HEARINGS OF THE COMMISSION AND A BRIEF SYNOPSIS OF WHAT WAS DISCUSSED

3.6.86 Judge Present — Public sitting of the Parliamentary Commission of Inquiry - Inquiry opens.

Counsel for the Judge. Mr R G Gyles QC, Mr M R Einfeld QC, and Mrs A C Bennett.

Counsel assisting the Commission - Mr S Charles QC, Mr M Weinberg - Mr A Robertson.

Commission seeks applications for leave to appear before it - no applications made. Commission adjourned for short time then reconvened in private when procedural matters were discussed including:

(1) the publishing of advertisements inviting submissions to the Commission and the requirement that such material be given in the form of a Statutory Declaration.

(2) the submission by Counsel assisting that what was contemplated by the Act was in the nature of a 3 stage proceedings:

(i) that Counsel assisting were to be the filter through which material supplied to the Commission was to be produced in the form of specific allegations.

(ii) that a series of particulars of specific allegations would be supplied to the Judge and his Counsel and at this second stage it was then for the Commission to consider whether there was evidence of misbehaviour sufficient to require an answer. This

decision would be made upon admissible evidence. If the Commission did so conclude, the third stage would then be reached.

(iii) that the Judge may be required to give evidence before the Commission which would include providing the Judge and his Counsel with an opportunity of calling evidence other than evidence to be given by the Judge himself.

Counsel assisting also submitted that the Judge and those representing him should see the material before it was made available to the Commission.

The Commission determined that there should be an advertisement and that members of the Commission should be regarded as at liberty to proceed forthwith to the perusal of the two reports of the Senate Committees and Part I of the Stewart Commission report.

A tentative timetable was set that a preliminary set of specific allegations be given with particulars by 20 June, 1986. Proceedings were then stood over until Monday 23 June, 1986.

On 7 June, 1986 advertisements were placed and material subsequently received by Counsel assisting the Commission.

23.6.86 Counsel - as before.

Judge present The Commission was informed of a letter dated 18 June, 1986 from the Solicitors for the Judge which raised the following points:

1. that the Commission was in default in the delivery of specific allegations, and to the extent that that was due to examination of, or inquiries initiated as a result of, information received, there had been a violation of directions given by the Commission on 3 June;

2. that the Commission had no power to use the assistance of investigators in the examination of allegations received, and in particular to use the services of law enforcement officers;

3. that the Commission had no power to take steps to verify information received;

4. that investigation should cease until a further hearing session of the Commission had been held;

5. that the Commission should make available to the Judge all information and documents as and when received.

The Commission was also advised of the reply date 20 June, 1986 from the Solicitor instructing counsel assisting the Commission, saying that the delay was due to the volume of material received, and that it would be impossible for Counsel assisting to draw and settle proper particulars before some investigations were made and statements obtained from potential witnesses.

Sir George Lush delivered the Commission's ruling on the submissions of 23 June, 1986 in which it rejected Mr Gyles application for declarations or directions on the following: that the Commission give particulars of all allegations so far received, that the Judge's representatives be allowed to inspect all material received, that no investigation should be made, nor investigators appointed until the material had been

seen and representations made on it and that the Judge be informed forthwith of the issue of any search warrants or material received from the N.C.A. on the Senate. The Commission was informed that the Judge wished to test the rulings made that morning.

Counsel assisting informed the Commission that in the light of that application an undertaking would be given that no investigations would be conducted for a reasonable time, nor investigators appointed.

on 26 June, 1986 the High Court heard an application for an interlocutory injunction seeking to restrain the Commission from making inquiries. The Court rules that these were serious questions to be determined in relation to the validity of the Act and the investigations of the kind proposed to be made by the Commission. The Court stated the material before it failed to raise any apprehension that Commissioner Wells could not be impartial or unprejudiced. The injunction sought was refused and the matter was listed for hearing in Canberra in August.

17.7.86 Judge present

The Commission was informed that 12 allegations had so far been delivered to the Judge. The allegations were then the subject of submissions by both Counsel.

Mr Gyles advised that the Judge would like the Inquiry to start immediately and that the argument as to proved misbehaviour could take place in the week commencing 21 July.

Matter adjourned until 22 July, 1986.

22.7.86

23.7.86

24.7.86 The Commission heard argument from Mr Gyles QC - and Counsel assisting as to the meaning of 'proved

misbehaviour' within S72 of the Constitution. At the close of submissions the Commission reserved its decision.

The matter was stood over until 31 July, 1986 for the return of documents under subpoenae.

31.7.86 Three summonses issued by the Commission were called on and in response thereto documents were produced from the NSW Premiers Department, the NSW Ethnic Affairs Commission and the NSW Public Service Board.

Mr Charles then raised the matter of the Judge's health and the recent media speculation and stated that if it were the case that the Judge was unable to attend the hearings he would submit the Commission should adjourn and proceed for the time being with no further formal hearing. Mr Einfeld said he did not know whether the statements made in the articles were correct. His present instructions were to continue with the activites of the Commission with all possible speed.

Submissions were then made by Counsel assisting in relation to a 16 page letter received from the Judge's Solicitors requesting various subpoenaes to be issued in relation to Allegation 1. The Commission ruled that all documents in respect of which Mr Thomas was the author or which contained Statements made by him could be obtained on subpoena issued by the Commission

The matter was then adjourned until 5 August, 1986.

5.8.86 Commission's decision on interpretation of Section 72 of the Constitution handed down - reasons to follow at a later date.

(Commission finds that misbehaviour within the meaning of Section 72 of the Constitution does not in any case necessarily include

(a) misconduct in the actual execution of judicial functions; or

(b) conviction for an infamous offence; or

(c) criminal conduct).

Application by R Gyles QC for adjournment due to medical condition of Mr Justice Murphy – statutory declaration with annexed medical certificate handed up.

Further hearings of the Commission adjourned to 19 August 1986 or such later date as may be the subject of 24 hours notice to the Judge's solicitors.

19.8.86 Commission publishes reasons on interpretation of section 72 of the Constitution.

Commission adjourned sine die.

G.H.L.

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

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 TUESDAY, 3 JUNE 1986, AT 10.00 AM

Secretary to the Commission

Mr J.F. Thomson
GPO Box 5218
SYDNEY 2001

Telephone: (02) 232 4922

SIR G. LUSH: Mr Secretary?

THE COMMISSION: This is the Parliamentary Commission of Inquiry appointed under the Parliamentary Commission of Inquiry Act 1986 for the purpose of inquiring and advising the Parliament whether any conduct of the Honourable Lionel Keith Murphy has been such as to amount, in its opinion,to proved misbehaviour within the meaning of Section 72 of the Constitution.

I have received a letter dated 28 May 1986 from the Clerk-Assistant, Table Office, of the Australian Senate. The letter has enclosed with it an extract from the Journals of the Senate Number 106 dated 27 May 1986 relating to the appointment of members of the Parliamentary Commission of Inquiry,and in addition a copy of the Governor-General's message Number 7 notifying Royal Assent to the Parliamentary Commission of Inquiry Act 1986.

I read from the extract from the Journals of the Senate Number 106 dated 27 May 1986:

> PARLIAMENTARY COMMISSION OF INQUIRY - APPOINTMENT OF MEMBERS - Message from the House of Representatives: The Following Message from the House of Representatives was reported:
>
> Message No. 337
>
> The House of Representatives acquaints the Senate of the following Resolution which was agreed to by the House of Representatives this day:
>
> That, in accordance with section 4 of the Parliamentary Commission of Inquiry Act 1986 -
>
> (a) the Honourable Sir George Hermann Lush, the Honourable Sir Richard Arthur Blackburn and the Honourable William Andrew Wells be appointed members of the Parliamentary Commission of Inquiry, and
>
> (b) The Honourable Sir George Hermann Lush be appointed the Presiding Member.
>
> House of Representatives,
> Canberra, 20 May 1986
>
> The Manager of Government Business (Senator Grimes), by leave, moved - That,in accordance with section 4 of the Parliamentary Commission of Inquiry Act 1986 -
>
> (a) the Honourable Sir George Hermann Lush, the Honourable Sir Richard Arthur Blackburn and the Honourable William Andrew Wells be appointed members of the Parliamentary Commission of Inquiry, and

(b) The Honourable Sir George Hermann Lush be appointed the Presiding Member.

Debate ensued.

The question was put and passed.

I seek leave to tender the letter and the attachments to it.

SIR G. LUSH: They will be exhibit 1 in the commission's proceedings. I will take appearances from counsel.

MR S. CHARLES QC: I appear, with my learned friends MR M. WEINBERG and MR A. ROBERTSON, to assist the commission.

SIR G. LUSH: Thank you, Mr Charles.

MR R.G. GYLES QC: I seek the commission's leave to appear, with MR M.R. EINFELD QC and MRS A.C. BENNETT, for the Honourable Lionel Keith Murphy.

SIR G. LUSH: Thank you, Mr Gyles.

MR CHARLES: Before any further appearances are called for, may I draw to the commission's attention section 14 subsection (10)(d) of the act setting up the Parliamentary Commission of Inquiry. By that provision, Mr President, it is stated that except in accordance with the direction of the commission, "D. The fact that any person has given or may be about to give evidence at a hearing shall not be published".

If the commission pleases, it has occurred to us that someone might wish to seek leave to appear but not do so in public at this stage. There could be a variety of reasons that people might wish to appear, one being on the basis that evidence was proposed to be given and representation sought for that purpose. Could I simply say this, that if any circumstance of that kind existed, notification could be given either to counsel assisting or to the secretary and arrangements would be made for applications to be made later when the commission was sitting in private.

SIR G. LUSH: Thank you, Mr Charles. For my part, I thought it was necessary to sit in public to take applications for leave to appear simply because that was the only way that those wishing to make the applications could gain access. However, in the light of what you say, I indicate that the commission will hear later applications by any persons who do not wish to give their names in a public hearing. After taking any applications

which may be advanced in its present public hearing,we shall adjourn for a short time and any others who may wish to make applications in private may speak either to counsel assisting the commission or to the secretary of the commission.

Are there any applications for leave to appear to be made at this public sitting? If there are none, we shall adjourn for 10 minutes. Upon resumption the commission will be sitting in private and we shall hear from counsel assisting whether there are any applications then to be made for leave to appear. Thereafter we shall proceed, as I understand it, to a discussion of some procedural matters. The commission will adjourn until 25 past 10.

CONTINUED ON PAGE 5 (in Transcript-in-Confidence)

G.H.L.

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

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 TUESDAY, 3 June 1986

Secretary to the Commission

Mr J.F. Thomson
GPO Box 5218
SYDNEY 2001

Telephone: (02) 232 4922

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CONTINUED FROM PAGE 4 (from Public Hearing)

SIR G. LUSH: Mr Charles, are you aware of any further applications for leave to appear?

MR CHARLES: No one has mentioned or put in an application to me.

SIR G. LUSH: Mr Gyles?

MR GYLES: No, Mr President.

SIR G. LUSH: Mr Gyles, Mr Charles has informed the commission of the substance of some discussions that he had with you about procedure. What in your submission would be a convenient way of handling the subject matters? Do you prefer to begin or would you prefer Mr Charles to begin?

MR GYLES: Can I just perhaps say one thing first, if I may, and that is for the limited purpose of discussing the future conduct of the inquiry we are happy for it to be public and, indeed, would suggest that it perhaps conveniently could be public so that the public and the Parliament know the course the commission is setting out on and it should not have any impact upon the privacy of individuals or prejudice other proceedings. We merely put that to the commission. It is a matter very much for it under the statute, of course.

SIR G. LUSH: Mr Gyles, we do not think that circumstances require us to sit in public for this purpose but I indicate to you that it is possible, and it will not be done except on further information being given to you, that a press statement will be issued giving an outline of the procedure which the commission hopes to follow.

MR GYLES: I think our view would be that that would not be a permissible course of conduct.

SIR G. LUSH: I note what you say but we will discuss it when the time arises.

MR GYLES: Thank you. So far as proceedings this morning are concerned, it is true we have had the benefit of some discussion between counsel. It may be better if counsel assisting indicate what he saw as the programme and we will make our comments on it. I think the areas of potential disagreement are known to us.

SIR G. LUSH: Are you willing to follow that course, Mr Charles?

MR CHARLES: Entirely, Mr President, yes. There are a number of matters that I wish to raise both in the hope of assisting the commission and to enable my friends and the judge to know what we contemplate happening. The full programme plainly we cannot set out because without a crystal ball we will not know at this stage what information the commission

may receive. However, at this stage the position seems to be this: as we understand it what is contemplated by the act is in the nature of a three stage proceedings. The commission is required by section 5 to inquire and advise the Parliament where any conduct of the judge has been such as to amount in its opinion to prove misbehaviour within the meaning of section 72. Before I proceed to the next remark I should, of course, remind the commission of subsection (2) of section 5, that in carrying out its inquiry the commission shall consider only specific allegations made in precise terms. One of the difficulties with this unique proceeding is that the commission has not been required to inquire into any specified rather than specific matter. In other words, in a sense the inquiry is at large and we have to make at some stage an assessment of precisely what matters the commission is to inquire into. Because no specified allegations are to be inquired into, someone has to make a decision which aspects of conduct can be reduced to specific allegations.

