief Justice at page 447, and after reference to the term, what the Chief Justice said was:

> The word does not of itself import any particular duration or tenure of office. Whenever used its meaning may and indeed must be controlled by the subject matter and the context.

SIR G. LUSH: What word is he speaking about?

MR CHARLES: He is speaking of a point in relation to the President of the Arbitration Court:

> Whenever used its meaning may and indeed must be . . . . . in section 12 of the Arbitration Act -

I think there is nothing further of particular relevance to be found in that passage there. Indeed, I ought really to have read the preceding paragraph. The Chief Justice said, after reference to the appointment of the President of the Court:

> The language demands careful examination . . . . . holds judicial office during good behaviour.

Then the second passage is in the judgment of Sir Edmund Barton at page 457.

SIR G. LUSH: That means that in successive paragraphs the Chief Justice referred to tenure during good behaviour and appointment for life.

MR CHARLES: Yes.

SIR G. LUSH: There is perhaps no difference between the two.

MR CHARLES: Yes, indeed. I will not read - I think the relevant passage in Sir Edmund Barton's jdugment is at page 457.5 for the rest of the page; in the judgment of Sir Isaac Isaacs and Sir George Rich at pages 469 to 470; and in the judgment of Mr Justice Powers at page 486.

SIR R. BLACKBURN: How did the question arise?

MR CHARLES: The question arose, your Honour, in the context of whether in the case of the Commonwealth Court of Conciliation and Arbitration the appointment could be made for a term of years or as a chapter 3 court had to be for life and it was incidentally in the course of that examination, in the course of deciding that the appointment had to be for life as a chapter 3 court that the incidental reference is made to the members of the High Court holding during good behaviour.

I had been dealing with the convention debates and had finished that examination. The next part of our argument relates to the position as to misbehaviour generally and that is whether there can properly be said to have been a received or technical meaning of the word which in some way the framers of the Constitution unknowingly translated into section 72. My submission is that it must have been unknowing because we assert that it would not be the ordinary meaning of misbehaviour and examination of the convention debates does not suggest that that is what they intended the word to mean. We make three broad propositions. The first of them is that in our submission misbehaviour never had the meaning at common law which is claimed for it. In our submission misbehaviour was a generic term used in relation to judges to describe conduct which justified removal from office.

One of the ways in which removal from office was obtained was in cases where forfeiture was claimed by the writ of sci. fa., scire facias.

SIR G. LUSH: That was a procedure.

MR CHARLES: Indeed, your Honour, in circumstances where it was claimed that the office had been forfeited by breach of condition. In that situation there may be justification for limiting the grounds giving rise to forfeiture and seeking certainty for those grounds and particularly in the light of the feudal nature of the tenure of offices, that officers frequently were passed on through a family. It would be in the highest degree desirable that the circumstances under which an office might be lost through breach of condition and vacated should be known with precision. But in relation to judges, it is our primary contention that it never had the meaning which is claimed for it.

Secondly, our second proposition is that if misbehaviour did have the meaning attributed to it in relation to forfeiture of offices, we say that misbehaviour in relation to removal from judicial office

had a wider meaning covering all forms of conduct justifying removal from judicial office. Our third proposition is that if misbehaviour has at common law a narrowly defined technical meaning in relation to grounds for removal from judicial office, then we submit that the word was not used in that sense by the framers of our Constitution. We say there that the Constitution coalesces two separate procedures by which removal could be obtained and on the assumption made in proposition 3, operates in differing areas of misconduct. We say that the fact that in order to secure the independence of the judiciary, the Crown's more readily available procedure was relinquished, does not lead to the conclusion that reduced standards of behaviour were thereafter to be expected from judicial officers.

From those three propositions we move to the question - - -

SIR G. LUSH: There is something I would like you to repeat in that third proposition, Mr Charles. You said that the Constitution coalesces two procedures and I am not clear exactly what followed after that. You referred to different areas of conduct. Were you saying with the coalescence of the two procedures the Constitution operates in the two spheres of conduct that were previously relevant to the two different procedures?

MR CHARLES: Can I start my answer, Mr President, by saying the assumption on which the third proposition is based is that our first two are wrong and there is a narrow technical meaning of misbehaviour. The coalescence occurs in this way, there was a right in the Crown to remove a judge using the fact of forfeiture of office on this assumption operating where there had been technical misbehaviour occurring, where there had been misbehaviour in office and misbehaviour outside office on conviction for an infamous offence.

There was a second and quite separate procedure by which the Houses of Parliament could, on any ground, address the Crown praying for removal. No grounds needed to be specified but by convention that was limited to misconduct of the judge but used in a different sense covering moral turpitude and in general terms we would say unfitness for office demonstrated by improper action.

What we say is that the coalescence which occurred was that now only the Houses of Parliament were entitled to produce an address praying for removal but in circumstances not at large but where there had been misbehaviour. We say that what occurred was the removal of one form of procedure, the procedure that entitled - on the one hand the Crown no longer was

entitled to act by sci fa or on any other basis of its own motion and on the other the Houses of Parliament could only act on the basis of stated misconduct. It was intended to bring about a procedural operation but not a variation of the type of conduct that would produce removal from office. I am not sure in so doing I have properly answered your Honour's question.

SIR G. LUSH: I think so.

MR CHARLES: Probably at much more length than was necessary.

SIR R. BLACKBURN: But on that argument coalescing seems hardly the word, does it, because there was nothing left of the power of the grantor of an office. It was a new procedure for removing judges altogether.

MR CHARLES: Yes, precisely.

SIR R. BLACKBURN: Which had nothing in it of the pre-Act of Settlement common law procedure.

MR CHARLES: Yes, precisely. We say that in considering the position at common law one has to recall the purposes of the Act of Settlement. The Act of Settlement were intended to secure the position of the judges against intervention by the Crown by introducing the notion of the judicial office being held during good behaviour in contradistinction with their offices being held at pleasure. It was the stewards encroachments on judicial independence that had brought this about.

Parliament which had not been seen to encroach in that way always retained the right of address without such limitations of cause. We concede that those who have commented on the meaning of during good behaviour in the context of the Act of Settlement have substantial arguments for saying thatits operation in that context should be confined partly because the feudal nature of tenure and the operation of the condition brought about forfeiture vacating the office and partly because Parliament had that residual power, that wide ability to seek removal. Most of the commentators upon whom reliance has been placed have been stating views as to the operation and meaning of tenure during good behaviour against that backdrop. The context of the Constitution is so different we would submit that the views of the commentators can have little bearing upon it.

It is quite plain that there is no thought of vacation of office in section 72. The removal from office can only be brought about by the address of both Houses of Parliament in the same session.

The offices plainly are not vacated by breach of condition. So that the circumstances which caused the commentators to produce the theories they have simply have no operation in this respect, and we submit that when one is dealing with section 72 one is in quite uncharted seas. The commentators have usually, not invariably, but usually not been forced or required to grapple with the precise problems which really are thrown up for the first time in this case.

If we can go back to the various commentators upon whom reliance has been placed and start with Quick v Garran. The passage that my friend referred to is at pages 731-2 in paragraph 297, and here one sees certainly it is asserted that misbehaviour means misbehaviour in the grantee's official capacity. It reads:

> The quamdiu se bene gesserit must be intended in matters concerning his office . . . . . if the office had been granted for life.

The difficulty with the argument in my friend's terms is that that very description of misbehaviour is in its very nature inconsistent with what is now claimed for its technical operation because that solely relates to misbehaviour in office. There is no necessary relevance to conduct outside office at all, whether with or without conviction, and, of course, one goes back to Coke for that statement of it.

Then one finds following the inclusive definition taken from Todd that it includes a proper exercise of judicial functions, neglect of duty or non-attendance, and then thirdly this question of conviction for infamous offence, and the authority that is assumed to produce that is Todd.

If one goes back to Todd and attempts to see why - I am now about to ask your Honours to look at a different version of Todd from the one my friend has produced. This is the second edition.

HON A. WELLS: Could I just clear my mind of the general direction of your argument and see if I am on the right lines? What you are putting is this, is it, that because these early authorities centred all their reasoning upon a notion of a conditional limitation affecting a tenure of office and hence were naturally circumscribed in their approach by consideration of misbehaviour in office, that type of argument does not apply to the present context of section 72 because there is no question here of holding during good behaviour, indeed, that was eliminated in the convention debates, and what we are concerned with here is simply

a condition subsequent in defeasance, which is quite a different order altogether.

MR CHARLES: Precisely. When one goes back to Todd it may be helpful to draw the commission's attention to the fact that the document that has just been handed up is the second edition of Todd. The chronology was that Todd had produced his first edition in 1866, and the relevance of that, of course, is that that followed the delivery of the opinion of the Victorian law officers in 1864. The second edition was produced in 1887, and the revised edition that my friend has used was in 1892. The second edition is the one that a reference is about to be made to. The revised edition from which my friend has been working is the edition of 1892. Todd had died in 1884 after some 50 years in public life. I think he had gone to Canada at the age of eight, taking, as the book says, his family with him. A man of some natural brilliance, he had written his first book at 19, becoming librarian, I think, of the Canadian Parliament, and it was on the basis of the work he did there in later life that these volumes were produced. At any event, after that entirely irrelevant digression, he produced this work, and may one start at page 855 and following. The work is particularly interesting because it sets out in a number of different places reference to cases where the judges, and particularly colonial judges, had been removed from office.

We find reference at page 855 to the Act of Settlement that the judges commissions are made quamdiu se bene gesserit, and may I add for completeness that that provision had been introduced into the Australian colonies in the 1850s. The Constitution Acts of Victoria, New South Wales and, I think, elsewhere in the colonies usually at around 1855 had introduced that provision, in certainly Victoria and New South Wales. Todd then continues in dealing with the position, and when one gets to 857 where he sets out the legal effect of the grant of an office during good behaviour in terms which are taken almost directly, in fact, probably directly from the opinion of the colonial Crown Law officers. Beginning at the middle of page 857 he sets out what my friend regards as the classic meaning of misbehaviour - we draw attention again to the fact that it is inclusive - and continues over to page 858 with the assertion that in cases of official misconduct the decision of the question whether there has been misbehaviour rests with the grantor, and asserts that in cases of misconduct outside the duties of his office the misbehaviour must be established by a previous convication by a jury.

Then he continues that the legal accuracy of that foregoing definition of the circumstances under which

a patent office may be revoked is confirmed by an opinion of the English Crown Law offices, and then he turns to Barrington's case, how Mr Denman at the Bar of the House of Commons when acting as counsel on behalf of Sir Jonah Barrington had set out what were, it was said, the circumstances under which a judge could be removed, and the writ of sci. fa. to repeal, and the patent, the criminal information, and the other circumstances. The particular passage is set out at page 859 point 5, and if your Honours wish to see it, the passage from the Lords Journal is in the commission at the present time through the courtesy of Mr Darryl Smeaton who succeeded in obtaining it in circumstances we did not think possible.

The passage talks first of cases of misconduct not extending to a legal misdemeanour. The appropriate course appears to be by sci.fa.to repeal his patent, good behaviour being the condition precedent of the judge's tenure; secondly, when the conduct amounts to what a court might consider a misdemeanour, then by information; thirdly, if it amounts to actual crime, by impeachment; fourthly, and in all cases at the discretion of Parliament.

One relevant fact, we would say, is that the references here totally contradict the view that misbehaviour had a limited technical meaning, in our submission, because what is being put is that if misconduct does not extend to legal misdemeanour, then the appropriate course is by sci. fa.

SIR G. LUSH: This passage is in the other edition of Todd verbatim.

MR CHARLES: Yes, indeed, and they all come, as we understand it, from Barrington's case but, in our submission, this set of propositions is quite inconsistent with any view of a limited technical meaning of misbehaviour.

SIR R. BLACKBURN: One of my difficulties with this is to know where the end is of the quotation that begins with the words, "First in cases of misconduct". Where is the closing inverted comma?

MR CHARLES: That we should be able to find if we look at the Lords Journal. I think that the quotation ends, "Fourthly and in all cases". What is happening is that one is reading from the petition of Sir Jonah Barrington. The quotation starts at page 599 of the Lords Journal - "Upon reading the petition of Sir Jonah Barrington", and whoever produced the petition was somewhat verbose because the petition continues over the next two full pages, and on the third page of it in the journal, page 602, in the middle of the page, we find:

> The petitioner humbly suggests that there are four . . . . . inquisitorial and judicial jurisdiction of the House of Lords.

SIR R. BLACKBURN: So that is a second quotation - by the joint exercise?

MR CHARLES: Yes.

MR CHARLES: Yes.

SIR R. BLACKBURN: Are we to take it that Todd, in quoting from Sir Jonah Barrington's petition, is implying approval that the law is correctly stated in this petition?

MR CHARLES: We would say that that form of approval appears to be given by Todd, because what he says is elsewhere the peculiar circumstances under which each of the courses above enumerated would be specially applicable and would be thus explained, and he continues at page 860:

> By these authorities it is evident . . . . . in addition to these methods of procedure.

- and this is the critical passage -

> The constitution has appropriately conferred upon . . . . . on which the office is held.

This passage also appears to be the basis for the passage in Halsbury in paragraph 1107. The passage is:

> Such offices may, it is said, be determined . . . . . vested in the House of Lords.

The authority given is Barrington's case, and presumably it is said by Todd.

SIR G. LUSH: Or it is said in the petition and not with authority. That may be the implication.

MR CHARLES: Yes.

SIR R. BLACKBURN: Is Todd really giving his approval to the proposition that if the judge has committed what he calls an actual crime, then he has to be impeached and that sci fa would not do? Is that what he means?

HON A. WELLS: I thought he was saying that misdemeanours, whatever that means, would ordinarily be done by criminal information.