We accept that primarily at least that function must be performed by counsel assisting the commission. We accept that we are to be the filter through which material supplied to the commission is to be then produced in the form of specific allegations. That as we follow it would be the first stage of the commission's proceeding.

Now, the second commences with a series of particulars of specific allegations which would be supplied to the judge and his counsel and in that second stage it is then for the commission to consider whether under section 6(1) there is evidence of misbehaviour sufficient to require an answer. As we understand it, that is a decision which the commission has to make upon evidence that would be admissible in a proceeding in a court under section 6(2). If the commission does conclude under section 6(1) that there is evidence of that kind, then the third stage of the inquiry would be arrived at which is that the judge may be required to give evidence before this commission and plainly enough that would include providing the judge and his counsel with an opportunity of calling evidence other than evidence to be given by the judge himself.

Now, at some stage in the second part of the proceeding, either at the outset, certainly before the end, the commission will have to address its mind to the question whether a specific allegation is capable of amounting to misbehaviour within the meaning of section 72 of the Constitution. That leaves the question what material the commission should see and when the commission should see it. I should say at this stage

that the members of the commission have received certain public materials and I propose to identify them now for the assistance of my friends.

Firstly, members of the commission have the Parliamentary Commission of Inquiry Bill, 1986; secondly the explanatory memorandum to that bill; thirdly, an extract from Hansard for the House of Representatives on 8 May 1986 which includes the second reading speech; fourthly, an extract from Hansard for the Senate for the same date, that is 8 May; fifthly, members of the commission have the report of the Senate Select Committee on the conduct of a judge which was a report given in August 1984. That was a public document and it includes the opinion given by the Solicitor-General on the meaning of misbehaviour in section 72 of the Constitution. Sixthly, the commission has the report of the Senate Select Committee on allegations concerning a judge, again a public document given in October 1984. Seventhly, the commission has the first volume, the public volume of the report of the Royal Commission of Inquiry into Alleged Telephone Interceptions, that is Mr Justice Stewart's report. Next the commission has - - -

SIR G. LUSH: Could you give us the date of the Stewart Report, Mr Charles?

MR CHARLES: I think that is 30 April 1986. Next there is an article contained in The National Times of 9 to 15 May 1986 which was headed Questions Lionel Murphy Should Answer. I should say that although my understanding is that members of the commission have had these documents, it is not clear to me at the moment whether members of the commission have read any of these documents and my friends may wish at this stage to ascertain whether any of these documents have been read.

SIR G. LUSH: I think perhaps each of us had better speak for ourselves, Mr Charles. I received all those documents physically in Melbourne last Wednesday but I handed them back for transfer to a different place. In the meantime, it was reported to me that you had had discussions with Mr Gyles who wanted to submit that they should not be looked at and the result of that was that the documents were not ransferred to me for perusal. I have not looked at any of the reports or the newspaper article to which you refer.

SIR R. BLACKBURN: I have read the act, the explanatory memorandum and the Hansard extract but I have not read any of the other material.

THE HON. A. WELLS: I read the bill, the explanatory memorandum, the Hansard extracts and I began to read the article from The National Times but in the middle of it I received

(Continued on page 7a)

the telephone call. I immediately parcelled all the material up and put it away.

MR CHARLES: If I can then turn to the question of what material the commission should receive and how it should receive it and enable my friends to deal with the views put forward, it seems to us that at least three views are open. Firstly, either the commission should look at and read all materials submitted to the commission when it is received or, secondly, the commission should receive the specific allegations drafted by counsel assisting and then receive all material that has been passed to the commission and read that material, or thirdly, the commission should receive specific allegations and then only receive such material as is relevant to those specific allegations.

(Continued on page 8)

Our submission is that the third view cannot be right, for this reason. Counsel assisting are not the commission. Plainly enough, we would say if the commission disagrees with a decision made by counsel assisting not to raise a specific allegation for consideration, we would say the commission is entitled to require counsel assisting to put forward that allegation and call any evidence there may be that bears upon it.

Now, we would say that if the commission did not see the material received by the commission, then the commission could not perform that task and, as we understand it, the commission has that task of deciding what specific allegations it must consider. If the position were otherwise we would submit that the views of those who drafted this legislation would not be given effect.

If that view be right, that the third position cannot stand with this legislation, as between those two possibilities, that is, that the commission should see material when received or that it should only receive it after specific allegations have been put forward to the commission, we would say as to those, time would be saved and no detriment would be suffered by the material being seen by the commission when it is received.

May we say that on any view we accept that the legislation requires that natural justice apply in these proceedings and on any view material that the commission receives would, subject to very few exceptions, be required to be supplied to the judge and those representing him, and the only exception I could contemplate at the moment is something which might require the identity of an informant not to be made known, but I know of no basis for expecting anything of that kind to arise.

Prima facie we would accept that at the least the judge and those representing him should see the material before it is made available to the commission and if the commission were to take the view that the first position we have put to the commission this morning is the correct one, we would propose the course of action which involved making available to the judge and those representing him material at a specified time before it was made available to the commission to enable objection to be taken, if that course were desired; I say for the purpose of argument, 48 hours before that course were taken.

As we have put before, the commission in effect has to decide what specific allegations it will consider. We say it is only by reading the material supplied that the commission can decide what to consider and whether

we have correctly identified the specific allegations the commission should consider, and we would submit that in taking this course the commission would not be in breach of section 5(2) because we would say simply by reading material supplied to it the commission is not in breach of section 5(2). I expect that my friends will take a different view and want to urge that upon the commission but in our submission that is the course which the commission is entitled to follow and of the first two positions we put, we submit it would involve some saving of time, but I accept other views may be open.

If the commission pleases, I do not know at this stage if there is anything further that I want to deal with in relation to programming. If may help to crystallise the argument in relation to the documents to be supplied to the commission if one were to take by way of example the second confidential volume of the Stewart Report and if one were to take that example, I have copies here which I am in a position to tender today. My belief is that my friends have for some time past had copies of that report and might therefore at this stage be able to deal with it if they wish, but I simply raise it by way of example.

Unless there is anything further I can say at this stage, if the commission pleases. I apologise, there is one further matter that should be raised at the very outset. I have raised with my friends and I raise now with the commission the question whether the commission should advertise for complaints. Now, in our submission, it is desirable that there be some advertisement. This course of action was contemplated by those who framed this legislation. In particular I should draw to the attention of the commsision what Senator Gareth Evans had to say in the Senate debate at page 1703 of the Senate Hansard. The senator referred to this question in these terms:

> The mechanism by which we envisage this will occur is essentially through the filtering agency of the counsel assisting the commission. . . . . rather than open ended investigation into topics or lines of inquiry that might appeal to the commission.

Likewise, the opening words of the second reading speech quoted on the left column of page 1687 contain these words:

> It will be noted that the terms of reference provide . . . . . that all allegations be dealt with one way or the other.

That is a reference to what the Attorney-General had to say at page 3443 in the debate in the House of Representatives. In our submission it is clear that the intention of the government in this legislation was to deal with any allegations that may exist at the present time and have them disposed of one way or the other. As far as we are concerned, it seems to us that the only way in which that can be done is ensuring that allegations come to the notice of the commission and the proper way of achieving that is by an advertisement.

I have given my friends a copy of an advertisement that we contemplate if the commission chooses to take this course and may I hand a copy of that advertisement now to the commission. It may be a question of the date if the commission pleases because I am told that there may be difficulties in any event in placing an advertisement by the end of this week and we would have thought that there ought to be a period of at least 14 days provided between the date when the advertisement is placed and the time by which it is said that submissions should be received. But that is a matter which if the commission decides to embark on this course could be considered later when it is known what arrangements can be made for advertisements. I have nothing further at this stage.

SIR G. LUSH: Thank you. Mr Gyles?

MR GYLES: Before turning to the particular points which arise for decision it may assist if I put some submissions as to the statute under which the commission is operating. Now for this purpose, of course, we or everybody must accept the constitutional validity of the bill, of the act, and in these submissions I make that assumption. I do not mean to say more or less than that.

Assuming its validity it must be because it is supported by the incidental power and it can only be incidental to section 72 of the constitution. Now I leave aside any constitutional problems which may arise by reason of that analysis. Section 72 of the constitution provides a mechanism for removal of federal judges. It is a mechanism operated by the Governor-General in council upon an address from both houses of parliament. Now the commission will be aware that in relation to federal judges the Australian constitution has, or did fundamentally alter the tenure of a judge. Up until then the precedent was for there to be - and I do not purport to give the commission a sort of a potted constitutional history but merely to summarize the position - that as at that time a judge could normally be removed either by the Crown upon breach of condition of tenure, such as good behaviour - in other words misbehaviour was sufficient to permit removal. The other alternative was removal by address from both houses without there being any necessity to assign a reason.

What our constitution does is not to choose either of those alternatives but to combine them so that the only method of removal of a judge, a federal judge, is by the Governor in council - that is the employing employer if you like -

but only upon address from both houses of parliament and only for named causes. Not only was the relevant named cause so far as this commission is concerned misbehaviour, it is proved misbehaviour. Now that phrase had in our submission plainly at the time of the framing of our constitution a received construction which was well-known not only in relation to judges but other officers of the Crown, which so far as the behaviour of a judge off the bench is concerned, it could only be constituted by conviction of a crime which was inconsistent with continuation of judicial office. Now I am putting these as assertions at the moment, your Honours; I do not suggest to the commission that it is appropriate to hear argument about this matter today, I merely wish to outline the way we see things.

Now to that received construction was added the word "proved". In the case of behaviour as it were off the bench, or away from judicial behaviour as such, the word "proved" merely reinforces the existing position that you have to prove by conviction. In relation to all misbehaviour it adds special force to the view that the misbehaviour must have been established as existing misbehaviour.

It will be our submission in due course that until this current controversy arose nobody had ever suggested that the conduct by a judge in his private life, in his private capacity could ever serve as the basis of removal for misbehaviour unless it were a conviction. Certainly the power to remove on the address of both houses could have been activated for all sorts of reasons without the necessity to prove misbehaviour of any sort; but the removal from office, nobody had ever suggested so far as we can tell - and we may be shown to be wrong later - but so far as we can tell nobody has ever suggested that that can be done otherwise than by conviction of a breach of the law of a serious enough nature for it to be incompatible with the continuation of judicial office.

We say in short that this whole controversy has got very seriously off the rails in the last couple of years and under the exigencies of a situation where for one reason or another, which it is not part of my function at the moment at least to inquire into, a series of people with the motive to harm my client have raised what we will be putting to the commission is a complete furphy and a red herring which should never have been allowed to intrude upon the deliberations of anybody on this topic.

The question of what judges may or may not think is acceptable social behaviour and the question as to

what one or other judge or any group of judges or ex judges may think about a private judicial behaviour is utterly irrelevant to the question which arises under section 72 of the constitution. And if we be right in that submission then the sooner that position is recognized by all here, the better; because this commission will be going off on a completely wild goose chase.

Now I can also make some other things clear about the attitude we take to this commission and this bill, this act. Let there be no misunderstanding, Mr Justice Murphy does not seek any inquiry into his behaviour. He says, and we will say for him, it is utterly irrelevant and a gross interference with one's right to live one's life according to one's own standards. The standards of private morality, the standards of judicial etiquette are quite foreign to the constitutional question as to whether a judge, a federal judge shall be removed, and lies at the heart of judicial independence. Any writings upon judicial independence will tell this commission the tenure lies at the heart of it.

Now he is not seeking any opportunity to clear his name; he sees no need to do that. And further than that, it is our submission that any approach to this commission which encourages people to come forward and to defame the judge is not to be countenanced. This commission is not a committee of the house, as one of the submissions of my learned friend seemed to suggest. Whatever Parliament may or may not decide to do in exercising its role is for it to decide; and what individual members of Parliament may say or think would be interesting so far as that is concerned. This is a statute which sets up this commission to carry out a function, the limits of which are laid down by section 72 of the Constitution. They are laid down both as a matter of construction of the act simpliciter; and, secondly, as a matter of construction of the act when one takes into account the constitutional underpinning which must be assumed for the purposes of this argument.

In short it is our submission that this commission is not empowered by Parliament or by the constitution to invite or receive any allegation which does not amount to an allegation of misbehaviour within section 72 of the Constitution. And my client does not in consent or authorise any action by this commission or those engaged by it to invite any step which goes beyond that which is strictly necessary by the commission for the performance of its function.

And we do not agree to any abrogation of any right of privilege which Mr Justice Murphy has as a citizen or as a judge. He objects to any investigation into his affairs or his life which is not strictly necessary for the performance of that function.

Now we submit that that is a consequence of the way the act works. May I just turn to look at it a little more closely in view of the questions which need to be assailed. My friend has drawn attention to section 5 of the act which carries with it a dilemma, I suppose. The words of subsection (1) of section 5 do not within themselves carry any limitation. Section 5(2) however, provides a clear indication of the manner and method by which the commission shall carry out its function.

Now it would not be correct in our submission to take the view that Parliament would intend to permit an inquisition into the life of a person simply because he happens to be a federal judge; so that his whole life and all of its conduct can be examined by an outside body of three citizens who then report to Parliament. That would be an extraordinary power to invest and would be in our submission totally opposed to the traditions of judicial independence and totally opposed to the constitutional arrangements which govern the federal judiciary of this country. That is not a construction of the section or of the act which would meet favour in our submission regardless of the views of individual politicians speaking in Parliament under the pressure of public opinion inflamed for all sorts of motives. What individual politicians may say to get themselves off a hook does not in our submission give any guidance as to what an act of Parliament means when it deals with the fundamental question of the independence of the judiciary and the rights of the judge as a private citizen.

When the act says that "the commission shall consider only specific allegations made in precise terms", it mean in our submission precisely what it says. And the fact that that may give rise to a difficulty of identification does not mean you read it down or read it out of the act. I accept, of course, immediately the question is then to be asked, which allegations? I do not shrink from the fact there is a problem there, but what I do submit is that the commission cannot ignore section 5(2) or read it in a way which permits it, sitting as a commission, to consider anything anybody would like to say about Mr Justice Murphy with a view to it selecting a matter for inquiry.

So that we, to summarize the points which do arise, are firmly opposed to any advertisement. The submission of any advertisement calling for - the form which has been proposed calls for submissions; that is clearly in our submission inappropriate. We will return later if the commission is against us to make some suggestions about that. But to advertise for people to come forward to this commission is to invite persons to come forward and defame Mr Justice Murphy under cover of this act. It would presumably, in the form we have been given, permit anybody to come forward with anything they would like to say about Mr Justice Murphy at any stage of his life or times, whether or not it had any connection with section 72 of the Constitution; and whether or not it had been identified as a specific allegation at the time this act was passed. We suggest that whether as a matter of law or of common sense there should be a limitation to such allegations.

SIR G. LUSH: Why do you say specific at the time when the act was passed?

MR GYLES: I am about to put that as a matter of common sense and as a matter of construction of the act it would not be expected that the Parliament would authorize any allegations which anybody would now like to make in specific terms of Mr Justice Murphy to be investigated. The alternative view is to say that it referred to specific allegations which had been made in precise terms at the time the act was passed; that is the question of construction there. We say that - - -

SIR G. LUSH: I hear what you say about the views of politicians on the subject, Mr Gyles, but it is pretty clear that Senator Evans did not take the view which you are now putting to us.

MR GYLES: I appreciate that but I have said what I have to say about that and I do not wish to expand on it. So that the first control, if I could put it that way, is to say the allegations must have been in existence to warrant this act. It is an extraordinary act and it has extraordinary consequences and it is quite open to that construction; it does no violence to the language. That would be our first submission.

Secondly, we submit that on any view the allegations must be such as to be allegations which, if proved, would amount to misbehaviour within the meaning of section 72.

Thirdly, we submit that when section 5(2) says, "the commission shall consider only specific allegations made in precise terms", the commission has no warrant, no statutory warrant to as a commission go outside those specific allegations; hence the dilemma. The resolution of that dilemma lies in the mechanism of counsel assisting the inquiry. Now this statute expressly, as your Honours know, provides for the engagement of counsel assisting by section 15 and - - -

SIR G. LUSH: Can I take you back for a moment - I do not think I grasped clearly what are the two horns of the dilemma. Would you state it again, please?

MR GYLES: Yes, the dilemma lies in the fact that the Parliament does not itself list the specific allegations. On the other hand it says that "the commission shall consider only specific allegations made in precise terms". Thus there is a problem of identification of those allegations which we say the commission should not take part in because the act says they "shall consider only specific allegations made in precise terms".

SIR R. BLACKBURN: Surely the commission may have to decide whether any given allegation answers that description, whether it is or is not a specific allegation.

MR GYLES: If the choice is between having this commission placed in a position where it receives as a commission every complaint or allegation made either heretofore or heretoafter on the one hand, and on the other hand leaving it to counsel assisting to consider that material and frame the allegations, we submit the latter is the correct way of approaching the problem both as a matter of law and as a matter of practice because the first is really unthinkable.

I know it is my friend's primary submission, but it is unthinkable that there should be a commission set up receiving all of the information and yet we know from the statute that it may only consider specific allegations made in precise terms and it may only make findings upon admissible evidence. In addition to the implications which flow both from the constitutional background and the sections of the act, particularly sections 5(2) and 6 - perhaps I should say a word about 6 separately. It is not just the fact that under 6(2) the commission shall not make a finding except upon evidence would be admissible in proceedings in a court.

At the end of the second stage, if I could adopt my learned friend's analysis, what the commission must do is decide that there is evidence of misbehaviour within the meaning of section 72 sufficient to require an answer. The commission has given the judge particulars in writing of that evidence. That must be, by virtue of subsection (2), evidence admissible in a court of misbehaviour within the meaning of section 72. This is not a procedure whereby this commission can say, "Well, what we can do is to bowl up to Parliament, as it were, all of the findings of fact which might be relevant whichever view one takes of section 72 of the Constitution". The act does not permit that course of action. It is not that simple, I am afraid, with respect.

What this commission is required to do under section 6 is to say at the end of the second stage "We are of opinion that there is evidence of misbehaviour sufficient to require an answer". That obliges the commission to have by then formed a view as to what misbehaviour within the meaning of section 72 of the Constitution is, and, having done that, say there is admissible evidence of

facts which would come within that definition. That section, together with section 5 subsection (2) and, of course, 8, which talks about its report, ultimately, findings of fact and its conclusions, point very clearly to a curial type of process.

This is not a commission which is of the traditional inquisitorial royal commission mould. Even if it were, of course, we would submit that this type of inquiry is appropriate to be governed by what might be called the Sir Charles Lowe rules which I am sure the presiding member will be familiar with. They are referred to in 24 ALJ 386, two articles written by Mr Justice McInerney as he then was. If I may just read a short passage from page 387 in the left-hand column from Sir Charles Lowe in the communism royal commission:

> Generally speaking where a royal commission is appointed counsel are appointed to assist that commission. The commissioner himself has nothing to do with the discovery of evidence, with the assembling of it or with the presenting of it. These are matters which are committed to the counsel assisting the commission.

Of recent years a number of royal commissioners have chosen not to follow that model of royal commission and have adopted an active inquisitorial role themselves. There are two views as to whether that has been wise or unwise but we do submit that in the context of this statute and these circumstances that the guidance Sir Charles Lowe gave in that royal commission would be persuasive and instructive of this commission. That does resolve the difficulty in which the commission is placed.

Looking at it in a practical level, if the first of Mr Charles alternatives is adopted, that is that all material submitted to the commission goes to the commission subject to us seeing it first, then it is impossible, in my submission, for the commission to thereafter adequately or satisfactorily play the role which Parliament must have intended it to play, that is, to bring in a report based on the curial model so far as is possible where the identity of the inquirers, being judges or former judges, would indicate again that what Parliament is expecting is a dispassionate assessment of facts and law.

We submit that would be very seriously hampered if the commission is receiving material as the

inquiry goes on, much of which - indeed, we would say all of which - will ultimately be found to be irrelevant either because of a view of the Constitution or because of the necessity to have it proved by admissible evidence. It would be a very unsafe thing and we would feel very uncomfortable, with respect, if the commissioners were to be receiving all of this material as it came in. We submit it is the role of the counsel assisting the commission to identify the allegations and then lead only that evidence which would be admissible in a court in support of it.

It is only by that model that this commission would be able to carry out, in our submission, its functions in a way satisfactory to all parties. Let me test it in this way: of the material which has been received so far, first of all the Senate Select Committee reports are certainly not material which this commission as a commission should have. Of course, all of the members of the commission have come here having read material from time to time as members of the public, but as commissioners those other inquiries can be had regard to under section 5 only in the context of considering any particular allegation or any precise allegation. They roam over all sorts of matters which will, we trust, never be the subject of an allegation before this commission.

The National Times article and the Stewart Report may provide for counsel assisting the commission the means of identifying specific allegations heretofore made in precise terms. It is then for counsel assisting to determine whether there is any evidence which would support those allegations. Furthermore, of course, the Senate Committee reports would infringe section 5 sub-section 4 which exclude the matters the subject of the criminal trials except under the limited circumstances there set out. However, there is a fairly stark choice to be made here which the commission I am sure is aware of, that either the commission adopts the curial model or it does not. If it chooses the submission that has been put to it, it will have rejected the curial model and what follows from that. We will be an inquisition into the whole of the life of Mr Justice Murphy with the commission receiving all that information. It is no use thereafter anybody ever saying that this was conducted in a fashion which was consistent with the normal way a court would look at it. It is a stark choice. From then on, if my learned friend's submission is accepted, it will be a statutory inquisition into the life of a citizen who happens to be a Federal Court judge with all that goes with it.

What this brings me to is what I hope is a practical suggestion. The course of advertising and then having the members of the commission receive either as it comes in or in a later form linked with allegations, material which is not admissible and which may roam into all sorts of factual areas is not something which the commission in my submission should embark upon without exploring the alternatives fully. The significant control mechanism in all of this, as I have earlier said, is the link with section 72 of the Constitution. If the submission that we put about this is correct or, to put it another way, if the commission forms the opinion that our submission is correct, then that really will be in practical terms the end of this matter and a very good thing too because the commission will have had the opportunity of considering it and tendering that advice to Parliament.

If it is simply true that the judge's behaviour away from the bench is no concern of the Constitution unless he is convicted of a serious offence, then the sooner that is told to Parliament the better and the sooner what we submit is a red herring is put aside the better. My friend has referred to the opinion of the Solicitor-General which has received some publicity. If his view is correct which is that off-bench behaviour is only relevant if it is a proven breach of the law of sufficient seriousness to warrant removal, then that again will place very serious limits upon the nature of this inquiry and very properly so in our submission, of course. It is only if one puts aside that approach and says that misbehaviour is what somebody may think is misbehaviour, a sort of Alice in Wonderland misbehaviour that one has the

problem of trying to sort out the complaints and allegations.

What we urge upon the commission is that it set aside in the very near future, next week or the week after, whenever is convenient, sufficient time to enable there to be a debate about the question of what is proven misbehaviour under section 72 of the Constitution or, I suppose, what is the meaning of sections such as sections 5, 6 and 8 of this act. If our view is accepted and that really provides a clear course of conduct from there on and unfortunately this statute does not enable the commission to avoid that responsibility in due course; if it has to be accepted in due course, why not accept it now because it is absolutely plain that our submission about it will exclude any complaint that we have ever heard. Mr Justice Murphy so far as we know has never been accused of improper judicial behaviour and he has never been convicted of anything, let alone serious crime. If that be right, then what Parliament is interested in is the view or the opinion of this commission on that topic. It would be quite wrong, in our submission, to leave that for a later day, allowing a statutory inquiry situation in the meantime.

SIR G. LUSH: There are real difficulties, Mr Gyles, in writing a chapter of a textbook on the subject without knowing specifically what is being decided by what is written. There is a high risk of omissions and a high risk of irrelevancies.

MR GYLES: If I may say so, in what respect? The view we advance about section 72 of the Constitution and the view that will be consistent with this so-called Solicitor-General's view - they are not academic in any sense at all because before one could understand what allegations you should be looking into, you must understand what it is at the end of the day. You do not have a charge without knowing what the crime is and just as there may be some risk if you look at a question of law first that you may be looking at academic questions, there is a much greater risk of wasting time and interfering with privacy and all those other things if you hear all manner of factual allegations without coming to a view as to whether they are potentially within the area or not. It is just a demurrer point, that is all, which the commission is well siezed of, on a point of law; are the allegations within the statutory framework?

HON A. WELLS: Would you allow the insertion of the word potential in the formula that you place before us or some equal word? In other words, reasonably capable of being so construed.

MR GYLES: I do not think we do although I quite see what is being put to me. It is a difficulty because we do not in any fashion consent to any extenison of the area into which this commission may roam and we do not consent to any

examination of the life of Mr Justice Murphy unless it be proved misbehaviour. In other words, if there is a factual situation which is alleged which falls outside the statutory definition, this commission has no business looking into it. That is the submission we make and that is why it becomes factually and legally essential for the good of everybody here that this be sorted out early otherwise this commission is going into matters which may cause enormous damage with no statutory authority. We do not consent to that.