MR CHARLES: What one appears to have is four situations: misconduct not extending to legal misdemeanour - I must say the inference I had from that is that conduct amounting to criminal misbehaviour leading to conviction is not really covered by that at all; secondly, when the conduct amounts to what the court might consider a misdemeanour, presumably a lesser offence, then by information; thirdly, amounts to crime by impeachment;

and fourthly, in all cases at the discretion of parliament.

That appears to be quite inconsistent with the alleged common law definition of misbehaviour, but what is perfectly plain is that what is said on the next page is totally inconsistent with the asserted common law meaning of misbehaviour because in terms it is so.

> It may be invoked upon occasions when the misbehaviour complained of would not constitute a legal breach of the conditions on which the office is held.

What follows is equally relevant.

> The liability to this kind of removal . . . . . legal consequence thereof.

SIR R. BLACKBURN: Yes, but that is a description of what parliament can do under the Act of Settlement.

MR CHARLES: Yes, and it is said to arise in the case of misbehaviour. Continuing:

> In entering upon an investigation of this kind parliament is limited . . . . . for his removal from the bench.

All we say is that quite plainly what is being contemplated is misbehaviour of certain kinds, but in the fourth class of cases referred to arising from Barrington, one sees it being referred to by Todd as such grave misconduct as would warrant or compel the concurrence of both houses in an address to the Crown for his removal from the bench. But that is also referred to by him immediately before his misbehaviour.

Now, when one proceeds through the passages that follow, one comes to Mr Justice Fox's case at pages 862 and following. Various cases are thereafter set out in which the procedure has been followed. Sir Jonah Barrington's case is dealt with in detail at pages 867 to 869. As far as we know, this is the only case on which an address to the Crown from parliament has actually brought about the removal from office.

Then, your Honours, other cases are referred to leading to the statement of a variety of propositions set out on page 872 and following, as to the way in which parliament should move, the type of procedure that should be followed. I simply draw them to the

commission's attention because they indicate what Todd regards as a fairly set form of procedure, and may I take the commission now to proposition 4 appearing on page 874.

> That the House of Commons should not initiate and ministers of the Crown . . . . . honourable discharge of the judicial office.

We say those last two lines are of particular significance, because it is really critical to the argument of my friends that the term misbehaviour is the same for all offices. My friends put it, as we understand it, that really no relevant distinction is to be made between a superior court judge and clerk of the county court, or a forester, or a filazer - a filazer is someone who looks after files and issues writs in superior courts. We say that it is simply preposterous to assert that there is no relevant distinction between such offices, and we would submit that it is indeed axiomatic in the contrary fashion that misbehaviour must be related to and the conduct tested against the office in question.

SIR G. LUSH: I can understand that this is a submission of what ought to be in the Constitution, but Mr Gyles' argument is that the practices to which you have referred, and particularly those dealt with at page 874 of these references, spring entirely from the second procedure open under the Act of Settlement, and while the word misbehaviour may be attached to this in the literature as a matter of law, misbehaviour is not attached to that second power; it is attached to the first power relevant to the Act of Settlement.

Mr Gyles says it has been carried into the one and only power in the Constitution, and when you look at where it came from, it must mean what it meant in the first power contemplated by the Act of Settlement. The fact that the second power contemplated by that act is very much wider, he says, is nothing to the point. I hope I do him justice.

MR CHARLES: I am sure my friend would say he has been done justice. We would say, your Honours, that my friend's argument is based upon assertions made by a series of commentators and that what one sees on examiantion of the authorities relied on is a series of murky streams consistently rising above their source, because when one goes back to the authorities in question, they in no case provide authority for the assertions claimed by the commentators, and in fact have never, as far as we can find, been actually applied to removal from judicial office.

SIR R. BLACKBURN: What you say really is that when the founding fathers used the word misbehaviour in section 72, they might just as well have been referring to this sort of passage in Todd as to that passage in Todd which describes the strict common law rules for the termination of an office by the grantor.

MR CHARLES: Precisely, your Honour, yes. Indeed, when one examines the convention debates, that is exactly, we say, what is shown to have happened. There is simply no basis for saying that misbehaviour in any case in relation to judicial office has been shown to have that meaning.

We say that when one looks at Todd and sees the heresies that thereafter have got in to the legal literature, one has to go back to the authorities beforehand and examine them to see what justification exists.

Now, from Todd one then has to go back to the Victorian Law Officers on whom my friend placed some reliance. It is always nice for Melbourne counsel to hear Victorian law officers being referred to with such respect, but when it is a person from the Sydney bar doing so, one wonders where the knife in the napkin is. When I say that reference is made to the Victorian Law Officers, I would claim that Victoria has produced better than Sir George Higinbotham and Sir Archibald Michie. However, one finds again indeed the passage to which reference has been made in Todd, but one also finds that the whole authority asserted for it is the King v Richardson in Burrow's report, which your Honours have.

Now, as to the opinion of the Victorian law officers in this troublesome dispute with Sir Edmund Barrie, may we make these points, your Honours. They were talking in the context of section 38 of the Victorian Constitution Act following the Act of Settlement. Secondly, your Honours, they used, as did Todd, the verb "includes"; and we would submit that it is not clear that they were attempting an exhaustive enumeration of the circumstances of misbehaviour. Thirdly, they rely on the authority of Richardson and we will come to that in a moment. Fourthly, they assume that Richardson delimited what may constitute misbehaviour in an unofficial capacity in respect of all officers. Finally - - -

SIR G.LUSH: Would you repeat the fourth, please.

MR CHARLES: The assumption that is made, your Honour, is that Richardson's case delimited what may constitute misbehaviour in an official capacity in respect of all officers. And the last point we make, the fifth, is that the Victorian law officers relied at length on Hallam and we are handing up a passage from Hallam, your Honours. It is Henry Hallam's Constitutional History of England, 5th Edition of 1846 in two volumes. And what Hallam said at the bottom of page 356 after the quamdiu se bene gesserint provision:

> We owe this important provision to the . . . . . tantamount to an act of the legislature.

We would say with respect to Hallam that that seems to have got it wholly wrong in the way in which he has asserted it; and certainly if the statement from Barrington's case is right, that is quite wrong; and Hallam is much relied upon by the Victorian law officers.

Now, your Honours, going back in to the main authority relied on by my friends and by Todd and by the Victorian law officers and everyone else, including Halsbury, who asserted this curious limitation for misbehaviour, Richardson - your Honours have the reference - 1 Burrows 539, dating of course from 1758. One notes that the problem was whether Richardson had good title to the office of portman - not, as unfortunately appeared by misprint in Justice Pincus's opinion, postman -of the town of Ipswich. And it turned on, of course, whether the corporation had the power to amove Richardson's predecessors for not attending the great court. The decision was that the corporation had an incidental power to amove and that the absences from the great court by

Richardson's predecessors was not sufficient to be a cause of forfeiture.

Your Honours, as far as we are aware this is the sole judicial authority for the view my friends have argued as to the meaning of misbehaviour in section 72, the sole judicial authority; and as far as we know it has never been judicially applied to the removal of a judge. There are a number of points we would make about the case. It has been dealt with at length and I do not propose to read the judgment but to point to page 437 of the English Report and to draw your Honours' attention to the fact that in the nominate report the relevant passage begins at page 536 and goes to the end of page 539.

The points to make about Richardson's case in our submission are, firstly, this: Richardson did not concern judges at all. It was after the initial Act of Settlement. Firstly, the case did not concern judges at all; secondly, the judgment is not expressed to contain a definition of misbehaviour; thirdly, it concerned the powers of a corporation, in particular its power to amove and its power to try offences having no immediate relation to the duties of an office; fourthly, we would say it is by no means clear that Lord Mansfield used the word "offence" as meaning anything other than a breach of duty.

SIR R.BLACKBURN: Where did he use it? Can we have a look at that?

MR CHARLES: Yes, your Honour, that appears in the English Report at page 438.4.

SIR R.BLACKBURN: I see, there are three sorts of offences.

MR CHARLES: Yes:

> There are three sorts of offences for which . . . . . indictable at common law.

We say he is talking generally about the breach of duty.

Your Honours, we say, fifthly, that when Todd adopted the limited scope of the word he directly contradicted his own adoption of it by the very passage - - -

SIR G.LUSH: We are leaving Richardson's case, are we?

MR CHARLES: No, your Honour, I am simply glossing it, if

I may put it that way. Todd adopted this case for a particular view but then himself proceeded directly to contradict that adoption in the passages we have referred to at pages 859-60. The last point we make, your Honours, is that when it is said - - -

SIR R.BLACKBURN: I do not quite follow that because Todd did not claim to be citing Richardson except as authority for the common law power of the grantor; is not that right?

MR CHARLES: I accept that, your Honour; I think I was being unfair to Todd in what I was putting to the commission. In so far as it is said that Todd's words amount to an adoption of this narrow and technical meaning of misbehaviour, then that proposition is contradicted by what is set out at page 859-60. One would have to concede that Todd is seen by a number of commentators as having adopted that view but I think for better argument we would say that Todd in fact did not. The assertions made later that he did are wrong and are contradicted by what appears at 859-60.

SIR R.BLACKBURN: Yes.

MR CHARLES: The last proposition in relation to this - - -

SIR G.LUSH: This revives the feeling I had before. This is really a semantic point about the word "misbehaviour", is not it? Todd, one would think, knew what he was doing and he was talking about Richardson's case in Act of Settlement terms in terms of forfeiture. There was no provision for addresses of Houses of Parliament in relation to Portman. He has used the word "misbehaviour" as appropriate to cover both the occasion of a forfeiture and the occasion of an address, but that is all. That is the essence of it, is not it?

MR CHARLES: Yes. Now, lastly, your Honours, implicit in what is put here is that the circumstances under which even an officer or corporator may be discharged are capable of clear definition in three cases; taken from Cook's reports and the Earl of Shrewsbury's case, use, abuse and non-use. Even that in our submission is not clear by any means because at least two of the commentators, Bacon in the abridgement and Hawkins took a different view. We are having some difficulty at the bar table in working out what is meant by Hawkins in the Savoy, unless that is where it was printed. In any event, your Honours, what we say is that Hawkins, the commission will see, looked at the position in relation to offences by officers in general and set out as to, on the first page:

Offences by officers seemed reducible to

the following heads . . . . . .
or extortion.

And at the end of the relevant section on page 168 these words appear:

> But it would be endless to enumerate all the particular instances where an officer . . . . . deserves to be punished.

In other words, we would saw Hawkins in 1716 taking the view that there was no ready classification of these matters but they were at large and readily discernible by common-sense.

SIR G.LUSH: All his examples are within your division misuse, are not they?

MR CHARLES: I draw the commission's attention to what appears on the first page because in that part, your Honours, there had been reference made to his obligation that the grantee ought to execute it diligently and faithfully, not acting contrary to the design of it and matters of that kind, so that one is neglectful breach of duty.

SIR R. BLACKBURN: But this triggers on criminal law and all he is talking about is possible crimes committed by officers, is that right?

MR CHARLES: Yes, pleas of the Crown.

SIR R. BLACKBURN: Yes.

MR CHARLES: In Bacon's abridgement, I think my friend has referred at some length to these passages, but at pages 45 to 46, as spoken in the context of forfeiture of an office, at page 45:

> There can be no doubt that all offices whether such by the common law . . . . . which make bring disgrace on the court themselves.

Then, in the last passage on page 46:

> Also it is said in general that all wilful breaches of the duty of an office . . . . . that it seems needless to endeavour to enumerate them

which we say is really precisely the same proposition as was being made by Hawkins.

SIR G. LUSH: Is this document you have handed up the same as the one we already have?

MR CHARLES: I think there may be a bit more in the extract we have sent up from Bacon's abridgement than the part relied on by my friends.

SIR R. BLACKBURN: Yes, the previous thing - no, it is the same.

MR CHARLES: I am sorry if we have unnecessarily multiplied the amount of paper the commissioners have. I want next to take your Honours to Chitty's Prerogatives of the Crown. My friends made the assertion that all offices are the same. We take the commission now to Chitty's Prerogatives of the Crown. This is of 1820. I ask the commissioners to look first at pages 82 to 83. At 82.7:

> Offices may be granted at will, of which there are many instances . . . . . unless sooner removed by the new King.

Then there is reference in the next paragraph to judicial offices. Chitty then continues to deal with public offices in the next paragraph; ministerial offices on the next page. Then, at page 85.2:

> Offices may be lost; among other things; . . . . . determination of the thing to which the office was annexed.

At the end of the next paragraph:

> The most methodical and perspicuous mode . . . . . and thirdly, refusal.

The only point we make of this is that although the assertion is made that all offices are the same, the commission will have noted that the termination of judicial office is dealt with in an entirely separate and distinct portion of the chapter in such a way to suggest that Chitty at least, and well after Richardson's case, does not see them as being necessarily within the same particular parameters.

The stream of authority is not, in our submission, assisted in any way by going back to Bagg's case in 11 Coke's Reports. That simply involved, in our submission, doubt arising from chapter 29 of Magna Carta as to the loss of office unless involving process by decision of the officer's peers or the law of the land. It simply involved, we would say, doubt as to the corporation's power to try which existed at the time of Bagg's case and which had been vindicated by the time of Richardson's case as appears on page 439 of the report of Richardson.

It is for those reasons that we say that when one traces back the stream of authority and finds the source, it is really quite plain that Richardson was not saying what is said for it has never been treated judicially as having said it. It may be, as was suggested in my friend's argument, not I think by him, that this whole quesiton of forfeiture of office has been confused by the fact that to the conditions which could result in forfeiture of an office, abuse, misuse or non-use, there is inevitably added the fact that attainder for serious offences would also bring about loss of office not because it was in some sense a forfeiture by breach of condition but by the effect of attainder, and that that has been in some way woven in in the course of Richardson's case into the circumstances operating as a breach of the condition of tenure.

It worked with the same result in terms of feudal tenure as a breach of the condition of office. We would say that that is where this misuse or misunderstanding of the position at common law has arisen, and a sufficient oddity that would follow is that the consequences of attainder having come to an end in something like 1870, it would be suggested that the same consequences ought to flow at 1900 at the time of the Constitution, 30 years later. In any event, we say

that when one was looking at the circumstances under which a feudal tenure could be terminated, and seeing that considered in Bagg and in Richardson - - -

SIR G. LUSH: Could you just stop for a moment. I am not sure I am clear about the legal significance of attainder. Was it not a sort of private act of parliament?

MR CHARLES: I believe not, your Honour. It was a consequence flowing from conviction for certain particularly serious crimes.

SIR G. LUSH: What does the expression act of attainder mean?

MR CHARLES: I think that may well have been a particular act, but I think the word has a separate meaning. I will search for it shortly. I do not have it with me at the moment, but my understanding was that it was a consequence said to follow from the conviction for certain serious crimes.

SIR R. BLACKBURN: An act of attainder was brought about in an ad hoc situation by an act of Parliament.

MR CHARLES: Yes.

SIR R. BLACKBURN: I am not quite clear about your argument here, Mr Charles.

MR CHARLES: What I am saying is that clearly enough when one is looking at the circumstances which might cause an office to be vacated and a feudal tenure to be brought to an end, it was necessary to have certainty and one finds in the Earl of Shrewsbury's case and what follows statements made as to how an office can be lost and the phrase misuse, abuse and non-use. Now to that trilogy has been added, not because it was necessarily a condition but because it produced the same result, conviction for a serious offence which by its operation also brought the office to an end.

SIR R. BLACKBURN: Yes.

MR CHARLES: From the fact that now one finds in four circumstances a feudal tenure being terminated, so it seems to have been asserted later that those are the circumstances amounting to misbehaviour.

In relation to Richardson's case, one finds Lord Mansfield saying that there are three sorts of offences for which an officer or corporator may be discharged and one finds them set out in 1, 2 and 3. What he is saying, we would put it, in relation to the first is that the officer or corporator may be discharged if he has committed an infamous offence, the fact being that by virtue of attainder, his office has been vacated. In the second and third one finds the situation is elsewhere set out which would bring about his loss of office. Lord Mansfield we would say has worked the three in together but not in such a way as to leave anyone properly later to say that those were the three circumstances of misbehaviour. The need for - - -

HON A. WELLS: In effect what you have put is simply this, is it not, the consequences of attainder are not a forfeiture of office in any real sense at all. Forfeiture of office is a separate classification concerned with misbehaviour within the office.

MR CHARLES: Yes.

HON A. WELLS: Attainder is simply an incidental consequence that an office should be forfeited.

MR CHARLES: Yes and what one then finds in the very next paragraph is the problem with the necessity for prior

conviction is again nothing to do with the definition of misbehaviour. The whole question of the relevance of a prior conviction simply arose because of the problems of Magna Carta and the question whether the corporation had the right in effect to try someone in circumstances amounting to an allegation of criminal conduct. Again we would say that has absolutely nothing to do with the definition of misbehaviour. It is something which the corporation may have a problem in dealing with.

The Magna Carta says it cannot and unless the power is expressly given it by the law of the land or prescription, a corporation cannot do it but that has nothing to do with the right of the Houses of Parliament in effect to try a judge for his bad behaviour. It has nothing whatever to do with the right under this Constitution of the Houses of our Parliament to look at the behaviour of a judge.

SIR R. BLACKBURN: Yes, but did it have something to do - I mean, was there a general law about the power of a grantor to terminate an office that he had granted or are you saying that the necessity to prove a conviction in the case where the offence was not in the office was limited to corporations for these special reasons that you have just been describing?

MR CHARLES: No, I say that those who had persons in various offices had difficulty in trying someone for what was said to involve criminal conduct because of Magna Carta.

SIR R. BLACKBURN: Yes, I see.

MR CHARLES: It certainly is not limited to corporations but as the law as to corporations developed and from Baggs case to Richardsons case, so the power of the corporation to deal with its offices was seen to enlarge. But we would say it is that notion that has engrafted the wart or quite unnecessary extravagance that some sort of conviction is necessary in criminal cases for there to be misbehaviour.

SIR G. LUSH: We started a little earlier and we might perhaps make a break a little earlier if this is a convenient point for you, Mr Charles.

MR CHARLES: Yes, indeed.

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MR CHARLES: Your Honours, the next case to which I wish to make reference is the case of Mr Justice Montagu's deliciously named Algernon Montagu from Van Dieman's Land. His activities appear to in every way merit his name. The reference is VI Moore at page 489, and the year of the decision being 1849. We draw attention in particular to Sir Frederick Thesiger's argument. The argument has been read. We respectfully remind your Honours that two grounds are put as the separate chief grounds of complaint at the start just before the end of page 497 of the nominate report. One sees the chief grounds of complaint against him are first obstructing the recovery of a debt justly due by himself and, secondly, the general state of pecuniary embarrassment in which he was found to be in. My friend has put that being in a state of pecuniary embarrassment or being bankrupt would not be acts of misbehaviour in relation to a High Court judge. This relates, if I may say so, to my friend's axiomatic proposition that there is no difference between officers, what is misbehaviour for a county court clerk is misbehaviour for a superior court judge without distinction.

We would say that the reason why that proposition is so fundamentally wrong can be easily stated. A county court clerk is not affected in the way he carries out his office necessarily by being in a state of financial embarrassment, indeed, if I can say so with no intention of being disrespectful to county court clerks, most of them are in a state of financial embarrassment. They nonetheless act quite properly in their offices, they file files in the right place, and it is not necessary that they be seen to be people of wealth and position to occupy that particular office.

There is the most plain and obvious distinction in the case of a judge. As one saw in the words of Mr Dobson in the debates in the Adelaide convention, what an unfortunate position it is seen to be, how much it brings the office of judge into disrepute if people are saying to one another in the street that so and so cannot pay his debts, or if there is a bailiff waiting at his gate. One can give a more dramatic example of this. If one takes the case of Sir Garfield Barwick of revered memory, the fact was, it is known, that Sir Garfield was once bankrupt in circumstances which reflect nothing but credit upon him for taking upon himself the debts of his brother. He had, however, of course long since recovered from that state when he became a justice of the High Court. It might well have been impossible, probably would have been impossible to have appointed him to that office had he remained

bankrupt, notwithstanding that the circumstances in which he became bankrupt redounded only to his credit. The reason is this. If a person is a member of the Federal judiciary, that person certainly being of the Federal Court rather than the High Court, might well have to preside and was certainly qualified to preside as a judge in bankruptcy. Now we would say it is inconceivable that one could have a judge or potential judge in bankruptcy who was also bankrupt.

SIR R. BLACKBURN: Well, Mr Charles, what about the Family Court?

MR CHARLES: Your Honours, I say nothing of the Family Court. It may be that different standards might be regarded as acceptable in that court having regard to the different functions of that court, but we would say that in relation to judges of the Federal Court and judges of the High Court sitting on appeal from that court that while it is not for me to say but a matter for judges to say what are acceptable standards of behaviour for a judge that reasons why different standards are applicable to a judge is obvious for that reason, the functions they have to perform, the respect they must command in the community in order to be able to uphold the fabric of the administration of justice in our society.

We say, your Honours, that these decisions are replete with references to the high standard of conduct required of judges because only if judges maintain their standards will their dispensation of justice in the community be accepted by the community. That logic, we submit, is perfectly plain from the argument of Sir Frederick Thesiger and from the way in which Montagu case was dealt with in the Privy Council. When one ends the first argument at the turn of the page in the nominate report, one sees:

> This was an act impeding the administration . . . . . another strong reason for his removal.

Then Lord Brougham at page 499 says - this is page 777.4:

> Upon the facts appearing before the governor . . . . . amotion of Mr Montagu.

It plainly did not occur to their Lordships to be necessary to differentiate between the first and second grounds for amoval, and we say that it is plain from that, and would remind your Honours of the circumstances in which the matter was brought to the attention of those debating at the Adelaide convention.

SIR R. BLACKBURN: If you go back to pages 491 and 492, you see what the facts were in much greater detail. The obstructing of the debtor appeared to have been done in this way, that the debtor sued him, Mr Justice Montagu, and Mr Justice Montagu himself went before the Chief Justice and got an order to show cause why the writ should not be set aside, because the court had to be constituted by two judges, and presumably, therefore, Montagu could not sit in it and so the case could not be determined at all, and so the writ had to be set aside.

MR CHARLES: Yes.

SIR R. BLACKBURN: But if you look at the next paragraph on page 492, it appears that a Mr Young had brought several actions on behalf of the Bank of Australasia, in which actions he alleged that Mr Justice Montagu had decided in favour of the defendants upon a technical point, being himself at that time indebted to them. Does that explain the allegation that his general state of pecuniary embarrassment was - - -

MR CHARLES: I think one has to continue reading through page 493, because one finds reference at the top of page 775 of the English Report two statements disproving Mr Justice Montagu's statement that the debt there alluded to was of long standing, but that it had stood over by Mr Addison's consent, and in fact the accounts are set out, and the fourth in particular:

> To his, Mr Justice Montagu's, bill transactions . . . . . his usefulness as a judge.

That is of the essence of what is said here, the, in effect, conduct bringing the bench into disrepute. If you do act in your private life in a way that excites public scandal, you derogate from your usefulness as a judge.

SIR R. BLACKBURN: I wondered if it might be a little more narrow than that, that if you had a large number of creditors

around the small town of Hobart in 1849, it is highly likely that those creditors will come along as plaintiffs, or one of them, and you would be disqualified, so your general state of pecuniary embarrassment is directly related to the fact that you are likely to be disqualified in a substantial number of cases.

MR CHARLES: We would say, your Honour, that that is certainly a possible explanation of the case, but that the way in which it is put in argument certainly suggests a wider basis, there were various pecuniary embarrassments - - -

SIR G. LUSH: The reference in the facts to bill transactions suggests the borrowing of money on bills, to me, and failure to honour the bills when they became due. That might be regarded as a good deal more reprehensible than not paying tradesmen.

MR CHARLES: Yes. In Mr Behan's work on Mr Justice Willis, it will be found that that judge, a member of the bench in Victoria, used regularly to attack counsel who appeared before him if he was aware that they used accommodation bills or bills as a means of paying their creditors, and he regularly asserted that not only was it quite wrong for any counsel appearing in his court to be involved in any way with horse racing but if he found that they used bills, they would be struck off the rolls in his court. I doubt if it could be said that using accommodation bills is improper behaviour by a judge, but being in a state of continuous and known pecuniary embarrassment is a different question.

MR CHARLES: The last words used in the relevant part of the argument of Sir Frederick Thesiger were:

> And tended to bring into distrust and disrepute the judicial office in the colony. This was another strong reason for his removal.

That is why I say while it is possible that the argument is limited in the way your Honour has just put to me, we say it is also open to a wider construction, and in any event that if bankruptcy supervened, that would be a more serious and more obvious basis for asserting misbehaviour, and we have made the point that the Privy Council sees no reason to differentiate the grounds for saying that amoval was properly brought.

SIR R. BLACKBURN: You will notice that Lord Brougham says that their Lordships do not state their reasons in those cases, so we do not get much information.

MR CHARLES: No. I think it was taken as being so clear a case that it really did not require comment, and if I may say so, with good reason.

Next, in our submission, it is difficult to over-estimate the importance of the words used in the appendix, the memorandum of the Lords of the Council, on the removal of colonial judges, because insofar as one is looking at the standards of behaviour regarded as appropriate and required for such judges, they are very clearly set out. If one starts with the main memorandum, the relevant passage begins at 10 at page 827.5:

> Some factual means ought to exist for removal . . . . . charged with grave misconduct.

Now, your Honours, we say that when one remembers that this document was produced in 1870, my friends assert that by this stage there had long since passed into the common law a received technical meaning of misbehaviour well known to everyone; so well known that all sorts of people at the constitutional convention were using it even though most of them were not lawyers, and all entirely well understood as the basis on which judges were to be removed from office. That seems to have escaped their Lordships of the council and they talk about grave misconduct; they do not talk about misbehaviour in this passage. And when one finds the matter being next discussed, the circumstances under which judges are to be removed from office, one would have expected, if this expression "misbehaviour" was to be so well known and received, that the circumstances of its operation would have been equally well known to them and the idea of tenure during good behaviour, terminating only on misbehaviour in office or conviction for serious offence. Now what one finds is really, if I may say so, as one would expect, that judges charged with gross personal immorality are to be removed from office. Now has anyone ever suggested anywhere, but of course particularly in the convention debates, that judges charged with gross personal immorality should remain in office? Of course they have not. Everyone has assumed that they would be removed from office. And what one finds here is that when a judge is charged with gross personal immorality or misconduct, with corruption, or even with irregularity in pecuniary transactions:

> - - - on evidence sufficient to satisfy the executive role . . . . . or a protracted investigation.

This, your Honours, is a case where it is said that matters such as immorality, irregularity in pecuniary transactions, they are sufficient to justify suspension even before the matter has been properly tried out by the Privy Council. You do not in a case of a charge of that kind even allow the judge to remain on the bench in the meantime. What they go on to say - and the distinction is of some significance - in the next paragraph is:

> On the other hand when the charges against a judge consist not in any alleged . . . . . lower the dignity of his office.

That situation, your Honours, is one that will more normally be found in a case of misbehaviour in

office; a cumulative case of judicial perversity: someone who consistently shouts at people appearing before him, or gets enraged at people appearing in his court; misuses his office in various ways. That is what one will more normally find for misconduct in office. That, is said, it is more difficult to justify suspending him. It is harder for the local executive to act on its own reponsibility. In cases of this kind you will probably have to wait until the Queen in council acts.