SIR R. BLACKBURN: What about the wholly theoretical possibility, perhaps an extravagant hypothesis that in response to the advertisement somebody may make an allegation of conduct on the part of your client which would amount to a criminal offence?

MR GYLES: In those circumstances the commission would say there has been no conviction. I think the point which would throw up the difficulty would be if somebody came forward with an allegation about misbehaviour on the bench which has not heretofore been made and we would say that the statute would be construed as excluding X later allegations but if that be wrong, if there were an allegation of misbehaviour on the bench, then that is the sort of thing which this commission may have to look into itself.

SIR R. BLACKBURN: So that only a conviction proves misbehaviour and this commission has not got the power - - -

MR GYLES: Convict.

SIR R. BLACKBURN: Or what I was going to say was decided that something is proved.

MR GYLES: That is so. Now there is an alternate view which would be that if the test is a breach of the law then the commission will inquire as to whether an allegation is a breach of the law and of a sufficiently serious nature to warrant removal. Which is the correct view makes an enormous difference in practice as to how things should proceed, in our submission. If we are correct then simply there is no power in such an extra judicial and extra parliamentary commission to decide technical guilt.

SIR R. BLACKBURN: It was not the intention of Parliament that we should be so empowered?

MR GYLES: This statute cannot travel beyond the Constitution. It does not purport to and indeed if one reads, as I have endeavoured to read, sections 5, 6 and 8 together, there can be no doubt that this commission is being asked to find facts and express opinion about proved misbehaviour, not on a range of possibilities. This is perhaps the best way of answering it, it is not being asked to inquire into conduct which might possibly be judicial misbehaviour.

It is being asked to inquire into conduct which would be judicial misbehaviour in the opinion of the commission.

If contrary to all of that it is proposed to advertise, we would make suggestions about the form of the advertisement. Rather than making submissions, a person should submit evidence of proved misbehaviour within the meaning of section 72, verified, we would submit, by a statutory declaration. The model of verified complaint, as it were, comes from the Medical Tribunal in New South Wales and complaints under the Legal Practitioners Act and also there is power to insist that they be verified. We submit that is a sensible course to take.

SIR G. LUSH: This is really a question of the drafting of the three lines beginning "any person", is it not?

MR GYLES: That is so, Mr President.

SIR G. LUSH: The draftsman has gone some way towards meeting your suggestion by the passage stating the facts on which the submission is based.

MR GYLES: Yes. The only other thing I think I should add is that if our model is to be chosen and counsel assisting do the sifting, we would submit that we should have access to the material that they have access to, certainly if there is any proposal that there be an allegation proposed, then we should have an opportunity of seeing the material and endeavouring to persuade counsel assisting that it is not an appropriate allegation.

SIR G. LUSH: The material that Mr Charles listed early in his submissions is all in your possession currently, is it not, except there are indications in Hansard, or perhaps I have got the impression from other sources that the judge received at least parts of volume 2 of the Stewart Report.

MR GYLES: He was given extracts from volume 2.

SIR G. LUSH: Have you received the other documents to which Mr Charles referred? The bill, the memorandum and the Hansards, they are easy matters.

MR GYLES: Yes.

SIR G. LUSH: The reports of August and October 1984?

MR GYLES: Yes.

SIR G. LUSH: And volume 1 of the Stewart Report?

MR GYLES: Yes.

SIR G. LUSH: I think we can dispense with The National Times for the purposes of these proceedings.

MR GYLES: It follows from what we have put that we say that should all be put to one side by the commission. Mr Charles does his work and in the meantime the commission will sit and hear submissions as to the proper construction of sections 5, 6 and 8 of this act. Linked with that, of course, will be the underlying question of what section 72 means and there be no advertisement in the meantime and that there be no press statements about what has been going on.

SIR G. LUSH: Thank you, Mr Gyles. Mr Charles, do you wish to add anything?

MR GYLES: There are some short matters, Mr President. We would submit that it would not be helpful immediately to conduct a hearing for the purpose of arguing what is proved misbehaviour. We accept that that argument must occur at a fairly early date but it is our submission that it would not be helpful to do it before one has at least the context of a series of allegations in which to see the argument as to what is misbehaviour and what is not, otherwise the commission will be faced with - - -

SIR G. LUSH: It is like having a demurrer without the pleadings.

MR CHARLES: Yes, indeed, a large exercise writing a book on those matters which might or might not become misbehaviour. In our submission the desirable course is to see what specific allegations might be considered after they have been framed and then argue whether they are capable of amounting to misbehaviour within section 72 or not. As to the question of advertisement, it is our submission that really that is the only way this commission can operate. If I may say so, we recognize the embarrassment to the judge. There is an unfortunate consequence of what is proposed.

In our submission it is unavoidable having regard to the legislation. If we do not take that course it is submitted the commission is not doing what Parliament said or intended. There are a number of authorities, Clough v Leahy, McGuinness's case and the BLF case which, in our submission, demonstrate that anyone may inquire; one does not have to look at the specific limits of section 72 of the Constitution for that purpose.

This commission has been requested by Parliament to inquire and advise it on certain matters. Even if the very limited definition of misbehaviour that my friend has referred to were correct, that would in itself involve later advertisement, in our submission, because one would be having to ask whether in effect people wanted to make complaints that the judge had, say, acted on the bench in such a way as to produce evidence of misbehaviour.

In our submission, what is contemplated by the advertisement is after specific reference to proved misbehaviour within the meaning of section 72, we recognize that it may provoke some complaints by people in circumstances which are wholly vexatious. Obviously it will be up to us to filter out those wholly vexatious complaints and leave standing before the commission only those which may arguably relate to matters within the ambit of section 72.

It is our submission that given that Parliament has required the commission to act as quickly as may be, in the circumstances the desirable course is to put forward some such advertisement as that which has been provided to the commission, and to do so as quickly as possible.

In relation to the question of the manner of proceeding, it is a matter for the commission whether it is prepared to receive material at the present stage or whether it would prefer to wait to some later time to see the material. We have proposed what, in our submission, is a procedure which protects the judge which gives effect to requirements of natural justice by indicating we would not supply the commission with material until it had been made available to the judge and his advisers and the time had passed to enable comment to be made upon it or, if necessary, argument directed to it.

SIR G. LUSH: Do we not need to distinguish between two things in relation to this, the formal material which you listed earlier and what I may call the informal material, if any, which may come in from now on?

MR CHARLES: It could, Mr President, either be material which was confidential or be material which was simply not public knowledge by virtue of the fact that it had been received by the commission secretary or by counsel assisting. It may be that my friends would argue that there is no real distinction, that something which may be public knowledge such as the report of a committee also is in precisely the same form because it is not properly before the commission until it has been formally tendered.

Now, we would submit that it remains the commission's function ultimately, not that of counsel assisting, to decide what specific allegations are to be considered and that the commission can only perform that function by itself seeing the material that is received. We would submit that does not involve the commission departing when it reaches the second and third stages from its proper curial function because one can see frequent analogies with proceedings in court in which judges are permitted, for example, to look at depositions before trial notwithstanding that when the matter actually comes to trial various parts of that material will not be before the jury.

SIR G. LUSH: We have not got a jury, so the analogy is not complete.

MR CHARLES: The analogy is not complete but we would submit that the legal system recognizes that judges are able to put such matters out of their mind when they decide they are not relevant. Judges will frequently for the purpose of proceedings need to look at lengthy documents to see whether or not they are relevant and proper to be admitted or not. But this is an inquiry and the commission is required to investigate by section 5 the conduct.

As my friend says, the dilemma is that the Parliament has not condescended into particularity. Accordingly, it is a matter for the commission to decide which specific allegations it must consider. As we have put to the commission, we accept that the primary function is ours but ultimately the decision must be that of the commission as to which allegations it proposes to consider.

Unless there are any further matters, there is only one concluding remark that we would wish to make, and that is the course proposed by my friends in effect will convert us into prosecutors which is a role we do not accept we are intended to perform, and the commissioners into a jury. What is required of this commission is the formation of an opinion and the giving of advice

and we say that is quite a different thing and in performing that function we are merely here to assist it. If the commission pleases.

SIR G. LUSH: Thank you, Mr Charles. Mr Gyles, there are one or two provisions of the act that I would like to hear you on. It may be said that these are - for all I know truly said - that these are provisions which have been imported into this act because they are standard in similar legislation, but that does not mean that they are to be given their effect. If you look at section 12 which deals with search warrants, section 12(3)(c) refers to the carrying out of the search and the seizing of any things. The requirement is that those holding the warrant should deliver things so seized to the commission.

Section 13 deals with either obtaining or obtaining access to National Crime Authority documents and (1)(a) uses the expression "to produce to the commission". When we go over to section 18 we find it stated that the commission or a member or an authorized person may inspect any documents or other things produced before or delivered to the commission and (c) handle the documents, (b) and (c) handle the documents in particular ways.

There may be difficulties in saying that it is an adequate or complete use of the act to say that the commission should delegate, so to speak, the examination of the documents to counsel assisting and accept without query their appreciation of them. The express power is given to the commission there to inspect the documents that come in and that power is given to each commissioner.

MR GYLES: Mr President, the same thing may be said, may it not, of a court where a court issues a subpoena or summons, the documents are produced to the court but the judge does not look at them. In precisely the same way this statute may provide a residual power to issue search warrants or have documents produced for inspection, but that would not provide any guidance, that would not provide any statutory indication that this commission would be expected to do more than await the tender of it in the course of considering a specific complaint as those provisions, as I have said, first of all are neutral as to what should be done with the document, in the same way that production of a document on subpoena is neutral and, secondly, they cannot be used to change or alter the correct meaning of section 5(2).

SIR G. LUSH: Well, that hangs in the balance, they may be a grand way of - - -

MR GYLES: Yes, well, that is the answer I make to the commission.

SIR G. LUSH: Thank you. Do you want to say anything about that, Mr Charles? The commission will adjourn until 2 o'clock this afternoon and at that time it would hope to deal with the submissions which we have heard this morning.

LUNCHEON ADJOURNMENT

SIR G. LUSH: Two matters have been the subject of preliminary discussion before the commission. The first is the question whether an advertisement inviting submissions to the commission should be published and the second is whether members of the commission should peruse documents already in the possession of the commission, being reports of previous inquiries. As to the first question, that of the advertisement, counsel for the judge objected to the suggested course. They argued that the acts must be incidental to the investigation of misbehaviour under section 72 of the Constitution, to be valid at all. they indicated that they would at an appropriate stage submit that acts other than acts in office which had not led to criminal conviction cannot be misbehaviour within section 72 and therefore it would be useless to invite commentaries upon the private life of the judge and in any case to do so would go beyond anything which the act was constitutionally capable of authorising.

For my part I am unable to accept this argument. The advertisement may conceivably attract allegations of different kinds, some relating to matters connected with judicial office and some not. The act provides for the elimination in the first place of any allegations which are not sufficiently particular, a process which may be compared to striking out a pleading ~~and~~ showing no cause of action. Those which survive this process will proceed to what counsel assisting the commission called the second stage, which involves ascertaining whether there is a case to answer.

At some point in this stage the decision on the meaning of proved misbehaviour in section 72 will have to be made, but that decision will be more realistically made and more pertinent to the actual facts than if it were made at the present stage when it would in effect be made in vacuo.

I do not think that the validity of the commission's proceedings can be affected by the fact that an advertisement has the potential to attract material which may be discarded at one or the other of these stages. Section 5 requires the commission to inquire and report. The operation described by the word "inquire" may be divided into (a) the collection and (b) the consideration of ~~allegations~~. I think that the commission should proceed at once with collecting information and for that purpose should advertise. It is not really to the point that we may receive some useless information.

I suggest that counsel might discuss the terms of the draft advertisement in the hope that agreement on it might be reached. In making that suggestion, of course, I preserve to counsel for the judge their position that the advertisement should not be published at all. I

indicate for my part, and I think in this particular matter I can speak for the other two members, we think there is substance in the suggestion made by counsel for the judge that statutory declarations might be required.

As to the second matter, the perusal by the members of the commission of materials being reports of previous inquiries, in my view the task of the inquiry, in the double sense which I have attempted to define of collecting and considering material, is entrusted to the commission. It was argued that counsel assisting the commission should perform the task of collecting and sifting and the members themselves should not study the materials until counsel assisting frame particulars which satisfy section 5 subsection 2. It was argued that otherwise the commission cannot properly perform its function of consideration which is essentially a curial function. Again, I am unable to accept this argument. There are substantial curial aspects of the commission's function but it is an administrative commission of inquiry. Jurists have always criticized the combination of some of the functions involved in the inquiry and report, but there is nothing exceptional about the form of the present act as I construe it in that respect.

Counsel assisting the commission are given no responsibilities under the act nor are they given the role of prosecutors. It is the commission's responsibility to make the inquiry with counsel's assistance. Consistently with this members of the commission are given authority to inspect documents delivered to the commission, see section 18, and to have access to information not in the possession of the commission, see section 13.

No doubt the commission will rely on counsel assisting it to a large extent in this particular area, but it is finally the commission that has to make the report. The commission should therefore be aware of and supervise the collection of information.

I think that for these reasons and in the interests of expediency, since the commission is under statutory instruction to proceed with all speed and since inevitably there will be intervals of delay when matters have to be considered by one or other of the groups of counsel engaged, the most efficient course is for the commission to proceed to the study of this material which is in substance public material already.

There was a matter in this context which was left up in the air this morning and that is the tendering of part II of the Stewart Report. When the giving of this ruling is completed, counsel assisting will be asked what he wishes to do in that regard. In my opinion therefore the result of the two matters debated this morning is this: there should be an advertisement and I hope it would be in terms agreed by counsel; and secondly the members of the commission should be regarded as at liberty to proceed forthwith to the perusal of the two reports of senate committees and part I of the report of the Stewart Commission forthwith.

SIR R. BLACKBURN: I agree with everything the presiding member has said.

HON A. WELLS: I agree, and I have nothing to add.

SIR G. LUSH: Mr Charles, what do you want to do about part II of the Stewart Report?

MR CHARLES: Mr President, I would now wish to tender part II of the Stewart Report. I do not take the commsision to a rule on that question yet - it is open to objection by my friends, as I follow it - but I would simply seek to tender that. I think at the same time I should ask to tender copy of letter and attached schedule dated 25 March 1986 from his Honour Mr Justice Stewart to the judge which is referred to in volume II.

SIR G. LUSH: Would you give me a description of the letter again, please?

MR CHARLES: Mr President, the letter is dated 25 March 1986, it is signed by his Honour Mr Justice Stewart to the judge, and there is appended to it a schedule of seven items in relation to which the judge was invited to reply. I have copies here and at the

moment, before formally tendering them, I wait on any objection that my friends may have.

MR GYLES: I do not have volume II and I do not have the letter myself of his Honour Mr Justice Stewart. I would like to see them.

SIR G. LUSH: I feel myself that - please do not take me as expressing a conclusion but a first thought from the top of the head - I feel myself we had all better read it and then we can hear you when we sit next or at some other convenient time on whether it ought to be cut up into receivable and non receivable parts. Some of it presumably bears on things with which we are not concerned.

MR GYLES: It is just not clear to me at the moment on what basis and to what issue this goes.

SIR G. LUSH: It is material which the commission is invited to use in deciding what specific elements have been made or ought to be formulated.

MR GYLES: As to volume II, I do not have it, we do not have it, we have never seen it, and I would object to the commission seeing something we have not seen. As to the letter to the judge, of course my client has seen it; as it happens, I have not, but that is not important for this purpose.

MR CHARLES: I should say, Mr President, when I moved to tender these documents I was under the impression my friends had all seen these documents and would not have been in any sense taken by surprise. When I said before that we would give our friends an opportunity of looking at documents beforehand, I certainly did not intend to avoid that offer in relation to these documents. If my friends have not seen them, then plainly they should do so before we make any formal tender.

SIR G. LUSH: Very well, Mr Charles. At the moment you are withdrawing your tender?

MR CHARLES: Yes.

MR EINFELD: Can we have copies in the meantime?

MR CHARLES: Yes, I handed them across to you.

SIR G.LUSH: How extensive is that volume, Mr Charles?

MR EINFELD: 188 pages.

SIR G. LUSH: Mr Charles, I would like to fix, if we can, a date by which you will deliver particulars. It is probably asking a kind of sight unseen guess, but I think it is highly desirable that we try to establish some kind of timetable. The time we have is not as

great as would appear because the hearings must stop at a time which allows a report to be written and printed by the end of September. While we have not yet internally in the commission made an estimate of it, I should think at the very latest we would have to get the hearings completed by the end of August.

We are bound to lose a couple of weeks immediately in the sense of not proceeding with hearings. I wanted to use that time to the fullest possible extent in relation to this other extensive reading material. If you look at the constriction at both ends, there is not all that much time to play with.

MR CHARLES: I accept that.

SIR G. LUSH: The sooner the particulars can be given, the better.

MR CHARLES: Mr President, the advertisement, which will of course be subject to change, had contemplated submissions be received on or before 20 June. At this stage we have only, I understand, a small proportion of the material which is going to be supplied us for the purpose of considering what specific allegations may be made. Doubtless more will come in on or about 20 June and that date will stand if we are able to have an advertisement printed by the end of this week.

I doubt, Mr President, whether we could hope to have a satisfactory set of specific allegations anywhere near completion before the end of June. I say anywhere near completion, meaning this, that on the material we have read so far one could frame a number of allegations with specificity, but we would obviously at the present time have no way of knowing what may arise when other material is supplied and whether submissions - whether in statutory declaration form or otherwise - come in. It may be that no submissions will be received, in which case it may be that we will have any allegations we wish to put forward by 20 June.

But if any substantial body of material came in at or about that time, then realistically one would have to say that it would be somewhere about the end of June that these allegations would be finished.

SIR G. LUSH: Is there any unreality in this suggestion: if counsel assisting engaged on this task, the task of examining material and extracting particulars, during the next fortnight up to 20 June, could a progressing set of particulars be given the judge's counsel on 20 June so that they would be able at least to start working on the problem. If you postpone until 30 June the giving of the whole body of the particulars, that means that they need two, three weeks for reasons mentioned in chambers the other day, which may lead to the loss of the first week in July.

If you add to that first week in July another two weeks for counsel representing the judge to consider the matter, we are getting close to reaching the end of July before we have even started. We have got to hear substantial argument on section 72, which undoubtedly will have us reserving and writing for a time. You see, we have managed to sit promptly after being constituted but it does not take much thinking to realize we are almost at once in a time crisis.

MR CHARLES: I would hope, Mr President, that we would be in a position to give a preliminary set of specific

allegations with particulars by 20 June and, depending on the amount of material we receive shortly, we would hope that we would be able to do so. So long as it is accepted that we may have to give other particulars later, I do not think we would have any objection to doing so.

Now, one question that may require consideration from time to time is, suppose my friends were able to deal with the question of whether part II of the Stewart report should be in the commission's hands, say, two days from today, Thursday of this week or something of that kind, it may be desirable that that be dealt with shortly, and that may assist in the question of the basis on which future material is received by the commission. It may remove doubts as to how the commission is going to act in relation to future material received before 20 June.

I should say, if the commission pleases, our understanding is that the most relevant passage in the Stewart report is chapter 2. My friends will see it referred to on page 3. But we should ask the commission to say that the balance of the report does contain material which is obviously confidential in relation to other persons and we would ask that confidentiality be observed of course by our friends in perusing the document.

SIR G. LUSH: I have no doubt that Mr Gyles would be prepared to give that undertaking.

MR GYLES: Yes, that is so.

MR CHARLES: I am grateful to the commission.

SIR G. LUSH: Thank you. Mr Gyles, do you want to make any comment on the suggestion that you should be given a progress batch of particulars in advance of the completion of the whole list?

MR GYLES: Certainly anything that can be done to help us focus our attention on matters is to be encouraged and we would be interested to receive those. Ultimately we would like to have, of course, a reliable set that we can work on. But what we do suggest is that once counsel assisting has decided that they will as it were propose a matter, that we be given that and an opportunity of speaking at least with them about it. That may help the progress of the matter.

SIR G. LUSH: Yes. I would doubt whether the advertisement will produce a great body of material but I do not pretend that I have the atmosphere of the situation and that doubt cannot really be said to be founded on any knowledge.

MR GYLES: Yes. All I can say is we will be glad to receive what we are given and make such use of it as we can.

SIR G. LUSH: Is it possible to fix a date for the next hearing of this kind of the commission?

MR GYLES: As to this issue it may be we can deal with it by agreement with my learned friend; I do not know. If it is necessary to have a hearing - - -

SIR G. LUSH: You mean part II?

MR GYLES: Part II, yes. I see what the contents page is and I see that we have been given an extract of some of it previously. But if it cannot be dealt with by arrangement then any day that suits the commission next week.

MR CHARLES: It may be that if the matter can be dealt with by agreement that should be known, as I understand it, not later than Thursday. If agreement cannot be reached then I gather Tuesday of next week would be a convenient date to my friends. It makes no difference to us which day of next week the matter is considered. We are in the commission's hands, if Tuesday is convenient, if there has to be a further hearing.

SIR G. LUSH: Wednesday the 11th would be more convenient for the commission than the Tuesday. Is there any real objection to that?

MR CHARLES: Not at our end of the bar table, Mr President.

MR GYLES: No.

SIR G. LUSH: Where do we stand about it? Is that sitting to be cancelled if counsel have reached agreement on part II.

MR GYLES: Yes.

MR CHARLES: The only purpose of it, Mr President, as far as we were concerned was to consider the reception of further material before specific allegations have been produced. The only material that we have of that kind that we desire to put before the commission at this stage is the volume II and the letter. It may be we will receive other documents before then but as we have said we have undertaken to give my friends an opportunity of considering material of that kind before we seek to tender it and if our friends agree on those documents there will be no need for a hearing next Wednesday unless other material has been received and we have agreed to disagree.

MR GYLES: It may be that some more discussion now could resolve at least part of these problems.

SIR G. LUSH: You mean during this afternoon?

MR GYLES: Yes, now as it were. I have had the opportunity to read the letter from Mr Justice Stewart during the course of the debate. I can deal with that now. As to volume II there are some questions in principle which we wish to shortly put and then those having been answered we can take it away and read it and form a view as to whether or not we have anything further to put to the commission about it. What I have in mind is this: the commission has ruled that the two Senate reports shall be as it were before it. I take it that that is part of the process of what the President called collection of allegations and it forms no part of the second stage of the consideration of those allegations. I think I this morning advanced our objections to that course and they have been heard and rejected. We would, of course, have precisely the same objection to the royal commission findings and I take it that it is implicit in this morning's ruling that a similar objection by me would receive a similar fate. In other words it would be my submission this is material which should not be received until my friend is in a position to prove by admissible evidence the matters of substance and to show that they were linked with an appropriate allegation of misbehaviour under section 72. Now I do not wish to take up the commission's time by re-arguing that question but I take it that that will be a submission which will be rejected conformably with the ruling this afternoon?

SIR G. LUSH: I think that must be so. The only difference between the papers referred to earlier and this is that by some steps before the commission was appointed these documents had been assembled and were simply there by the time the appointment was completed.

MR GYLES: Yes.

SIR G. LUSH: But once it is tendered - and the tender for the moment has been withdrawn - this document comes into the same classification in principle.

MR GYLES: Yes.

SIR G. LUSH: We do not want to get into the position, Mr Gyles, where, having abstained from looking at it, we then have to read it to decide it is relevant or not.

MR GYLES: Yes.

SIR G. LUSH: That could be a constant trouble in the affairs of this commission.

MR GYLES: Yes. Well, perhaps it may be prudent to settle as it were that ruling, if I may put it that way, for future material.

SIR G. LUSH: I am very reluctant to give forward rulings; but still, ask for what you want.

MR GYLES: I think what we want is pretty clear; we do not want the commission to see anything until my friend is in a position to call evidence in relation to the relevant allegation. We will maintain that position wherever and whenever we have the chance. We in other words do not want to be put in the position of having to waive our rights in relation to it. If the commission, however, made a ruling about it, of course we will abide by that ruling.

SIR G. LUSH: I am quite prepared to say that the commission will regard you as conceding the commission's right to see these documents only because of the ruling which has been given and without prejudice to presenting the contrary argument elsewhere if the occasion arises.

MR GYLES: Yes. Thank you, Mr President, that does assist in our consideration of the matter, if I can put it that way. It may be better really to leave the question of Justice Stewart's letter until we read the actual substance of his report about it because it depends on how the two correspond. I think the material which has been identified to date does not include the National Times article.

SIR G. LUSH: That is right. It seems a bit odd to reject a decent newspaper but it would be equally odd to receive it.

MR GYLES: Yes. The only other question, I did mention this morning that there may be special, or there are questions which arise in relation to the Senate Committee's reports under section 5 of the act. I referred to that this morning and I do not wish to reargue it at the moment save for indicating that there is that inhibition; the consequences

of it may have to be considered in due course. Thank you.

SIR G. LUSH: The upshot of this seems to be that we should adjourn the commission until Wednesday the 11th but that that sitting should be subject to cancellation on notice to the commission. Suppose that that sitting is cancelled, what then? Mr Gyles gets the first edition of the specific allegations on Friday, the 20th. When can we begin work on those?