So obviously, your Honours, what is seen by this is that it is a worse reflection on the judiciary requiring suspension rather than postponement in cases where you have got gross personal immorality, or irregularity in pecuniary transactions. And we would say the inference one draws is that what is being said here is that in the kinds of immorality or irregularity which my friends are saying the constitution precludes as a basis for removal of High Court judges are seen to be cases requiring more immediate action to remove the judge from office pending a proper trial of it.

This is quite plainly not a single view because we find Lord Chelmsford saying really precisely the same sort of thing. In the opening words of his Lordship's comments on the right hand side in page 16 of the report, and in that passage his Lordship talks about the desirability of ample opportunity being given to the judge to answer the charges; and then over the page, after talking of the behaviour of the judge being incompatible with the temperate and dignified administration of justice:

> In these cases it would be better in my opinion to inform the judge . . . . . of the Privy Council.

You do not suspend a judge who is behaving badly on the bench. You tell him what it is; you give him a chance to answer it; and then you send it back to the Privy Council:

> These observations do not apply to . . . . . immediate removal from the bench.

Precisely the same thought, if I may say so. And we would submit that the opinions of the Right Honourable Stephen Lushington and the Right Honourable Sir Edward Ryan are to the same effect.

We would submit with respect that that memorandum is entirely inconsistent with the views argued by my friends suggesting that there is a received and technical meaning of misbehaviour. And we would submit that what those arguments lead to is that what is misbehaviour requiring the removal of a judge from the bench is of a very much wider description covering personal misconduct, gross personal immorality, covering irregularity in pecuniary transactions, covering cases of immorality and corruption.

SIR R. BLACKBURN: Is not it important to be sure that in these cases they were contemplating - I mean in this memorandum they were contemplating the case of a judge who had been the subject of addresses under Act of Settlement provisions in the colonies which came to the Queen and were referred by her to the Privy Council?

MR CHARLES: Yes.

SIR R. BLACKBURN: And not only to judges who were removed under Burke's Act.

MR CHARLES: Yes, your Honour.

SIR R. BLACKBURN: I suppose that is so.

MR CHARLES: Indeed so, your Honour, yes.

SIR R. BLACKBURN: Certainly Boothby, whom they mentioned, was dealt with under the South Australian equivalent to the Act of Settlement but it went to the Queen and not to the governor of the colony.

MR CHARLES: Yes.

SIR R. BLACKBURN: If they were contemplating the removal under the colonial equivalent of the Act of Settlement then, of course, your argument is very much stronger. If they were only contemplating removal under Burke's Act, well your argument is not so strong.

MR CHARLES: Yes. In our submission it is plain that they were looking at the position generally and that is to say covering both. And as your Honour points out, explicit reference is made to Mr Justice Boothby's case and to the fact that addresses to the Crown had been relied on.

SIR R. BLACKBURN: Yes.

MR CHARLES: And indeed, as appears in the middle of page 10, all the forms of suspension or removal which are in

use lead by different roads to the same result.

SIR R. BLACKBURN: Yes.

MR CHARLES: Likewise, can I add what appears at the bottom of that page:

> Charges brought a colonial assembly against a judge . . . . . Queen in council.

SIR R. BLACKBURN: Yes, but some of those cases at least were under a provision in an act of - was it William IV, which was in very general terms, that the Queen may refer any matter referred to her to the Privy Council.

MR CHARLES: Yes. I suppose I should also draw your Honour's attention to page 829 at the beginning of page 15 of the nominated report:

> It is scarcely necessary to add that in colonies . . . . . corroborates the argument stated in the paper.

So in other words, your Honours, we submit that it is clear that what their Lordships are stating is of general operation in any of the various methods by which removal of a judge from office can be obtained.

May I next give the commission a short reference to Wade and Phillips Constitutional and Administrative Law at pages 316 to 317. It is the ninth edition of Wade and Phillips.

SIR G. LUSH: Is this the same Mr Phillips as Hood and Phillips.

SIR R. BLACKBURN: No, Hood Phillips is a different one.

MR CHARLES: No, indeed not, your Honour.

SIR G. LUSH: It is O. Hood, Phillips and Jackson. Yes?

MR CHARLES: At page 316.5, Tenure of Judges, it is said that:

> Judges of the High Court and Court of Appeal held their offices during good behaviour . . . . . although arguably any conviction is misconduct.

Then there is Lord Russell's case referred to and:

> Since the Act of Settlement only one judge has been removed from office . . . . . witnesses may be called to give evidence.

We say as to that that was has in effect happened with the commentators since Todd is that most of them have not been required to give serious attention to the question which is now of critical importance for this commission, and what has simply happened is regurgitation by one commmentator after another of the notion seen to be derived by Todd from the Victorian Law Officers.

It has simply been passed down a pile of people, in most cases after the Constitution was adopted in 1900. We say that the fact that a lot of academic commentators have simply accepted a line of thought without being required by particular cases to give clear attention to the problems involved is no justification for saying that this is now a received part of the common law.

SIR G. LUSH: You simply want to direct our attention to the fact that Wade and Phillips are commentators who do not follow that pattern.

MR CHARLES: The part they take is in effect to say, "Well, it is not really quite clear". If I may say so, exactly the same comment can be made about the passage from Anson upon - - -

SIR G. LUSH: Although Wade and Phillips referred to the possibility of dismissal not only for misconduct but for any other reason which the houses might adopt, they do not seem to attempt - when they come to a definition of misconduct they do not go very far into it, do they?

MR CHARLES: No, they do not, but what one finds is that the position is not wholly certain in their view. Of course,

they talk about the wider bases on which judges may be removed. When one goes back to the passage in Anson, what one finds, if I may simply read from the single sheet that my friend relied upon at pages 222 to 223, it is the 1907 edition of Anson, what is said is that:

> Appointments made during good behaviour create a life interest in the office . . . . . good behaviour in respect of the office held.

Again, your Honours, that is a statement inconsistent with any behaviour outside office, even criminal, being relevant:

> Misbehaviour appears to mean misconduct in the performance of official duties, refusal or deliberate neglect, or it would seem conviction for such an offence.

We would say considerable doubt is being expressed by the learned author, both the "appears to mean" and the "it would seem" - a consequence of a paucity of judicial experience in this area.

May I, in passing, note that when one looks at the Constitution itself and the circumstances under which members may be disqualified from office, one does find in section 44 disqualification being found in subsection 2 as:

> Being attainted of treason or has been convicted or is under sentence or subject to be sentenced for any offence.

So, at least so far as members are concerned, those who framed the Constitution were prepared to descend to specific reference to conviction. Obviously not very much can be made of this, but we simply point to it as an indication that in that respect at least those who framed the Constitution were prepared to descend to reference to a conviction as a means for seeking to remove a judge. They obviously do not - and having regard to that, we would say it is at least open to inference that if it had been put to those constructing the Constitution, "Do you think that in relation to conduct outside office such as immorality or peculation or matters of this kind that it will be necessary to have a conviction before there can be misbehaviour?" They would have said that that was wholly outside their intention.

On the question of what is meant by proved misbehaviour, we say that the intention of the Constitution or at least of those who framed it was clearly never demonstrated in the second debate, the Melbourne debate;

that what was intended was two things. It was to provide protection for the judge in giving the judge some form of hearing, notification of what was alleged against him, and the necessity for proof of it. Secondly, it is clear enough on the face of what was being said by those debating the matter that they also thought that use of that expression would procure finality for the decision of parliament.

That is something which we submit they may have failed to achieve because, notwithstanding what they said and intended, in our submission the High Court would say that judicial independence is to be maintained by curial review in this respect. We submit that misbehaviour has no technical meaning. We say that one can suggest tests which would be applied, for example conduct which would be regarded as sufficiently morally reprehensible whether or not criminal as to render the person unfit to exercise the office.

One can use a variety of different sentences to try to achieve this, but alternatively one would say: conduct which is inconsistent with accepted standards of judicial behaviour - [redacted] sufficiently serious to lead to the conclusion that the person is no longer fit to be a judge. We submit that the intention of the framers of the Constitution was fairly clearly that they wanted parliament to be left as the judges of what is the sort of behaviour, the sort of conduct which would justify removal from office, but we say also that the High Court would intervene to correct, firstly, any denial of natural justice to the judge, for example if the judge was not given notice of the allegations made against him, or a fair hearing, or if the material was not proved.

Secondly, we say that if parliament attempted to give the word misbehaviour a meaning or operation more extensive than the word can legitimately bear; and thirdly, if there were a decision to address made in the complete absence of evidence of misbehaviour, we say that in those circumstances the court would intervene.

SIR R. BLACKBURN: Does this matter to your argument, though, the argument that the HIgh Court would intervene?

MR CHARLES: It is not critical to our argument in any sense, your Honour. We include this in our argument simply for the purposes of making the argument itself complete.

SIR R. BLACKBURN: Yes.

HON A. WELLS: I suppose it is important, is it not, in this respect, that it does away with the suggestion

that the final result of what you have previously been putting is to leave a sort of roving commission in the hands of parliament to redefine misbehaviour from time to time, and that in turn worked back to cast doubt on a more erratic meaning of misbehaviour.

MR CHARLES: If I may say so, exactly. My friends have put it that one simply cannot have a definition of misbehaviour in the form that we have now suggested because it would result in - I am attempting to find the passage in my friend's argument. Really, it relates to the suggestion that there is scope for oppression; there could be no more pernicious method of interfering with the indep-pendence of the judiciary; that it is impossible to work out any sort of definition - matters of this kind. We say that those are arguments which simply on examination do not stand up.

SIR R. BLACKBURN: On the other hand, Mr Charles, you have to face this argument, do you not: you cannot have it both ways, the founders of the Constitution clearly wanted parliament to have the last word and it can be argued therefore that they intended to imply a technical meaning for the word misbehaviour.

MR CHARLES: What we say as to that is that examination of the debates shows that that was not their intention. They were saying that there was a wide field in which it might be necessary to seek to remove a judge, although obviously enough they also thought that those circumstances would arise very infrequently. Having said that, they were maintaining, although they thought there may be no judicial review and did not want one, that the real protection for the judges was that these were parliamentarians in two separate houses expressing the will of the people and they would not act unless there were proper grounds of misconduct and that that position was secured by having to state the grounds of misconduct and prove them.

HON A. WELLS: As I tried rather stumblingly to indicate yesterday, parliament has ample grounds for working if they have to determine within a particular legal content whether as a matter of fact and degree it justly applies to the facts proved. They have ample room for operation and that would take up what you have just been putting. It would still leave very much what the founding fathers wanted, namely parliament to be in a fairly dominant position.

MR CHARLES: Yes. I think it may be helpful to raise at this stage what Sir Harrison Moore said when commenting at this very time on his view of what was being brought about. The sequence is that Sir Harrison Moore prepared a set of essays on the constitution and the constitutional debate. They were produced in 1897. Your Honours will see them under the heading, W. Harrison Moore, the Commonwealth of Australia (1897). Sir Harrison Moore produced his work on the Constitution in 1902 in its first edition and a second edition was produced in 1910. I have not been able to find the 1902 first edition.

SIR G. LUSH: I think that is because it is on my desk.

MR CHARLES: That may explain the absence of it in the library, your Honour. My understanding is that there was a change of intention demonstrated in Sir Harrison's work between 1902 and 1910.

SIR G. LUSH: I have checked the references from the footnotes to that article of Thompson's that has been mentioned two or three times. What it says is accurate but perhaps we can get that for you.

MR CHARLES: The first edition of 1902 - in 1897, what Moore said is at the bottom of page 101:

> Section 72 carefully protects the office and the emoluments of the Federal Judge

He then sets out how the judges are to be appointed:

> not to be removed except for incapacity or misbehaviour - - -

and then only by address. He goes on:

> We here depart from the provisions . . . . . now open to such review

It may be that that statement was what caused Sir Isaac Isaacs to come back then at the start of 1898 in the Melbourne convention, concerned about the possibility of judicial review. Your Honours will recall his statements in that convention and how in the course of his speech he converted Sir Edmond Barton, who had previously been against him. The fact that Sir Harrison Moore - a very well known Victorian academic - had the previous year produced his essay may well, we would submit, have caused Sir Isaac Isaacs and possibly the Victorian assembly in making the suggestions it did. At page 279 point 5 in Sir Harrison Moore's first edition of 1902 he said:

> The ministry of the day and the . . . . . . . . . . in any court of law.

That would have been doubtless in the light of the very strong expressions of opinion which were quite clear in the debates in the Melbourne convention. That having been said in 1902, we find in 1910 - one finds at page 203 point 8 an interesting gloss on those words:

> The ministry of the day . . . . . . . . . . was flagrantly unjust.

It is not a full reversion to the 1897 view but it is the start of a swing back.

SIR R. BLACKBURN: How would you invoke the jurisdiction of the High Court in such a case, I wonder?

MR CHARLES: We would say that in no circumstances would the High Court intervene in relation to a debate itself in parliament. It simply would not happen. What would happen would be that at some stage after the debate had completed - - -

SIR G. LUSH: The High Court would not enjoin a debate.

MR CHARLES: No, under no circumstances but what would happen is that after the debate had completed and at a time when an address was either being prepared to be sent up or in the course of being sent up or something of that kind, proceedings would be taken by way of

declaration or injunction or action of that kind to prevent an address proceeding to the Governor in Council or the Governor in Council acting upon it.

We would submit that there is no technical meaning of misbehaviour in the way that has been suggested. We say that the lack of any readily apparent definition of misbehaviour confirms the unwisdom of attempting to substitute other words for those which appear in the Constitution or of attempting an abstract exercise in the absence of facts. We respectfully submit that it is not simply a question of, apart from official misconduct, has a criminal offence been committed or is there a conviction for one, because we say that either question misses the whole point. We would say the question is the nature of the conduct, the nature of the misconduct or misbehaviour. Is it such as to unfit the judge for his office? That in our submission is at bottom the question that has to be asked. Is fitness for office involved?

SIR G. LUSH: I understand the argument but what is put against you of course is that first of all the limitation is to conduct in office, and that is investigated without reference to conviction. Mr Gyles says it is an extension, possibly even a dubious extension to look at what might be called the private life of the encumbent. The only extent to which that has been permissible by history, he says, is when there is a conviction.

MR CHARLES: Your Honour, we say that is wholly wrong.

SIR G. LUSH: I know you do but I think your last propositions do rather less than justice to Mr Gyles argument. In the first place you made no reference to the conduct in office and in the second place to take conviction by itself, as you did, hardly conveys the atmosphere or implications of his statement that this was an extension of the essential thing; it was conduct in office.

MR CHARLES: If I can go back to that, we gave his argument the justice it deserved. It is our submission that the reason for there having to be reference at all in the authorities to conduct in office is because of the feudal nature of a tenure held during good behaviour and the circumstances in which there was seen to be a breach of those conditions of tenure affecting the office. When one looks at the position of a forester or something of that kind, one sees the necessity for looking at types of conduct in office. However, we say that historically when one looks at the circumstances in which on an address from the Houses of Parliament there have been seen to be grounds for removal from office, one does

not see any limitation of this kind. One sees by historical convention, being built up and acknowledged in Todd, the types of conduct upon which an address for removal should be brought.

They have no relation necessarily to conduct in office. They have no relation to criminal convictions. They look at the question of the general conduct and its operation in relation to the person's fitness for office. We say that that is not the question of legal wrongdoing - whether within the purview of the civil or criminal law appears to be far less important than the nature and moral quality of the conduct in question.

SIR G. LUSH: There is one exception to what you just said, perhaps more than one, but what of that case - I began to try and locate it last night but I did not have adequate papers with me. What of that case in which a clerk had - - -

MR CHARLES: Owen, your Honour?

SIR G. LUSH: He had gone in for a peculation in one area and that was held not to affect him in another.

MR GYLES: That was the Mayor of Doncaster.

SIR G. LUSH: Is that cited in your summary, Mr Gyles?

MR GYLES: Yes, it is.

SIR G. LUSH: I have got it, paragraph 5.

MR CHARLES: Yes, the King v Mayor, Aldermen and Burgesses of Doncaster in the County of York. I think the relevant passage that my friend read was at page 1566 of the nominant report in these words:

> For they held first . . . . . .
> but not of a capital burgess.

HON A. WELLS: That was very closely linked up with the procedure undertaken, was it not?

MR CHARLES: Yes. That seems to suggest, Mr President, that in the first place what was said against him was relevant to his holding the position of chamberlain and was not relevant to his position as a capital burgess. We say in relation to that, that it is in the first place inconsistent with the view that all offices are the same, in other words, that activities as a county court clerk are seen in the same light as those of a superior court judge.

The second point we would make is it is plainly in relation to activities in office that this argument is made and what is simply said as we follow it is that when one is looking at activities in office, it is activities in relation to that office and not a different office that are relevant.

SIR G. LUSH: Mr Wells has pointed out to me at the bottom of the first page of the photostat that we were given the return to the writ of mandamus is described as setting out Scott 1718 was chosen chamberlain. He became middle chamberlain and took upon him the execution of that office, 1719, that he as middle chamberlain received several sums of money of the tenants of the corporation mentioning them particularly due to the corporation, of which he may have no account, retained them for his own use, charged the corporation moneys as laid out which he never laid out and so on. So what has happened is that the writ of mandamus has gone directing them to restore him to the office, I suppose, and they have made return to it saying we are entitled not to because he committed sins in some other office. The question is whether the matter was decided as some kind of pleading point or whether it was decided as a matter of substance. But if it was decided as a matter of substance, it seems to involve quite a narrow view of what is conduct in office.

MR CHARLES: I accept that that may be derived from the case, a narrow view of conduct in office and as such, we say it has absolutely nothing to do with the sort of misbehaviour that would justify the removal of a judge because we would say a judge who was also shown to have and received sums of money of attendance of a corporation giving no account to them but concealing them and detaining them to his own use would be in very great danger of being removed for misbehaviour from judicial office if that were proved against him even though he might have been able to be removed as chamberlain but not as capital burgess.

It was Owen's case that caused my friend to wax lyrical on the pecuniary embarrassment of a county court clerk and as Lord Campbell said, no other ability existed than pecuniary embarrassment, that in itself is no inability and our judgment must be for the latter. Now, it was inability or misbehaviour that was being referred to and we say that there are very good reasons for saying that pecuniary embarrassment are not either inability or misbehaviour in a county court clerk. We would say that Montagu's case indicates an entirely different state of affairs obtaining in relation to superior court judges.

We say that nothing further needs to be derived from Owen's case in relation to the meaning of misbehaviour. When one comes to Ramshay, however, and looks at the argument that was there put, my friend read from page 72 of the English report, page 193 of the nominant report beginning at the passage, "Sir Fitzroy Kelly relied much on the Queen v Owen". The passage immediately preceding the one he read beginning with page 193, page 72 of the English reports in Ramshay's case, these words are used by the Lord Chief Justice. He said:

> But after all we must look at the language which the legislature has employed . . . . . . . . . . the language of the legislature.

Then there is reference to Owen in the passage there set out. What we derive from the passage we have just read is in relation to an expression, inability or misbehaviour, they say you have to put meaning on it in its natural and grammatical meaning, nothing appearing to show it is used in any extraordinary sense. In other words, that does not suggest a technical and received meaning of misbehaviour. It is lawful to remove for inability or misbehaviour is not the natural and grammatical meaning of the language. We say that that is quite inconsistent in again, I think it is the 1850s. I think it was 1852. That is entirely inconsistent with any suggestion that at this time there is a received and technical meaning of the word misbehaviour.

May I refer briefly to Harcourt v Fox. That is the case of custos rotulorum and I only desire to refer to two passages. The first of them is in Mr Justice Ayres judgment at page 726 beginning at page 520 of the nominant report. It is in Showers Kings Bench Reports. You have the reference to the case I think and the case itself. Mr Justice Ayres says:

> And I do think without any . . . . .
> . . . . . state of Henry VIII.

Then to the same effect at page 736 of the English Report, 736.8, and this time I am reading from the Lord Chief Justice, Chief Justice Holt:

> That this is an estate for life appears from the words of the act . . . . . . . . . must hold in this, this is in office.

All we draw from this is, firstly, this is the estate, a feudal estate, held during good behaviour, and drawing attention to the fact that the contrary behaviour determines it, that the expressions used are, with respect, loose; again they do not suggest a technical meaning of misbehaviour. It may be that in cases determining feudal tenure quite specific precision came to be required, but these words do not suggest that precision, these words suggest simply so long as he behaves himself well, and we would submit a much wider connotation.

SIR G.LUSH: What had happened in this case, the real trouble here was that some intermediary who held the grant of this office had himself died, and the question was not actually about the man's behaviour, and if that is right there was no need to attempt to define it. It seems to have been some intermediate grant or call for custos. I do not understand the word in its context. He seems to have made the grant to the incumbent who was party to these proceedings, a party alleging that he had an interest for his own life, and the contrary argument, which I think succeeded, being that the termination of the estate, so to speak, of his headlands or the custos had terminated his interest.

MR CHARLES: I think it is the other way round, your Honour, and my friend certainly thinks so. I will try to give you a short statement immediately after lunch as to exactly what did happen.

SIR G.LUSH: You mean it was decided that in spite of the death of the custos the estate still remained for life?

MR CHARLES: Yes.

SIR G.LUSH: But no point arose as to what was misbehaviour, or not, did it?

MR CHARLES: I do not think so.

SIR G.LUSH: The only point that arose was what the limitation during good behaviour produced in terms of tenure.

MR CHARLES: It means it is as irrelevant to questions of

misbehaviour in judicial office as all the other cases that are relied upon for this so-called technical meaning.

SIR G.LUSH: Well, having made that winning-post - - -

MR CHARLES: I will finish very shortly after lunch.

MR GYLES: I wonder if the commission might be prepared to sit at a quarter past two so I can get myself in some sort of order to shorten my reply.

SIR G.LUSH: I remember an encouraging remark made by Sir Garfield Barwick in somewhat similar circumstances - you would take up a good deal less time if I say yes.

LUNCHEON ADJOURNMENT

MR CHARLES: Can I take the commission on a short excursion into attainder. I am reading from Chitty's Prerogatives of the Crown, Chitty junior of 1820. At page 221 Chitty says:

> The forfeitures for which the crime of high treason . . . . . lands and goods shall be forfeited.

In other words, ordinarily speaking, in the case of those crimes the attaint is the judgment of death being passed, and Blackston, in a commentary reported at pages 213 to 214, says this:

> The true reason and only substantial ground . . . . . majesty of the public resides.

If, therefore, an office is regarded as a species of property, then one sees some basis on which the attaint following crimes of high treason, petty treason or felony may be said to work a forfeit of that property. It is highly doubtful, one would have thought, that it was an operation in the same area of criminal law that has been referred to in Richardson's case where the reference is to some form of infamous crime, but it may be that it is a notion of that nature which brought about the additional stipulation.

SIR R. BLACKBURN: What was that reference to Blackston, please, Mr Charles?

MR CHARLES: The passage is quoted in Chitty at pages 213 to 214, and the reference to Blackston is in the first volume of the commentaries at page 299.

Now, in addition to the attaint following conviction for those crimes, there was provision in the Houses of Parliament for an act of attainder, and this jurisdiction was stated in these terms, that proceedings against accused persons by bill of attainder are in usual legislative form and follow the stages of a public bill, and that is said in the note to paragraph 735. I am reading from the fourth edition volume 10 of Halsbury, paragraph 735, and in note 1 to that paragraph, the bill of attainder is said to be a bill to declare a person attainted, that is to say:

> Under the spell or corruption of blood . . . . . there has been no example since the 18th century.

One assumes a bill of attainder would be introduced against a person of great consequence in the community, a noble or somebody of high office, somebody of that kind.

Your Honours, the other matters that I want to deal with shortly - Henry v Ryan. to which reference is made, is an example, we would say, of the way in which conduct out of office may be relevant to misconduct justifying removal from office. I do not desire to read the case. Your Honours have had the passage read from page 91.7 of 1963 TasLR in the judgment of Sir Stanley Burbury. It is an example of how:

> Misconduct in his private life by a person discharging . . . . . to continue in his office or profession.

Your Honours, my friend referred to Capital TV v Falconer, 125 CLR 611. May I simply submit that insofar as Sir Victor Windeyer was saying, at page 611, that judges of the High Court held an office terminable only in the manner prescribed for misbehaviour in office or incapacity, that was Sir Victor's own personal gloss on the Constitution, and we would respectfully submit an inadmissible gloss.

I said to your Honours that I would attempt to obtain a short statement of Harcourt v Fox. The question for determination was whether Harcourt, who was a duly constituted clerk of the peace by the custos rotulorum, did thereby become clerk for life, only removal for misbehaviour, or whether his continuance in office depended on custos rotulorum in office.

It was a competition between the two acts - 37 Henry VII chapter 1 and 1 William and Mary chapter 21. Your Honours, I do not desire to refer at any length to the commentators my friends have referred to but simply by way of example can I refer to the article in the Australian Law Journal by those two budding academics, Sir Zelman Cowen and Sir David Derham, on The Independence of Judges at page 463, left-hand column, where the authors say:

> Two questions arise here . . . . .
> . . . . . to work a forfeiture?

And then say:

> So far as the first question is concerned, a good statement . . . . . in the footnote hereunder.

Can I submit to your Honours that that is a good example of how this heresy we would say has grown up. What has happened is, they say, "What type of misbehaviour . . . . . a good statement is to be found". Now, there is no critical examination of it, it is simply asserted: there it is; that is good enough. No attempt to investigate difficulties that will work in operation; just, it is there in the authorities, and a quick adoption of it in practice. And it has of course not occurred to it in sufficient frequency to cause problems to be seen, examined and understood. Now by contrast when one looks at Jackson's work one sees that Professor Jackson in the passage that my friend put to the commission comments that:

> In that judicial process the ground for cancellation would be misbehaviour . . . . .
> . . . . . private capacity.

Now Jackson obviously of course has turned his mind to it but as he says in the body of his work at page 368, and really, if I may say so, with particular point:

> As no English judge has been removed since the Act of Settlement . . . . .
> . . . . . is by no means certain.

That, your Honours, at the very least is clear and makes very difficult the assertion that there is a received and technical meaning of misbehaviour.

HON A WELLS: What was the reference to that passage?

MR CHARLES: It is at page 368 of Jackson's work - The Machinery of Justice in England, 6th edition at page 368. I notice that my friend regards the authority as so

disreputable that he has not included it in his outline of argument at all.

Now we would say that it is entitled to quite as much weight, and in logic is to be preferred to Professor Shetreet's work where at page 89 he says that Professor Jackson's opinion it is respectfully submitted cannot be sustained and points out that no authority for it is cited. And Shetreet asserts that:

> It clearly appears from the authorities that except criminal . . . . . during good behaviour.

Now Shetreet like so many others goes back to Richardson which does not support his contention; relies on Anson in which the doubt is quite clearly stated on the face of the assertion; goes back to Halsbury, which simply regurgitates the provision from Todd and Hearn. So one only judicial authority which does not support the proposition.

The last two matters then, your Honours, that we desire to put in argument - - -

SIR G. LUSH: What was the page of Shetreet?

MR CHARLES: 89, your Honour.

SIR G. LUSH: Is it Accountability, or Judges on Trial?

MR CHARLES: Judges on Trial, not the work on accountability.