MR CHARLES: It might be it would be desirable to have, assuming that we reach agreement on matters of tendering documents so that no further question arises before, say, 20 June, it might be prudent to have a hearing of the commission at about that time to see, firstly, what submissions have been received if any, and, secondly, to check progress in relation to the making of the allegations and to discuss what further timetabling is then possible.

We would hope by then to be in a position to say when we could bring evidence on in relation to those allegations. My friends might want to give some indication that they either would or would not be ready to deal with those matters at that time. There might be a question of programming some date when argument was to be advanced in relation to the meaning of proved misbehaviour.

SIR G. LUSH: Suppose we fix 12 noon on Monday the 23rd?

MR GYLES: That is convenient to us. We would urge the commission, however, to consider having the debate about section 72, more particularly section 5 of this act, that week. By then there will be a series of particulars which will enable that debate to be focussed. In the meantime, whatever backroom work is needed can be dealt with by those assisting the commission and counsel on his side can put the argument about section 72.

SIR G. LUSH: There may be some difficulties about that, Mr Gyles, in light of the terms of section 8. We are required to report our findings of fact and our conclusions of law. One matter that we shall have to give consideration to in timing the debate on section 72 is whether the result of that debate can in fact narrow down the consideration of the allegations.

We may find that the allegations - perhaps we will not find that they do form into three groups. From what you have said this morning, the third group I have in mind may not exist. The three groups I had in mind were those which could not possibly constitute misconduct; those which might depending on what view you took of the law; and those which if proved would amount to misconduct on any view of the law. The difficulty is that Parliament is not bound to debate our view of what misbehaviour under section 72 is.

They may want to know what our findings of fact are on matters which hypothetically we

consider could not be - in the might or might not class of fact our view might be that some facts could not be within our definition of misbehaviour. Parliament might think that if another definition were adopted those facts would be relevant. I do not feel that is a model of clarity.

MR GYLES: I follow what is being put. I fear I follow it with some trepidation, if I may be so bold, because that would indicate that it is a possible view or a view of the commission that it may proceed to find facts and to express those findings of facts without those facts being based upon the commission's view of a breach of section 72 or indeed beyond the constitutional boundaries of section 72. In any event, I can do no more than say I follow what has been put. We would strongly urge that is beyond the power of this commission and the sooner the better that is settled, then we would submit that week of the 23rd really should be devoted to these fundamental questions rather than having a roving commission into facts without deciding what their legal result may be.

SIR R. BLACKBURN: You say that findings of fact in section 81A means findings of fact which substantiate proved misbehaviour and that only?

MR GYLES: Yes, your Honours. If your Honours go back to section 6, for example, we submit there is a fairly safe guide to that in section 6:

> Mr Justice Murphy shall not be required to give evidence on a matter unless the commission is of the opinion that there is before the commission evidence of misbehaviour within the meaning of section 72 of the Constitution.

SIR G. LUSH: Yes, I see.

MR GYLES: So, we would, as I say, urge the commission to try to utilize that time in that week in June where there will be at least a list of particulars to test the legal propositions and which will still be in time to focus the inquiry depending upon the result of the argument.

MR CHARLES: What we had contemplated doing, if the commission pleases, is that at whatever time the commission decides to proceed we would hope to be in a position to say in relation to such allegations as we have decided to put forward - and when I say that, the major premise is that they would be specific allegations in our filtering process - if we come

to the conclusion that the allegations were either vexatious or could not be made specific, they would not be contained in a set of allegations, but in relation to those that are put forward there are at least four possibilities open.

We would be hoping to have ready submissions to make to the commission as to the meaning of proved misbehaviour. We would be seeking to put to the commission in relation to such allegations as arise - I suppose these are the four alternatives. If we have an allegation which appears to amount to potential misconduct which we cannot prove, we would say so for the purpose of enabling the commission to dispose of it in a proper way in its report.

If, equally, we thought the allegation could be proved but was not misconduct, we would say so. If it was not either, we would say so. Fourthly, if the allegation appeared to constitute potential misconduct and we had the proof, then we would say that and indicate when we were going to be ready to put the relevant witnesses forward.

HON A. WELLS: Mr Charles, something has occurred to me several times in this matter - and I am not for a moment seeking an answer now but I mention it simply so that counsel can give consideration to it - the general tenor of remarks of counsel so far has been that specific allegations are to be considered severally, one at a time. What I would like to hear myself in due course is whether they ought to be considered jointly and separately. In other words, whether there might not be a situation - I am only speaking in theory - where if allegations A, B and D were proved, they together might amount to something. I do not know, I have no idea. That is just a thought. I would appreciate it if there could be some submissions on that in due course.

MR CHARLES: Plainly we would have to address submissions to that question and will do so at the appropriate time. I am reminded that we may not be able to deal with these matters in any way finally on the 23rd because we may not have all the allegations in, particularly if material arrives with any degree of substance on or about the 20th, that being the Friday. We would be happy to address an argument on a partial basis if the commission wished to proceed on the 23rd but it may be there would be more chance of it being comprehensive slightly later that week.

(Continued on page 44a)

SIR G. LUSH: Mr Charles and Mr Gyles, our feeling is that it should be possible for counsel assisting to keep in touch with the progress of the arrival of responses to the advertisement and to have a pretty accurate idea on the 23rd of what has come in and how significant it is. We think it probably best to attempt to proceed on the 23rd. There may be some hesitation on whether the section 72 point should be argued before any conclusions on the specific allegations are made but the problem is probably as broad as it is long.

Mr Gyles'point is that if we do not confine the allegations by the decision of the section 72 point, we will be investigasting a lot of useless material. The other aspect, I suppose, is that we may be exhausting our minds trying to find solutions for things which, like the snail in a bottle, do not actually exist. However, subject to what my brothers might think I feel we might as well prepare ourselves to proceed with the argument on the 23rd.

HON A. WELLS: I agree.

(Continued on page 45)

SIR G. LUSH: Provisionally the commission will adjourn until noon on Wednesday, the 11th. If counsel advise the secretary that that sitting is unnecessary, it will be cancelled and in any event the commission will sit on Monday, the 23rd, again at noon.

MR GYLES: May I raise a couple of purely machinery matters?

SIR G. LUSH: Would you rather discuss these in chambers, Mr Gyles?

MR GYLES: I can mention it very briefly now. The first is the access of the press to the room immediately outside here. I noticed at the morning break and again at lunchtime it was infested with press people and, indeed, they were taking photographs into the courtroom whilst I was endeavouring to confer with my client. It does seem to be too narrow a view of what is the precincts of the commission.

The second matter is that of conference facilities on this floor. We would seek access to an appropriately secure conference area for, once the matter gets under way, problems if I can put it that way.

SIR G. LUSH: So far as the first matter is concerned, we are prepared to give a direction that no photographs be taken in any part of the rooms used in the course of the hearing or by personnel engaged in the hearing. If there is any further trouble, Mr Gyles, we will arrange to have a uniformed man here through the sittings but it is the sort of thing we are a bit reluctant to use a man for. So far as the second matter, we will do the best we can. It may be possible to give you a room on the 11th floor for that purpose. There is a conference room on this floor but from your point of view it is not secure. It opens on to my room and it just is not appropriate for use, I think. Please discuss that with the secretary.

MR GYLES: We do have chambers available in the reasonably near precincts. What we are really looking for is somewhere we can use during the intervals that occur in a day's hearing. That is the critical thing as far as we are concerned.

SIR G. LUSH: The 11th floor room might be adequate for that.

MR GYLES: We would not think so.

SIR G. LUSH: The secretary is authorized to negotiate with you, Mr Gyles. The commission will adjourn now until noon on Wednesday, the 11th.

AT 3.08 PM THE MATTER WAS ADJOURNED
UNTIL WEDNESDAY, 11 JUNE 1986

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

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 MONDAY, 23 JUNE 1986, AT 12.05 PM

Continued from 3.6.86

Secretary to the Commission

Mr J.F. Thomson
GPO Box 5218
SYDNEY 2001

Telephone: (02) 232 4922

SIR G. LUSH: Mr Charles?

MR CHARLES: If the commission pleases, certain matters have arisen since the last hearing of the commission on 3 June. Members of the commission have received two letters dated 18 June and a reply which was dated 20 June. The first letter was sent by Steve Masselos & Company and it is directed to me. The reply comes from Mr Durack, my instructing solicitor, directed to Mr Masselos. Do members of the commission wish those letters to be read?

SIR G. LUSH: You have them, I suppose, Mr Gyles?

MR GYLES: Yes, I do.

SIR G. LUSH: No, we do not wish them to be read. We will have to look at their terms later, presumably.

MR CHARLES: If the commission pleases, six matters in effect are raised by Mr Masselos' letter. If I can direct the commission's attention firstly to page 1 of that letter, the third paragraph. In that paragraph Mr Masselos refers to the commission's considerations of 3 June and points to the fact that the presiding member in the ruling agreed with by the other two members had said that the operation described by the word "inquire" could be divided into the collection and the consideration of the allegations. That is a reference to page 31 of the transcript in confidence, in particular the second last paragraph on that page and continues:

> We had understood that only the first stage would be dealt with prior to the next hearing of the commission. We had understood that from the ruling that after a list of allegations had been compiled there would then be a process of eliminating those allegations which were not sufficiently particular to comply with section 5 subsection (2) and also those allegations which could not even if proved amount to proved misbehaviour.

He then contends that his client should have the fullest opportunity of putting forward submissions concerning the allegations which are to be considered before any step is taken by or on behalf of the commission to investigate. The second matter that is then raised is in effect a complaint that the process which had been referred to in the earlier proceedings had not been complied with.

What had occurred is that on pages 36 and 37 of the transcript in confidence I had said that I would hope that we would be in a position to give a preliminary set of specific allegations with particulars by last Friday. Mr Masselos asserts that that should be complied with and continues that there is no reason why the sifting process on both bases - that is lack of particularity and lack of relevance - should not take place.

Then the third matter that is raised is a question of concern that the services of investigators may be engaged and contends that there is no role to be played under the statute by anyone in this matter save for the commission and counsel assisting it. There is a complaint that the process of inquiry is secret, open-ended and a roving inquiry into the whole of the life of the judge. I should say that the third matter would then require comment on the fifth paragraph on that page, adding that it would be wholly inappropriate and indeed unlawful to obtain the services of a policeman for the function of investigation.

The fourth matter raised brings in the question of defamation and whether any of these inquiries will act in such a way as to defame the judge. The fifth matter which is contained in the last paragraph on the second page is an assertion that it is simply not proper to verify any allegations made at this stage and that the proper process is, firstly, that there should be a consideration of the relevance of the allegation and particularity which then should be followed by the verification of any allegation that may have been made, and to act in any other way is not justified by the statute.

The last matter that is raised, after seeking assurances from us that we will not proceed - in effect opposition to these views before any hearing today, the last matter is a request for access to all material that has been received by the commission.

If the commission pleases, may I deal briefly with what we see is the basis for our activities in this commission, and then to apply that general basis to this act and to what we - and I am speaking now as counsel assisting the commission - are attempting to do in providing that assistance. The basic power of inquiry - certainly so far as the Crown is concerned - is well-established as a matter of the Crown's prerogative. That is so even though the inquiry is as to whether an individual has committed a criminal offence.

(Continued on page 49a)

The authorities which establish that - I do not propose to take the commission to them at length by way of citation, but if I may read them and give the citations and then some very short reference to the judgments - are Clough v Leahy 2 CLR 139; the second is McGuiness v Attorney-General 63 CLR 73. As the members of the commission will recall, that was a case in which an inquiry was sought to be made into whether a bribe had been offered to a member of parliament, and if so, by whom. The most relevant passages in the judgments are those found in the judgment of Starke J at pages 89 to 91 and of Sir Owen Dixon at pages 93 to 102, in particular at pages 93 to 94. The third case to which I would make reference is ex parte Walker 24 State Reports New South Wales 604.

(Continued on page 50)

Each of these cases was referred to in the BLF case - Victoria v Builders Labourers Federation, 152 CLR at 25. The most relevant passages in the judgments are the Chief Justice, Mr Justice Gibbs, at pages 47 to 53.

SIR G. LUSH: I must have taken the page reference down incorrectly.

MR CHARLES: 152 CLR at 25.

SIR G. LUSH: The Chief Justice at - - -

MR CHARLES: Pages 47 to 53; Mr Justice Stephen at pages 64 to 68; Mr Justice Mason at pages 86 to 91; Mr Justice Wilson at pages 123 to 129; and Mr Justice Brennan at pages 147 to 158. I should add that Mr Justice Murphy, of course, dissented on this point.