SIR R. BLACKBURN: I think we have only got pages 90 and following; or did we get another one?

MR CHARLES: I am surprised, your Honours, because I thought it began at 88. I think a number of additional pages were supplied during my friend's argument.

SIR R. BLACKBURN: That is right.

MR CHARLES: Now, your Honours, my friends have said that it is all far too uncertain if you are going to have these wins of what is acceptable in judicial behaviour. We say it is really not difficult at all to decide what are acceptable standards of judicial behaviour and we say that the High Court, if parliament attempted to remove a judge simply because they did not like the judge or because the judge had dissented once too often, or the judge had voted against the government on five occasions, the mere statement of the offence would entitle and compel the High Court to intervene very quickly indeed to prevent any action being taken successfully to remove a judge in circumstances of

that kind. And if parliament for political reasons or because of the actions of a particular pressure group were to attempt to act in that way they would be stopped. Now we submit that is no argument and involves no interference with the judiciary.

Now, your Honours, can we attempt to encapsulate our arguments in conclusion in five propositions. We say, firstly, that the consequences of the Bennett view, if I may so desribe it, being accepted, are potentially very serious. In the interests of independence it is said that Australia has given up the ability to remove from office a High Court judge who could be seen to be demonstrably unfit to hold office in the circumstances - and there were 15 of them - put by us at the outset of our argument.

Secondly, the question is, did those who framed the Constitution intend this? We say that examination of the debates and of the Constitution itself provides no support for this view and indeed, your Honours, we say that examination of both suggests the contrary, that the framers were not using misbehaviour in any technical sense even if the word did have a limited meaning.

Thirdly, your Honours, we ask, does the Constitution mean what is claimed in ordinary language? To which we would answer, in the ordinary grammatical meaning of the words, indeed not. What is suggested is a strained and artificial meaning which could only be justified by a very clear demonstration of the reception into the Constitution of a word of well accepted technical meaning.

Fourthly, your Honours, we ask, did the word misbehaviour have such a limited meaning? To which we would answer for the reasons put this morning at length, no. We submit that the circumstances in which judges could be removed from office were well understood and accepted, repeatedly tested in the parliament and the Privy Council, and we say that never in any case has it been said that a judge can only be removed from office for conduct outside his office involving serious offence and/or resulting in conviction.

Lastly and finally, your Honours, we ask, is such a technical view of misconduct - - -

SIR G. LUSH: That last comment is framed in terms of an offence.

MR CHARLES: Yes, your Honour.

SIR G. LUSH: It has never been said in any case that the judge cannot be removed - - -


(Continued on page 340a)

MR CHARLES: Can only be removed from office for conduct outside his office involving a serious offence and/or resulting in conviction, which is to test both the Griffith and the Bennett views.


(Continued on page 341)

Our fifth question is: is such a limited and technical view of misconduct or, I should say, misbehaviour, necessary to preserve the independence of the judiciary.

We submit that question should be answered in the negative for four reasons. Firstly, because two houses, the states and the people's houses, must both decide by majority to address in the same session. Secondly, on grounds of misconduct of which notice has been given to the judge. Thirdly, proof in circumstances in which the judge was given a fair hearing. Fourthly, the High Court being entitled to intervene to protect the judge if parliament attempted to act without proof or if the conduct alleged could not constitute misbehaviour. Your Honours, unless there are any other questions we can answer to assist the commission, we have nothing further to say.

SIR G.LUSH: Thank you, Mr Charles. Mr Gyles?

MR GYLES: My learned friend would qualify for the role of chief historian for Jozef Stalin, having in mind his revision of history. May I leave aside for a moment what Sir Harry Gibbs recently told us was Sir Garfield Barwick's description of a good deal of my friend's address and that is points of prejudice, and concentrate firstly on history. After all, the point at issue in the end, once history is understood, is a fairly narrow one; that is whether misbehaviour in section 72 refers to misbehaviour in office.

If the answer to that is yes, then subject to one subsidiary question our submission is correct. My learned friend sought to suggest that all of the commentators who passed upon this question either before 1900 or after it have been mistaken; in particular they have been mistaken as to the effect of Richardson's case. I do not think, however, he seriously challenged our submission that in relation to judges and other people who hold offices upon tenure which can only be terminated upon proof of misbehaviour, that misbehaviour means misbehaviour in office.

HON A.WELLS: It must at least include that.

MR GYLES: That is the meaning of misbehaviour when it is used in that context.

HON A.WELLS: I see, yes.

MR GYLES: There is the subsidiary question as to what misbehaviour in office means but the first question

I do not think he reall· could seriously challenge the authorities - - -

SIR G.LUSH: But as a condition subsequent, his misbehaviour in office - - -

MR GYLES: Is properly described as misbehaviour in office. There is a subsidiary question as to what that encompasses.

HON A.WELLS: I am sorry, I do not want to be seen to be picking a point but I have understood your argument and Mr Charles comments on this facet of it to turn upon your attributing to the Constitution the grant of an actual life tenure in office - determinable limitation, determinable on misbehaviour.

MR GYLES: I do not think I have pinned myself to that analysis.

HON A.WELLS: I am sorry, I thought that was the force of the during good behaviour act.

MR GYLES: That is very much a subsidiary point. The question is, what does section 72 of the Constitution mean.

HON A.WELLS: Leading up to that, I mean.

MR GYLES: The office of a High Court or a Federal Court judge is an office granted by the Governor-General in council based upon the Constitution and on any relevant legislation. The High Court have said that that is an office held on good behaviour or the equivalent but my submission at the moment is that, in historical terms, the removal of an office holder who held office on terms that it could be brought to an end for misbehaviour, the term was misbehaviour in office.

The procedure for removal by the Crown upon address from parliament was a quite separate and distinct method of removal which did not depend upon good behaviour, misbehaviour or any other stated standard or criteria. As I understand his argument this morning, it was that the original heresy was that of the Victorian Law Officers; that was picked up by Todd and thereafter everybody has simply adopted Todd.

He fails to deal with Hearn. It will be recalled that I referred, although briefly, to The Government of England, W.E. Hearn, 1867. That, I understand, is the first edition of Hearn. I do not have the volume myself but my instructing solicitor has made enquiries and there was a second edition in 1886.

We believe that the passage we have copied is from 1867, the first edition.

At page 82 will be found an analysis of the position, page 82 to the top of page 83, which is entirely consistent with and based upon the same sources of the Victorian Law Officers and Todd and all of the subsequent commentators. Whether between all of the sources there has been some unattributed plagiarism, we simply do not know. All we know is that the contemperaneous commentaries all drew the same conclusion from the sources. Having had occasion to go back to Hearn, may I ask the commission to read on from that paragraph on page 83 through to page 87.

That, in our submission, is an excellent account of the choice that Australia had to make at the time of federation. It puts it in a way which at least, I would submit, is illuminating. If I could pick up and read from point 5 of page 84:

> It is contended that the power of amotion is inconsistent . . . . . the object of the clause -

This is the clause in the Act of Settlement:

> was undoubtedly to prevent . . . . . . . . . one case as it has been in the other -

the proviso being the ability of the parliament to address for removal:

> The judges would have held their office . . . . . may be obtained from the Constitution of the United States.

SIR G. LUSH: Before we leave that paragraph - I am looking at the bottom of page 85 where it is said that the grievance was the removal of judges for political reasons as the mere will of the executive. The remedy was designed to correct this grievance but not to go further. The remedy that he is there referring to was the establishment of the good behaviour tenure instead of the at pleasure tenure, was it?

MR GYLES: Yes, it must be so. As is implicit in that, there are two aspects; there is a good behaviour tenure being imported and then the proviso to it.

SIR G. LUSH: Upon all the material that we have had before us in the last three days the proviso does not restrain the executive in any way at all.

MR GYLES: The proviso provides a mechanism by which the executive can remove the improper judge but only on address from the parliament.

HON A. WELLS: So it was before it covered the field, in effect. It excluded the executive acting on its own motion.

MR GYLES: No, it did not exclude it. On the contrary. The executive acting on its own motion for breach of the tenure of good behaviour remains.

HON A. WELLS: Outside that?

MR GYLES: Yes.

SIR G. LUSH: That is the assumption we have been making but there are one or two authorities that really suggest that the Act of Settlement has never been thoroughly analysed itself. Have there been any instances of prerogative removal of judges since the Act of Settlement?

MR GYLES: Of judges holding tenure under the Act of Settlement?

SIR G. LUSH: Yes.

MR GYLES: I cannot bring any to mind. The colonial experience is an unsafe guide to that because the Act of Settlement did not apply to them, although there were like provisions. I do not know that there are any contemporaneous commentaries which cast doubt on the position. They were there up to 1900. I will read on and endeavour to put what we suggest is the view being advanced:

> Some confirmation of this view may be obtained from the Constitution of the United States . . . . . without any obligation on the Crown to accept it.

What the author is saying is this: where independence of the judges does not warrant a paramount interest - that is, where independence from executive and legislature is not necessary - then the address provides a method by which the legislature retains control over what the author calls improper judges; that is judges who are doing their job properly but who for other reasons it is desired to remove. It is precisely that which the United States Constitution removes because of the special constitutional position of the federal judges in that country, by a particular mechanism. The framers of the Australian Constitution were provided with the same dilemma or same question. Because of the fact that the federal judiciary - particularly of course they had in mind that the High Court can declare unconstitutional legislation of the federal parliament, and because they determine disputes between the federal and the state bodies you cannot have a situation in which the legislature and the federal body retains the ability to deal with judges in the way the Act of Settlement deals with them. The solution, or the compromise if you like, which was adopted by the Australian Constitution is different from that chosen by the American Constitution but so far as extra judicial activity is concerned, the effect is very much the same. When one comes to look again, I hope very quickly, at the constitutional debates with this in mind it will be seen that this very question, framed in almost the same way, was the question which was debated.

Mr Isaacs as he then was, supported by Mr Higgins and others, said the present position in relation to the legislative control over judges has worked satisfactorily; we ought not to give up legislative control over the judges. The other point of view most clearly enunciated by Mr Kingston was that the very nature of the federal court which was being constituted and its powers and functions made it necessary that that parliamentary control over the judges be limited, not simply as a matter of form but as a matter of substance.

The argument of the opponents on the status quo it was said simply did not take into account the new and special role that the High Court was to play in declaring legislation unconstitutional and in the division between centre and state. It was the very debate which occurred. Before going to those debates, may I pick up the other matter which I promised to do and my learned friend has anticipated me, that was to go to Mr Harrison Moore's commentaries. I think everybody has been provided with extracts from two sources from Mr Harrison Moore.

SIR R. BLACKBURN: Before we come to that, with apology to you, I just do not follow how what you have been saying to us goes to the centre of your argument at all, that is, on

the nature of misbehaviour. What is the relevance of what you are saying?

MR GYLES: As far as my analysis of Hearn is concerned, in my submission he makes clear that the method of removal of judges otherwise than by parliamentary address related to their activities as judges in office.

SIR R. BLACKBURN: You mean he implies or says they could not be removed for activities out of office?

MR GYLES: Yes, save for conviction. That is the first point. He says all that very clearly on pages 82 and 83. That is the first point I get from Hearn. He draws the same conclusions from the sources as do the other commentators upon which we rely. This was a source available at the time. Secondly, I drew attention to an aspect of Hearn which I had not drawn attention to before but which fits in with our understanding of the convention debates, that there is a sharp division between a unitary state where the judiciary has no role in declaring legislation unconstitutional or deciding between organs of government on the one hand, and a state that does. There is his analysis at page 85.6 of how the address by parliament dealt with a judge whose actual conduct in the exercise of his office could not be impugned yet it might be highly inexpedient to keep him as a judge. The English system opts for parliament having power to deal with that situation, as indeed it does in New South Wales and Victoria and other states of Australia. If, although a judge is conducting himself properly in office, for good reason it is inexpedient that he continue, parliament may pray for his removal. It is that point which is given up in America and we say given up in Australia quite deliberately under this Constitution. It is the deliberate choice that was made to give up the power to remove an inexpedient judge.

SIR R. BLACKBURN: All this depends upon your acceptance of Hearn's dogmatic statement that misbehaviour means in the first place misbehaviour in the grantee's official capacity, and also includes a conviction.

MR GYLES: Yes, quite.

SIR R. BLACKBURN: So he does not take us any further on that point?

MR GYLES: He does not take us any further on that point. He leaves us precisely where we were before with all the other commentators but in the further passages which I have read he puts into context, in my submission, in a very clear way what lies behind all of this, that it is the extra work which the address does enabling parliament to have a general control over judges in the sense of all of their conduct, is the very thing which was given up by the Americans and was given up by us in return for, and that was the evil that was avoided by section 72 or put another way, the object be achieved by section 72 was to preserve the independence of the judiciary, not just from the executive but also from the legislature save in certain situations.

If I could then go to Harrison Moore, the first of the sources were the lectures in 1897, pages 102 and 103. He says:

> We here depart from the . . . . .
> . . . . . in the courts.

And so on. That latter point is the point where there was some wavering by that learned commentator but his first point is that the change between the two types of tenure, double condition of tenure, the change in that was to emphasize the fact that the courts are guardians of the Constitution even against parliament. Precisely the same point that Hearn makes. It is perhaps more clearly expressed in the second edition to which you have, pages 202 to 203.

HON A. WELLS: May I just remind you again he was there dealing with a proposed section which included the holding of office during good behaviour which meant that misbehaviour was the coming into operation of a condition or limitation.

MR GYLES: I must confess that I would submit that that is hardly critical to his analysis of the position.

HON A. WELLS: I thought throughout that part of your argument that led up to saying this is misbehaviour in office that we are concerned with was because in effect the High Court judges held office during good behaviour. That was a tenure that it borrowed all the qualifications of a condition of limitation and that that meant it was misbehaviour in office that we were dealing with.

MR GYLES: I certainly am happy to have that as one line of argument. I do not in any sense limit myself to that line of argument. It is not an essential part of my argument that it be said that there is a strict tenure of office on good behaviour. It may or may not be. Mr Justice Windeyer thinks it is. The High Court in Alexander's case thought it was but I am not pinning my argument to that. My argument is what does misbehaviour mean in section 72.

HON A. WELLS: All right, if that is so then you disavow any help in that wider way from getting the tenure of office?

MR GYLES: Indeed I do not. I do not disavow. Indeed I said I relied upon as a line of argument what we submit is a correct analysis by Mr Justice Windeyer and other members of the High Court which says this is tenure on good behaviour. I do rely upon that. However, we do not depend upon that. The separate argument is simply that the words of section 72 of the Constitution where they use misbehaviour, where misbehaviour is used in a particular sense and the understanding of that sense depends amongst other things upon the state of the common understanding of the Constitutional position as it was at the time of the constitution. That is what I am examining as indeed those commentators were. I am not pinning myself on any fuedal notion of tenure so far as High Court judges are concerned.

In his second edition, Harrison Moore said at the foot of page 202:

> The provisions of the Commonwealth constitution go beyond . . . . . . . . . . of the causes stated.

In other words, wrapped up in that short passage are the propositions which we are advancing as the fundamental propositions to be understood in analysing this question. The power to address is additional to the power to remove for misbehaviour; it is not in lieu of it and those independent powers are interwoven in section 72 and that is precisely the first two propositions we advanced before here in chief and we have looked at the first edition of Harrison Moore and so far as this point is concerned, the words are in precisely the same terms. Tne first edition was 1902.

Reminding the commission of those matters, may I briefly go back to the debates. My learned friend put in his address yesterday and returned to it again today but really misbehaviour according to Todd had various meanings in 1900 or 1897, 1898. One of them he said was from page 897 of that work. I will come back to that later. But may I remind the commission of precisely what was put to the commission by Mr Isaacs who I had thought it was being cited by my learned friend as the person who understood the correct position. That appears at page 947 in the 1897 debates and he says in the right-hand column:

> Far back up to 1688 or thereabouts . . . . . Houses of Parliament at all.

I ask that particular attention be paid to the words in regard to the office and that, of course, refers to the power of the grantor of the office, in this case because of the High Court it would have been the governor general but if parliament comes to the conclusion that for reasons good and sufficient for parliament these judges ought to be removed, they may without any judicial determination of the question of misbehaviour ask the Crown to remove them and the Crown has power to do so. So that Mr Isaacs as he then was is clearly adopting the view that the two remedies are cumulative. The condition of removal under the first of those alternatives is judicial misbehaviour in regard to their office. Removal by parliament is done without any determination on the

question of misbehaviour. It is suggested in some fashion misbehaviour is being used in some unspecified way. Here is the proponent for the status quo, distinguished lawyer then and with a distinguished career thereafter who is clearly adopting the analysis that Todd and Hearn and all of the other commentators theretofore adopted in putting it very clearly to parliament. Then on the following page - - -

SIR R. BLACKBURN: Is he implying when he says if they are guilty of judicial misbehaviour in regard to their office and may be removed without any vote, does he mean if they are guilty of judicial misbehaviour not in regard to their office they may not be removed by the Crown?

MR GYLES: He is saying judicial misbehaviour means misbehaviour in office.

SIR G. LUSH: There is no other judicial misbehaviour.

MR GYLES: There is no other. It must be so. First of all as a piece of English and secondly as a piece of commonsense that is what he is saying. It happens to accord with all of the commentaries also and accords with the passage that he himself reads from Todd later. With respect to my learned friend, it cannot be that all of these learned people have so fundamentally made a mistake.

SIR R. BLACKBURN: Including the Lords of the Privy Council in their memorandum? They were clearly completely wrong?

MR GYLES: No, not at all. As I have put in chief and as I thought had been put to my learned friend when he put a submission about that memorandum, that memorandum dealt with all methods of removal and certainly we are not limited to judicial misbehaviour or removal by the grantor for breach of a condition of good behaviiour. What Mr Justice Isaacs is talking about and what Todd is talking about are those circumstances where tenure is held upon good behaviour.

The memorandum of tne Crown law officers dealt with all manner of tenure, prima facie not for good behaviour. Prima facie, as Terrell's case tells us, it was held on pleasure, normally of pleasure and the methods of removal were not limited to Burkes Act. That memorandum was not wrong. I never submitted it was wrong. I have simply said it dealt

with an umbrella situation and was plainly inapplicable to judges where misbehaviour as a judge is necessary for removal.

Of course, in addition to my submissions the supplementary opinion of the Solicitor-General adequately demolishes Mr Pincus's contention upon that particular memorandum. Going back to Mr Isaacs, page 948, he draws attention again to the distinction:

> For instance, a judge might not be guilty of judicial misbehaviour but he might suffer such incapacity as to unfit him.

Then at the foot of the same paragraph he says:

> It will bring upon us much possible litigation . . . . . . . . . . that is a position which we ought not to court.

This is not the language of the layman, this is not loose language, this is language deliberately chosen in the light of what he had earlier said. What Mr Justice Isaacs is saying is that if you amend the constitution in the way we now know it was amended you will achieve a situation in which a judge who is not guilty of misbehaviour in office can stay in office notwithstanding the fact that he does not have the confidence of the Houses of Parliament, and that is precisely what has happened, Mr Isaacs was right, his view did not prevail, a contrary decision was taken, and that is the position Mr Justice Murphy may be in.

We are not talking about the litigious part of it, but the effect of it is this. If in relation to a judge he has not been guilty of misbehaviour in office, and if he has not been convicted, he may defy the Parliament, the Crown or the nation, and that was the purpose of the founding fathers of our consitution, it was the purpose of the framers of the United States Supreme Court. That is the most fundamental question in this case, and in our respectful submission, Mr Isaacs as he then was got it quite right.

The response which comes is more illuminating, or just as illuminating - "That is a balance of risks that we might well take together". I will come back to balance of risks when I deal with my learned friend's point of prejudice but, yes indeed, a judge may defy Parliament, he may defy the Crown and the nation provided that he does not misconduct himself and provided that he is not in office, and provided that he is not convicted of an offence.

SIR G. LUSH: I think I grasp what you are saying quite clearly, Mr Gyles, but if that was what Mr Isaacs feared, how

did he come to approve of the introduction of the proved misbehaviour provision as a solution to what he was worried about?

MR GYLES: Political commonsense.

SIR G. LUSH: You mean he counted the numbers?

MR GYLES: He simply counted the numbers and saw that his cause was lost and it was best to salvage something out of the wreck. If you read the Melbourne debates he again put forward the amendment that Victoria proposed, that again although Mr Barton started to waver, the numbers were against him, and so he changed the position, I think, of the clause in an endeavour to avoid judicial review. He sought, I think, if you read those debates, appreciating the inevitable, to endeavour to frame the clause in a way which he thought was more likely to avoid judicial review than the way the clause had been framed.

What I have just put, of course, is very much reinforced by what follows from Mr Justice Isaacs. He then read the situation concerning the Victorian constitution and said:

> So that a judge holds office
> subject to removal for two
> reasons . . . . . .
> we must trust Parliament.

Then he reads Todd.

SIR G. LUSH: It is always difficult to pick up these documents and read them in a scrappy form. 948 occurs in the debate on amendment, does not it?

MR GYLES: Yes, it does. The amendment is set out on the right hand side. The clause itself appears at 944, then on the right hand side of 946 half way down is the actual amendment, but because of interjections it could be taken that misbehaviour was to be the word rather than misconduct, and there were suggestions that unfitness should be dropped out.
Mr Justice Isaacs went on to read Todd, including the passage about misconduct outside of the duties of office for misbehaviour must be established by a previous conviction of a jury. Then, of course, he contrasts with that the position under the act of settlement proviso where there can be an address to the Crown.

So it is a little difficult, I would have put, with respect, to suggest for a moment that there is some view which now be taken of Todd which differs from that which Mr Justice Isaacs was then putting.

Mr Symon, and I will not reread this because I have taken the commission to it, at 950 makes the precise point that I have already made that the problem with the Isaacs view was that it just ignores the fact that he does not appreciate the effect of the High Court's role in the federation. Mr Symon has precisely the same view. Mr Barton has the same view. Mr Higgins, who was on Isaacs Js side, shared his concern. At the foot of page 953:

> May I point out to Mr Kingston . . . . .
> . . . . . leaving it to the house to prove capacity and misbehaviour.

and so on. He proposed an amendment which is an interesting amendment because it would have avoided judicial review except in the most extreme of cases - if both houses are of the opinion that he has been guilty of misconduct or misbehaviour. As the commission appreciate, they were not the words chosen, they were the objective words, misbehaviour or incapacity.

As far as the 1898 debates are concerned, at 313 I should point to a passage in the righthand column at the bottom which I had not been able to read in my earlier copy of this. Mr Kingston, at about point 7 of the page:

> To prevent the judge being removed . . . .
> . . . . . he need fear no one, he will favour no one.

So again there is the stress upon behaviour in his high judicial office.

The point the presiding commissioner put to me appears from page 313 in the lefthand column. So that, in our submission, when history is looked at, it is impossible to sustain any point of view which says that really everybody has misunderstood Richardson's case and what the duties of a judicial office are and that we in 1985 can now correct all of that misapprehension and say that the word "misbehaviour" will now mean what we think it means, not what all of the commentators thought it meant in 1900 and not what all the commentators have thought it has mean up to the present day, apart from Pincus J. I leave aside counsel's argument in cases because they are not a reflection of counsel's opinion at all.

Before leaving history, could I just say a word about Doncaster's case? It is my respectful submission that that was the case in Lord Raymond's reports. May I put the submission that that did not depend upon any procedural point, it was a mandamus of calling

upon them to show cause why they should not restore Scott to the office of capital burgess. Then they make the return which justifies their action. The passage was read out this morning. At the foot of the page of the English report:

> He received several sums of money . . . . . mentioning them also particularly.

Then there are recitals as to the fact that he was called upon to answer anyway and he was held guilty.

SIR G.LUSH: I do not know enough about the forms of the writs, particularly the writ of mandamus then in use, but it struck me that the writ must have contained an order or there would not have been a return made to it. Can you tell me whether it was likely that the writ stated a ground?

MR GYLES: I do not know, but one imagines that the writ - well, the writ commanded them to restore Scott to the office of capital burgess, the ground presumably being that he had been wrongfully excluded from that office.

SIR G.LUSH: The answer was that he had been guilty of default as chamberlain.

MR GYLES: Been excluded for good cause.

SIR G.LUSH: I would not think that it would be impossible it did go off on a pleading court because, though it is not said as far as I know, what perhaps might have been said was that the return might have been good if it had said having defaulted as chamberlain he was thereby rendered unfit for his office.

SIR R. BLACKBURN: Moreover, the office of capital burgess appears to have been a real office, whereas the office of chamberlain was not an office in that sense at all, was it?

MR GYLES: That makes our point, if I may say so, all the more powerful. You see, the first answer is that the only guide we have is what the court is reported as having said, and it is not reported as a pleading point at all. That is point one. Point two, we know what the return said, it is set out there. It is set out, as far as we know, verbatim.

SIR R. BLACKBURN: They purported to remove him from his office of capital burgess for his said offences and misbehaviours.

MR GYLES: That is right.

SIR R. BLACKBURN: And all those offences and misbehaviours were offences and misbehaviours qua chamberlain, not qua capital burgess.

MR GYLES: No, that is not correct, with respect.

HON A. WELLS. I thought the courts made that very clear towards the end of the judgment.

MR GYLES: No, it has just been put to me that the misbehaviours are all in office of chamberlain, not burgess. That is not correct.

HON A. WELLS: Yes, but they picked the wrong one, to put it in colloquial language.

MR GYLES: No, with respect, they did allege that as capital burgess he obstinately and voluntarily refused to obey several orders and laws and so on. That was said not to be particularized, but it is not correct to say that they picked the wrong office. Capital burgess, as Sir Richard Blackburn has said, was a real office, and they had to make out a case for removal of a person from a real office.

One of the grounds of misbehaviour was that he had in another position acted contrary to the codes of that position. He had taken money and he had made false returns as to expenditure. In other words, it is saying that because you misconducted yourself in that dishonest fashion in that office, you are unfit for that office. They are saying, as is said here against Mr Justice Murphy, because of things you have done outside your role as High Court judge, you have shown yourself unfit to be the burgess of this corporation, of this body, precisely the argument my learned friend has put, could not be closer, and what the court said was not go away and come back with another pleading, because they did not want to remove him as chamberlain, they wanted to remove him as

burgess, they said that:

> What he was charged with was not in his office . . . . . but not of capital burgess.

HON A. WELLS: That is the very point that they are trying to make.

MR GYLES: With respect, it escapes me.

SIR G. LUSH: Was the office of chamberlain something that one of the burgesses was appointed to?

SIR R. BLACKBURN: Yes, it says that.

SIR G. LUSH: It does say he was chosen chamberlain, and that may imply that he was chosen by the burghers.

SIR R. BLACKBURN: Yes, the chamberlain was appointed out of the capital burgesses. That is in the middle of the paragraph.

MR GYLES: Let us say that a justice of the High Court happens to be a chancellor of a university, and as part of the alleged proved misbehaviour it is said whilst chancellor of the university you kept for yourself emoluments of office and fees to which you were not entitled and charged to that university expenses and received expenses which were never incurred by you, well knowing that you had not incurred them. It is as simple as that.

HON A. WELLS: Does that not show a very narrow view of the compass of the office and of the obligations under it, in that particular case?

MR GYLES: In this case it shows that if you wish to remove somebody from office A, you cannot remove them because of misbehaviour in office B unless you are convicted of a criminal offence in office B.