Now the purpose of this power is dealt with shortly and helpfully in the judgment of Mr Justice Mason at page 89 where his Honour said after referring to the New Zealand authorities which take a contrary view, and in particular there is reference to Koch's case in New Zealand in which the contrary view is best seen. Koch's case is reported in 28 NZLR and page 405 is where their report commences. Mr Justice Mason said at page 89 point 1:

> As I have already indicated, the conclusion reached in Koch is . . . . . narcotic and deleterious drugs.

It is our contention that relevantly the houses of parliament under our Constitution have a like power of inquiry which relevantly derives from the existence in section 72(2) of the fact that justices shall not be removed except by the Governor-General in council on an address from both houses praying for such removal on a certain basis; taken with the incidental power, if no other power, contained in placitum 39, by which:

> Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to -

and then 39:

> matters incidental to the execution of any power vested by this Constitution in the parliament or in either house thereof.

We contend that the existence of the incidental power here classically extends to matters which are necessary for the reasonable fulfilment of the main power over the subject matter. We have taken that statement from Burton v Honan, 86 CLR 169 at 178, and we contend here that in this case parliament has sought assistance from this commission of inquiry in deciding whether or not to proceed to exercise that power.

Now having said so much as to what we contend is the general basis for the existence of this commission of inquiry, one then turns to the act and we see, and we have had reference made to it before in the proceedings on 3 June, section 5, subsections (1) and (2), that the commission is to inquire and advise the parliament whether any conduct of a judge has been such as to amount in its opinion to proved misbehaviour. And then, secondly, that in carrying out its inquiry the commission is to consider only specific allegations made in precise terms.

We put to the commission that the inquiry is into conduct. It contemplates that a substantial degree of material may be made available to the commission. That contemplation is obvious both from the very terms of section 5(3), but also from the fact that the act contemplates that material will be made available by the Senate itself and other parties.

Now it is plain we would submit that the act contemplates that the material reaching the commission will be sifted or filtered by counsel assisting. I have already made reference before the commission on 3 June to the passage appearing in Senator Evans' speech in the Senate on 8 May at page 2703 in the left-hand column. If I may shortly repeat what Senator Evans said because of its relevance to the complaints that are made in Mr Masselos's letter, and in dealing with Senator Durack's questions as to what was meant by section 5(2) Senator Evans said:

> This is an important issue that has been raised by Senator Durack . . . . expression "specific allegations".

Now it will be, we would submit again, obvious enough that information arrives with the commission staff, by which I include counsel, in a form which is necessarily imprecise. Members of the public supplying information do not generally couch their information, or for that matter, speech in the form of specific allegations in precise terms.

When they make a complaint relevantly they will say something such as: the judge did X; but not giving a date. And they go on to say: you can test this by asking A, or B, or C, who were present. Now what it will be seen is that based on section 5(2) Mr Masselos's letter suggests that counsel assisting have no business because of that section in engaging in any investigatory of interrogatory activity for the purpose of making an imprecise allegation specific.

The difficulty with asking us to put forward allegations now is increased if one contemplates this situation. Ordinarily speaking in court, or rather in court proceedings, a pleading would not be settled without at least some statements being taken from relevant witnesses. This enables precision to be gained; issues to be identified; and it avoids later repeated amendments and delays caused by finding that a witness says that the judge did not do X on date 1 June, but did it on date 10 June. Now in the process which faces the commission we submitted on 3 June at pages 5 to 6 of the transcript in confidence that there was a three-stage procedure that was involved here. We put it that the first stage involved counsel assisting acting as Senator Evans said as a filter - in the middle of that page I put:

> We accept that we are to be the filter through which material supplied to the commission is to be then produced in the form of specific allegations.

And that as we followed would be the first stage of the commission's proceeding.

We say that it simply cannot be right that when information comes to us we do not ask questions of those who supply it.

SIR G. LUSH: Is there a word omitted in the transcript of that sentence? "We are to be the filter through which material supplied to the commission is to be - - -", something.

MR CHARLES: "- - - is to be then produced in the form of specific allegations".

SIR G. LUSH: You are satisfied with it as it is typed, are you?

MR CHARLES: It may be unhappy English but I suspect I used it, Mr President.

SIR G. LUSH: Yes.

MR CHARLES: We submit that information can be supplied either in the form of documents or orally. The fact that the commission in its advertisement asked those who supplied information to do so by statutory declaration in our submission could not possibly justify us in refusing to accept information supplied orally. And we say that it would be nonsense to suggest that when someone comes to the commission staff and says, "We want to supply information", and proceeds to do so by word of mouth, we should then sit back and say, "You say X occurred; when did it occur?", for example. Or, if an allegation is made with precision as to date, that we should not attempt in that conversation to seek precision as to particular activity - "How was this done?" We would submit that if we are entitled to ask questions of someone who comes in and supplies information to us orally, it would logically follow that we should be entitled to ask questions orally or in writing of those who supply information to us in documentary form. Now we would respectfully contend that there is no possible justification for saying that we cannot ask questions of that kind and that really is what is involved in this suggestion that counsel assisting or the commission staff are not permitted to engage in investigatory work.

Now having said so much if I can turn to the specific matters raised in Mr Masselos's letter again. The first of those goes to the suggestion that one should look at the allegations and see, firstly, whether they are specific; and, secondly, whether they could amount to proved misbehaviour before going further and engaging in any investigation.

We would submit, in addition to what we have put before, that the collection of information which is at present occurring is an undertaking by counsel assisting the commission, and we submit that when section 5(2) prohibits the commission from considering anything other than specific allegations in precise terms, that is, a direction to the commission in proceedings of this kind where the commission is sitting in hearing, the commission is prevented at that time from considering anything other than the specific allegation in precise terms, and for that purpose that the commission must then have a series of specific allegations to which the evidence would relate.

Now, we say that until we are in a position to put forward those allegations, we are simply engaging in that collection and filtering process.

SIR G. LUSH: That submission only goes so far as to cover investigation of allegations of some kind received from outside; it does not cover the generation of allegations within counsel's activities.

MR CHARLES: I am not quite sure if I have fully understood what the presiding member is putting to me. We are not in a sense generating anything ourselves. All we are doing is looking at a very substantial volume of material which has been put to us, and then sifting or filtering that material, where it is not clear to us whether an allegation is made at all or where it is imprecise or where it has, let us say, not a date attached to it, we are then making inquiries, or propose rather to make inquiries of persons outside for the purpose of seeing if that allegation has definition.

SIR G. LUSH: I might make it clearer if I put it in this way. It is implicit that counsel are acting responsively and not of their own initiative in the starting of their inquiries.

MR CHARLES: Yes. As to the second matter, the complaint that we said that we would comply by June 20 in providing the start of what was to be a progressive series of particulars, as I have put to the commission, we certainly have stated that we hope to be in a position to do so. We have found that the situation has changed somewhat since we stated that optimistic view. The reason for it appears in the letter which was sent in reply to Mr Masselos, and in particular the middle of the first page, that:

I confirm that those assisting the commission have been placed in possession . . . . . statements obtained from potential witnesses.

In support of that argument, I rely on the submissions we have already made. We say as to that that one additional factor is that although we were in possession of material in form such as The National Times questions, with which the commission is familiar, they having been referred to on June 3, some of the material we have received has thrown different light on those matters and has suggested that an allegation which might have been thought to be raised by those questions should possibly be raised in different form.

We therefore have what could be a number of different allegations relating to the same facts but which might well require different form, depending upon what questions are asked of those witnesses who might assist. We say that we must be entitled to ask those questions before we can put forward specific allegations for the commission to consider, and we would submit, with respect, that we are not in default of any ruling made by the commission in having failed to provide specific allegations by this time. We are doing our best to comply, but are being prevented at this point from being able to do so.

As to the third matter, the quesiton of investigators, the act contains in it provision in section 20 for the staff of the commission to be persons made available to the commission by the president of the Senate and the speaker of the House of Representatives, and there is provision made in subsection (2) for the president and speaker to arrange with the secretary of a department of the Australian Public Service for the services of officers or employees in the department to be made available to the commission..

Mr Masselos in his letter contends that they are very concerned at the suggestion that the services of investigators might be engaged. They see no role to be played under the statute by anybody in this matter save for the commission and counsel assisting the commission and those carrying out essential administrative functions.

Then there is a complaint as to the method of procedure which we have foreshadowed, and in the letter we sent by reply to Mr Masselos, we indicated, as the commission will see, that with the exception of the appointment of a director of

research, we had not appointed anyone who could be regarded as someone who would carry out investigations and although we have received certain information supplied orally, we have not spoken to persons for the purposes of investigating or verifying, as it is put, those allegations. I have indicated that unless something occurs in argument today or if the commission otherwise directs, those steps might well occur tomorrow.

Now, as to that matter, we would contend that if we are entitled to ask questions of those persons who supplied information to us, there equally ought to be no reason why we could not ask questions of persons mentioned as possible witnesses in information supplied. If we can ask those questions, we would put it, why cannot the commission employ persons to ask those questions. We know of no principle of law, and we submit that there is none, which would prevent the commission employing persons to ask those questions, and equally we would respectfully submit if persons may be employed, why may they not be police investigators who may be persons particularly well qualified to carry out that task. If they are made available to the commission, we would submit the commission is entitled to use them for that purpose.

As to the fourth argument on the second page, that is, the question of defamation, we would submit in the first place that there are well-recognized rules which apply to persons involved in inquiries of this nature and to police officers which would result in persons conducting inquiries of this kind being given privilege for actions properly taken in the course of those inquiries. It is not, I think, necessary to argue that matter at this stage, but may I simply refer the commission to the eighth edition of Gatley, and in particular to paragraphs 395, 401 and 484 to 486. In any event, all that that means is that it is a matter for us to do all we can to ensure that inquiries are properly undertaken, and certainly no one has any intention that persons will go out into the community defaming the judge, but it is up to us to take steps to ensure that inquiries are properly instituted and carried out, if we are entitled to conduct inquiries of this kind at all.

SIR R. BLACKBURN: The letter says that to send investigators out is to defame. It is not quite what you are now addressing yourself to.

MR CHARLES: No, indeed not, Mr Commissioner. We would say as to that that sending out of investigators is something which is covered in the paragraphs in Gatley to which we have referred, but we would say that in any event, although it is a matter for us to ensure that the steps we take are within the law, there is nothing in the act or in the common law which prevents us from acting properly in pursuit of the commission's inquiry.

As to the fifth matter raised, the suggestion that it is not appropriate for us to verify allegations, we accept that it is not appropriate for this commission to summon persons to give evidence or to summon documents or to consider allegations other than allegations in precise terms. But in the process of sifting and filtering, counsel assisting are not using any coercive powers or powers of compulsion. All we do is ask questions of those who give information to us, and possibly of others, to assist us in putting forward proper allegations.

We say that insofar as that process can be described as verification, it is an entirely proper preparatory process before this commision begins the function of considering the allegations. We would say, in light of the argument already put why can we not take those steps.

As to the last matter that is raised, and I simply interpolate that the matter is raised first on page 3, we do not take it to be any part of our function to manoeuvre or do anything other than indicate clearly to those representing the judge the course we are to follow and to enable these matters to be argued before we took steps of employing investigators or embarking on investigation. We have refrained from taking the steps suggested before today's hearing.

As to the last matter, the request for access to material, we submit that there is no basis on which material which has been received by us at this stage should be made available to those representing the judge. It is a matter for us, as the act and parliament contemplated, to see which material should be put forward as specific allegations and on which evidence may be called, and we would submit that there is no warrant in natural justice or in the terms of the act or otherwise for us to make available all the material we have received, regardless of whether it relates to a specific allegation and regardless

of whether this commission is to be asked to pursue it, and therefore unless directed otherwise we would not propose to comply with that request.

Unless the commission has other matters it would wish to put to us in opening, those are the matters that we desire to raise with the commission arising out of the exchange of letters that has occurred.

SIR G. LUSH: Thank you, Mr Charles. I indicate that we are proposing to rise at one o'clock today and, subject to any suggestions that may come from the bar table, to sit again at two. Thank you, Mr Charles.

MR GYLES: If the commission pleases, the first matter I have a duty to raise is the position of Mr Wells. It has come to my instructing solicitor's attention that on Thursday, 23 February 1984 when a judge of the South Australian Supreme Court Mr Wells made remarks from the bench unconnected with the case which was being heard which responded to, or related to some allegations published or some material published in The Advertiser the day before which related to the so-called Age tapes. So far as we can tell, it related directly to a matter which is also referred to in the second Stewart report and the questions for the judge which were tendered to this commission on the last occasion.

All I can do is raise it and submit that it is inappropriate that a member of this commission should be somebody who has publicly expressed those views, particularly whilst sitting as a judge although, of course, one wonders in what capacity the statement was made, and we having drawn it to his attention - it is a private hearing - we do no more than that at the moment. We would obviously ask that the matter be considered by him and decided before there is any ruling on the matters which have been adumbrated this morning.