SIR R. BLACKBURN: No matter what the office is. We are talking about the office of a judge of a High Court - makes no difference.

MR GYLES: Not in that respect. I did not put, I have not put and I do not put that all offices are the same for all purposes. That was never part of my submission, as the transcript will show. It is that they are the same in this respect, that misbehaviour in office has the same limits, whatever be the office. It must be misbehaviour in the office in question or conviction out of it. To that extent it does not matter whether you are a portman or a High Court judge or the chairman of the Reserve Bank or all the other offices held on good behaviour or terminable by misbehaviour. You cannot be removed from those offices for misbehaviour for what you do in some other office unless you are convicted of a criminal offence in relation to that conduct.

If, for example, there had been proceedings in relation to his conduct as chamberlain which had led to a conviction against him, and on the facts here it looks as if it could have been; then, of course, he would have been removable under the general principles, but not otherwise.

The short point I make about that case is there is absolutely no suggestion that that is a procedural matter or a pleading matter, and when one analyses what the pleading was, and it is set out in detail, it says precisely what is being said against Mr Justice Murphy, that you have whilst in some other capacity done something which is dishonest or wrong, sure you have not been charged or convicted of it, but you have done something which is wrong. My friend keeps saying that there is no authority and these are all commentators who have gone wrong. Even if Lord Mansfield went wrong and even if in 1986 it is possible to correct him, since 1730 this deciison has stood and never been doubted.

My friend also said on more than one occasion, quite repeatedly, that we were arguing for a technical meaning of misbehaviour. Might I suggest that we are doing no such thing. Misbehaviour in conjunction with office, misbehaviour which justifies removal from office, is limited only in the respects that I have mentioned. That relates to misbehaviour in office and does not relate to conduct out of office save for conviction. That is not a technical meaning. That is the ordinary meaning which it has always borne.

Now, what, may I ask rhetorically, is the definition of misbehaviour which is put forward by my learned friend? We have listened with interest to his submission and we have read carefully Mr Pincus's opinion, and we can find no endeavour to explain what misbehaviour means.

Let me concentrate, because this case concentrates upon it, on misbehaviour out of office. What is the definition of misbehaviour out of office? One can understand misbehaviour in office. It has been explained on many occasions. No doubt one cannot catalogue examples of it, but there is a very clear notion as to what a person does when he misbehaves himself in the conduct of his office.

What, however, is misbehaviour out of office? Where is the definition of it? According to my learned friend, apparently it means anything which Parliament thinks it means. It is Alice in Wonderland. He says that the High Court can correct it. He says the High Court - I will not go into the question of justiciability. Let me assume for the purposes of the argument that is correct. If our meaning of misbehaviour is not correct and if it is at large, by what criteria is the High Court to draw the line, and I suppose it would be correct to say that there must be a cause assigned - I withdraw that. That may not be correct. As in Brown v Fitzpatrick, it may be sufficient if all that happens is the Parliament to produce an address to the Crown saying on the basis of misbehaviour.

Even if that not be right and if the High Court can go into the proceedings in Parliament and see what happened there - it may be that if what is recited to be or charged to be misbehaviour could not be behaviour at all. Let us say it is an omission of some sort. I cannot think of a good example now, and it is very difficult to think of examples which would be beyond or outside the definition of misbehaviour as it is being put here, so far outside that the court can say there is no possibility of that being regarded as misbehaviour, although there are no limits - - -

HON A. WELLS: A matter of eccentricity would probably supply your example, would it not?

MR GYLES: That may be a positive act though, and once you have a positive act it may be difficult to - you see, I suppose even wearing no shoes on to the bench may be said to be within the range of misbehaviour. If that sort of view is correct, then if one goes back to Hearn and goes back to the debates, this very evil which was to be avoided has not been avoided, and the open-ended nature of it will leave the federal judiciary in the same position as the state judiciaries and English judiciaries in practice, and that, of course, was debated at the convention and we say that that result was never intended.

Before going back to the points of prejudice there was some debate about Barrington's case - what Denman said and what Todd said at 859-60.

SIR R. BLACKBURN: This is the first edition of Todd? The second rather - - -

MR GYLES: Yes, I have taken the one my friend handed up. Now that is apparently taken from the speech of Denman as he then was before the House of Lords. There was some debate this morning as to whether it was being said that if you were dealing with a crime you could only proceed by way of impeachment. Now we know from what the same counsel put to the House of Commons that that was not being submitted. In the Mirror of Parliament 1830, 22 May, page 1897, Mr Denman said - he was putting an argument there ought to be proof by a court beforehand:

> There was one mode of proceeding, namely, by impeachment . . . . . sue the Attorney-General.

He then went on to debate the matter further. So it is not being put that these were exclusive categories; they were cumulative, depending upon the seriousness of the conduct.

My learned friend from the passage at 860 developed an argument which I think is the high point of making bricks out of straw.

SIR R. BLACKBURN: What, Todd at 860?

MR GYLES: Todd at 860, yes.

SIR R. BLACKBURN: Well which edition are we talking about?

MR GYLES: The one my learned friend handed up which is the second edition.

SIR R. BLACKBURN: My photocopy only goes as far as 856.

HON A. WELLS: That is the first one; the second one is a different size and different printing.

SIR R. BLACKBURN: We have had three photocopies from Todd, have we?

MR GYLES: There is Todd on the colonies; Todd on parliamentary government mark 1 and mark 2.

SIR R. BLACKBURN: I see, now I understand. I am sorry, Mr Gyles, go ahead.

MR GYLES: I was full of admiration for this submission. At page 860 Todd examines the procedure of the Houses of Parliament and says that:

> This power is not in a strict sense . . . . . office is held, reliability, et cetera.

Now we know from what Todd has previously said that in dealing with legal breach of the conditions on which the office is held he has a plain view of what misbehaviour means. What he is plainly saying there is that the parliament may go beyond misbehaviour into other conduct and he then says: therefore Todd is using the word misbehaviour in that sense; therefore the framers pf the constitution might be. Even apart from what Mr Justice Isaacs actually read to the convention, we would say that is a very inventive way of overcoming the formidable barrier that Todd presents to the argument my learned friend advanced.

Could I then deal with the points of prejudice, the argument - the 15 examples of the dreadful things that could happen if you uphold our view. Now may I put our general answer to this without conceding that everyone of his examples is apt. Let me assume for the purposes of this exercise some, or a large number of his examples are correct.

HON A. WELLS: Are what?

MR GYLES: Are correct. I do not want to concede every line of what he has put there but may I accept for the purposes of argument that a number of his 15 points are correct if we are correct. Now argument from absurdity - and this is argument from absurdity - has its limitations. The chief limitation is that it does not deal with the proper context. A judge is appointed carefully, taking into account not just his legal expertise but his temperamental suitability for the job, his personality, his standing in the community, his mode of life and the like. And the framers of the constitution would make that assumption. That would have the consequence that it will be expected that judges will normally be and will always be persons who when appointed bear that character. That has the consequence not only that may be expected that they will generally behave in the way that a gentleman might behave; but they would be expected to resign in the event that they became involved in some of the conduct which is referred to in the 15 points. So that the fundamental substratum of all of this is that we are dealing with removal of judges who have been properly and carefully chosen. Thus the practical chance of these things happening is very slight.

Certainly it is as absurd to pose these examples as it is to pose a situation where parliament, as Mr Justice Isaacs said, corruptly decide to move against a judge because of his opinions; or where a dissident litigant or dissident group raise against the judge allegations of private conduct which call for the sort of difficulty that is now being occasioned to this judge. That once an allegation is made people say: unless it is answered it will not go away. The allegation may be completely baseless but it is still an intimidation. It may indeed have some validity but in fact, but in truth be no basis for removal, but nonetheless causes intimidation.

We have had examples here amongst these allegations. More importantly, let us say that somebody politically motivated, personally motivated, does raise from private conduct a matter which right thinking people would regard as irrelevant but which occurred and which the parliament act upon to remove that judge where the High court cannot do anything about it because it is an act - justiciability is no answer to this problem. He could have abused a chauffeur or upbraided a clerk of the High Court. One could think of even more stupid examples where, if parliament wishes to rid themselves of an embarrassing judge who was voting the wrong way on constitutional issues, it can sieze upon that.

The Right to Life organization may say that that judge should be removed because he participated in his wife having an abortion - perfectly legal; or that he had been divorced. Arguments in absurdity really are of no great assistance. If what is submitted by us is correct, then the consequence is that a judge must conduct himself properly in his office. If external behaviour is alleged it must be a breach of the general law. It is very dangerous, in our submission, to construct standards which are said to be bad but which do not breach the law and for which citizens are not punishable. This is the real point about all this.

Let us assume that in every one of these examples which is correct - and I do not really stay to analyze them in detail - in every one of these cases if the example is correct, it is correct because the criminal law and the law of our land does not impose punishment in those circumstances. If that be so, then the law so operates and people in the same position are free to do all manner of things. They walk in this country unstained by the fact that they may have killed somebody overseas.

Even the most outlandish of these examples, positing a judge who will make these admissions and so on, all it means is that the general law of the land allows that to happen. As was said in the convention debates, it is a question of balancing risks. The risks of a High Court judge doing these fifteen things or those which are truly of concern is so minimal, and even if he does them, they are not a breach of the general law. If they were heinous, if they required punishment, then there should be conviction because if a person is in Australia, he is subject to our legislature - there is no difficulty about having a crime that says you cannot do something

overseas if you are an Australian resident.

The risks of that happening are far less real than the pressures of political parliamentary, extraparliamentary pressure upon federal judges who, every day of the week - perhaps that is an exaggeration - many times a year will be deciding issues as to the validity of legislation and as to the rights of the centre against the state. We know for a fact that those things will happen every year and often every year. We know that there will be disaffected states, there will be disaffected politicians, disaffected litigants and people with access to crime.

We know those pressures will be there and it is that which the American Constitution and the Australian Constitution take pains to relieve the federal judge from pressure because of it. The risks of that pressure are great, they are inevitable. What is not inevitable is that one has a maverick judge doing the types of things which Mr Charles finds offensive. As I say, I do not want to stay to give detailed argument about all of these examples.

SIR R. BLACKBURN: Mr Gyles, I appreciate entirely what you have been saying but it can be put against you in a slightly different way that when you have the Act of Settlement situation, you do not have to worry about any of these because parliament could take it in hand and remove the judge. Therefore, it might be suggested it seems improbable that the framers of the Constitution intended proved misbehaviour in section 72 to have the technical meaning for which you are arguing. It seems more probable they intended proved misbehaviour to have the wider, looser meaning so that these cases could not occur.

MR GYLES: But why, though, with respect? I know it is put against me, but why? That is the very point that the convention debate centred upon; should the Act of Settlement position be so or not? The decision was not. Why not - because, as they said, and as Hearn makes clear, the Act of Settlement provisions are not appropriate where you have judges holding the central position in the constitutional framework where they need protection from parliament as well as from the executive; that the framers of the constitution, when the debates are read, deliberately stood aside from and abjured the parliamentary control which was the position in the States.

That being so, once they did depart from that model for the reason that was given, then one says, having departed from the model, they had two well known methods - and I forget the phrase Mr Harrison-Moore used but - they joined the two together.

SIR R. BLACKBURN: Coalesced.

MR GYLES: Coalesced, yes. Of course, as we have said on more than one occasion, the role of parliament is by no means - under our construction of these provisions, parliament still has a very significant role to play. They are the initiators, and in cases of misconduct in office they have a very significant role to play in deciding whether the conduct is such as is inconsistent with office; in relation to external matters they have to have the conviction established, and then they have to decide whether that conviction is - I accept that the debate here is inevitably skewed because of the facts here.

All of these provisions were primarily, of course, being looked at in the light of misconduct in office, I appreciate that, but we submit that the policy reasons in favour of our submission are powerful and whether they are or not, they appeal to those responsible for the framing of the constitution. Might I say just in short form that we do not necessarily agree that example five, that is an offence proved and a bond would not be a conviction under the cirucmstances. That is a matter of construction which one could argue.

SIR G. LUSH: I think some of the statutes which provide for that expressly say that there will not be a conviction.

MR GYLES: Yes, that is a matter of looking at the - - -

SIR G. LUSH: They must, in fact, or in Victoria they do because the order is for adjournment.

MR GYLES: Yes. In any event, that is perhaps a small point. On the second set of examples, I was going to go on to say that we did not see some of them as being terribly necessary in any event, but I think that is probably not helpful.

MR CHARLES: I was not suggesting they were.

MR GYLES: Yes. If the commission pleases.


(Continued on page 365a)
Transcript in Confidence

SIR G. LUSH: Thank you, Mr Gyles. We are indebted to counsel for their assistance in this matter and we will endeavour on our part to deal with in as rapidly as may be.

MR CHARLES: May I clarify something? Our understanding is that there will be no hearings next week. Is that a correct understanding?

SIR G. LUSH: Yes. Unless we run into difficulties of our own with our plans for next week, we will expect a start to be made on evidence on the Tuesday of the following week, which I think comes to the 5th. If counsel are unable to agree on what is to be taken first, then we will arrange a short hearing to deal with that matter.

MR CHARLES: Both sets of counsel have need for a hearing at some stage before evidence begins for the return of subpoenaed documents. We are in the commission's hands. It need not be a lengthy hearing.

SIR G. LUSH: You mean simply for the production of them in this building?

MR CHARLES: Yes, on subpoena. My friend suggests Thursday. We have no objection to Thursday as long as that date is convenient to the commission.

SIR G. LUSH: Thursday would be acceptable, Mr Charles. To get it clearly on the transcript, that will be Thursday 31 July at 10 am. We will now adjourn these sittings of the commission until then.

AT 4.25 PM THE MATTER WAS ADJOURNED
UNTIL THURSDAY 31 JULY 1986.