SIR G. LUSH: Do you suggest that this is a matter for Mr Wells to decide for himself, Mr Gyles? That is the usual situation when a court is sitting in banc when a query is raised concerning one member of it.

MR GYLES: I do not see any role for the commission as a commission, as I am asked. It is a matter for Mr Wells. I do not see a role at the moment except consultation perhaps for the other members of the commission to play in that particular matter at this moment or, indeed, at any time, and I think either our views are accepted or they are not, and then whatever consequences flow from one or the other flow. It is not a matter for a ruling.

SIR G. LUSH: Mr Gyles, have you got documents which give an account or make it possible for the reader to understand what the subject of the observations was and what the observations themselves were?

MR GYLES: I think the answer is yes. We have a newspaper report of the remarks and a newspaper report of the - sorry, and the newspaper report which is the subject of the remarks.

HON A. WELLS: Is that a complete copy of the statement?

MR GYLES: I would not think so. If you had one we would be most interested to see it. Could I hand these up?

We have taken what steps we can to obtain one but they have been unsuccessful so far. We stand willing, of course, to give whatever assistance might be sought about the principles to be applied, but we await any request so far as that is concerned. I do not think it is appropriate we should make lengthy submissions about it.

SIR G. LUSH: Thank you, Mr Gyles.

MR GYLES: Is it convenient for me to go on with the other matters?

SIR G. LUSH: Yes, I think it is, Mr Gyles. If you would proceed, Mr Wells can refresh his memory from these documents.

MR GYLES: If I can take the matters in the order that my learned friend did. It is, I think, not terribly helpful to debate the constitutional basis of the commission at this point. We do not accept that there is any analogy between the executive power to investigate breaches of the law pursuant to its function to enforce the law, on the one hand, and the powers of Houses of Parliament to address under section 72 on the ground there set out. I do not stay to examine that at the moment.

May I turn to the submission he made that the act in section 5 should be construed somehow in the light of some remarks of a senator? Now, as I understand what he said, he referred to the remarks in debate by Senator Evans. It may be that a - well, it is correct that a second reading speech may be looked at for the purposes of finding out the mischief to be dealt with by the statute if that be necessary, but for reasons both legal and practical it has never been the position that an act of parliament is construed by reference to what individual members of parliament say.

SIR R. BLACKBURN: But Mr Gyles, does not that actually - the recent amendments to the Acts Interpretation Act practically say that. That is just what you can do now.

MR GYLES: Individual members of parliament, I would submit, would not be a guide to the meaning - - -

SIR R. BLACKBURN: I have not got it in front of me.

MR GYLES: Neither do I.

SIR G. LUSH: Do you mean a guide de jure or a guide de fact?

SIR R. BLACKBURN: I do not think I am mistaken in saying that the recent amendments to the Acts Interpretation Act allow you to look at anything that appears in Hansard.

MR GYLES: My friend has referred to it, the commission appears to have read it also. What I am saying is that what an individual member of parliament says has never been regarded as any guide to the meaning of the legislation.

SIR R. BLACKBURN: Not until the recent amendment to the act.

MR GYLES: I know he is a minister, that does not change the position.

HON A. WELLS: What sort of material can you look at then in the debate? Is there anything at all other than the individual expressions?

MR GYLES: The second reading speech would be something to look at, but you do not look at - in any event, you have to find an ambiguity before one goes to that material. You do not construct one by going to the material. What is the question of construction which this speech will bear upon? That is, I suppose, the first inquiry. We do not, with respect, perceive any. Subsections (1) and (2) of section 5 appear to us to be plain English, and they certainly do not, are not assisted by anything Senator Evans had to say relevant to my friend's submission which was that the counsel acts as a filter or sift for material.

The commission will recall that that precise submission was overruled by this commission on the last occasion. The precise submission was overruled, and if I may remind the commission of the ruling of the presiding member, at page 32. It was said there:

> As to the second matter, the perusal by the members of the commission . . . . . be aware of and supervise the collection of information.

So that was a precise ruling that is completely in the teeth of several submissions that my learned friend has just addressed. He has addressed the submissions without even noticing that ruling or providing any reason why the commission should reverse itself on two consecutive days.

The substance of what was held last time was that counsel assisting is given no role under the statute to inquire and that all that is done by counsel assisting is generally in effect in the name of the commission and by the commission. That has a number of consequences for the conduct of this inquiry which will no doubt be explored as we go on. The first of them is that counsel is no more entitled than is this commission to breach the act. He is no more entitled to clothe himself with statutory authority than is the commission.

When section 5(2) says:

> In carrying out its inquiry the commission shall consider only specific allegations made in precise terms

That of course means, according to the ruling made last time, that this commission may do nothing in relation to anything unless it has before it a volunteered specific allegation in precise terms. If it goes beyond that, it is simply going beyond power. It is quite inconsistent with this commission's ruling last time that 5(2) is read down, as my friend sought to do a few minutes ago, to the commission sitting in hearings.

For reasons which we will advance later, it is a correct perception that the commission only operates by the calling of witnesses and the production of documents. That is and will be our fundamental submission in due course but to the extent to which that is departed from by the commission and the commission takes upon itself an out of hearing role, then 5(2) governs that as well as everything else. It is not for the commission to seek or to obtain or to frame or to initiate anything; it is to inquire into specific allegations made in precise terms. We accept for the purposes of the exercise today of course the ruling that was made last time, that that does not inhibit the collection of information in order to ascertain whether there is an allegation. What we do say is that the stage which is identified in the ruling last time on page 31 - I see it is one o'clock.

SIR G. LUSH: If this is a convenient time, Mr Gyles, we will adjourn now until 2 o'clock.

LUNCHEON ADJOURNMENT

SIR G. LUSH: Mr Gyles.

MR GYLES: It should perhaps be clear that my reference to the material from The Advertiser is not limited only to the matter of the so called appointment that relates to the relationship of the judge and the executive. Lest there be any question about it, we object to Mr Wells sitting in the commission. The other loose end from this morning was the acts interpretation amendment. Perhaps before leaving that, do I take it from silence that Mr Wells proposes to continue to sit?

SIR G. LUSH: At the present time, yes. We expect that we will give a ruling on the submissions that we are hearing possibly at the end of the day and probably tomorrow. I will invite Mr Wells to say what he has to say at that stage.

MR GYLES: One other loose end is that I understood I was being referred to section 15 AB of the Acts Interpretation Act. We looked at that during the lunch hour. The purposes for which material may be used is to confirm that the meaning of a provision is the ordinary meaning or could determine the meaning where the meaning is ambiguous or obscure or the ordinary meaning leads to a manifestly absurd or unreasonable result. They are the circumstances under which section 15 AB comes into play. In the material which is listed as being relevant the explanatory memorandum and the second reading speech by the minister was referred to. There is no reference to speeches by members save for (h) which refers to the record of debates in the parliament or in either house of parliament, that is relevant material. We submit that would not normally relate to speeches by individual members.

SIR R. BLACKBURN: What would it relate to?

MR GYLES: It may relate to petitions, tabled documents, resolutions of the house, that sort of thing. The basic point must be that an individual member of parliament, as with an individual member of any deliberative body or indeed any joint body where one simply votes, has no impact upon. His view is not in any sense the view of parliament. Even if several members express the same point of view that does not mean that is the reason for the vote aye or vote nay.

SIR R. BLACKBURN: The trouble with that argument is that it explains too much. It is a convincing argument why the legislation should not have provided for the minister's second reading speech to be looked at.

MR GYLES: The theory about that, and this is touched on in the cases which I do not have with me, is that it is regarded as relevant to know the purpose in introducing the bill, that is the mischief which it was being aimed at. That is all it does. It does not indicate that the purpose was achieved but it does show what was being aimed at. What an individual member might say, and I mean by that an individual minister as well as a member, even if he be the minister who is piloting the bill through, speaks nothing as to the deliberative will of that assembly. Who is to be preferred, Senator Evans or Senator Durack? This commission is in no position to judge that.

SIR R. BLACKBURN: No, but all that the act says is that we may look at, as I understand it, anything that anybody says.

MR GYLES: That is relevant.

SIR R. BLACKBURN: Yes.

MR GYLES: I am putting an argument as to why it is not relevant to know what an individual member has said. Returning to the point at which I had arrived, my learned friend sought to argue that material which comes to him does not come to the commsision. I had put before lunch the ruling of the commission at page 32 and I was about to read what the commission had said at page 31 on transcript, about six lines down:

> As to the first course, that of advertisement, counsel for the judge objected to the suggested course.

Then there is a repetition of our argument:

> For my part I am unable to accept this argument . . . . . which involves ascertaining whether there is a case to answer.

I do not need to read the next paragraph. Further down:

> I do not think that the validity of the commission's proceedings . . . . . it is not really to the point that we may receive some useful information.

That ruling makes it plain, or made it plain to us at least, that what was being engaged upon was the collection, by which we mean the receipt of allegations.

SIR G. LUSH: Collection and receipt are not synonymous words.

MR GYLES: No, but we take it that collection meant, as we put this morning to counsel assisting, not something which was the result of initiative by the commission. It was not generating allegations, to use one phrase, acting responsively and not of its own initiative.

For present purposes, whether it be responsive or otherwise, the ruling said that what counsel assisting should do - and what the commission was going, I am sorry - was receiving and collecting allegations. It would then strike those out which were not particular enough. The remainder would then be put through the misbehaviour sieve, if I can put it that way. After those two processes were complete, then the commission will consider the evidence relating to those which remain. That is what we were told by this commission on the last occasion. We naturally relied upon that.

We learned, however, that what was happening was something quite different. The advertisement sought verified material. We do not know whether anything has been received in response to those advertisements at all. Indeed, we have no idea what information, material or allegations counsel assisting have. We do know, however, that they have received oral information from those who can give no relevant evidence themselves but point the commission into various other directions.

That, in our respectful submission, is just the process which neither the statute nor the ruling of this commission permitted. We know from the letter which those instructing counsel assisting wrote and from his submissions this morning that there have been no allegations made or received within section 5(2). There is a process going on now of creating some. In our submission that receives no authority from the statute at all.

SIR G. LUSH: What do you envisage as the range of sources of allegations that you say should be received, Mr Gyles?

MR GYLES: On the last occasion the Stewart report was tendered, as I recollect it. I also recall that the Senate Committee paper went up.

SIR G. LUSH: Yes, the two Senate reports and the Stewart report were under discussion.

MR GYLES: I do not know; that is my answer.

SIR G. LUSH: This is really going back to your objection to the advertisement of the previous sitting, is it not? Once you get outside what might be regarded as considered formulations of propositions in those reports, allegations may take various forms. They may be allegations of certain facts which by themselves are neutral but which, when allegation A is linked with allegation B and allegation C, a pattern emerges. Do you say that that cannot be

done, or if allegations A and C come in, the commission cannot inquire from witnesses whose identity even may be suggested by the first and third allegations for the purpose of finding out whether the link which might have been allegation number 2 exists?

MR GYLES: We certainly say that for several reasons. The first is that section 5(2) binds this commission, and it may only consider specific allegations made in precise terms. When it says the commission, it means all those acting under colour of the commission, by authority of the commission.

As I have read before lunch, the commission has ruled that it does the investigating and what counsel does is for it; there is no independent role for counsel assisting under the statute. Secondly - and I will come to develop this a little more clearly later on - the way this commission operates is by summonsing witnesses to give evidence and produce documents. It simply has no business manufacturing allegations. I do not mean making them up, I mean fashioning them.

Let me posit something which we fear to be the true position, although because of the refusal by counsel assisting to let us see any of the material and his refusal to provide any particulars, we have no means of knowing. Let me assume for the purposes of argument that some journalists came along to this commission and made generalised allegations which they were unable to support by any precise allegation or by any evidence from themselves but said, "Look, I know if you go and see A, B and C, they will tell you" and then this commission goes out and sees A, B and C through the medium of an investigator, that would be the very evil which section 5(2) is intended to limit. That would be no more and no less than permitting this commission to be the tool of journalists with an incentive, personal and financial, to utilise the privileges of this commission to pursue what can only be described as a scurrilous campaign against my client.

SIR R. BLACKBURN: Are you saying then that the word made in section 5(2) means already made at the time of the passing of this act?

MR GYLES: I put that submission last time, and I think that was rejected implicitly if not explicitly. I do not want to re-argue it. We do make that submission but I do not want to take up the time of the members of this commission by repeating what has been rejected, as I understand it.

What we do say is that whatever time - it must be made externally by this commission, it cannot be generated by this commission, manufactured by this commission in the sense they use that word, directly or indirectly. It has absolutely no rule to produce bullets to fire at this judge. If any other view is taken, then on our submission it is plain the statute is unconstitutional. In any event, the plain words of the section have that consequence.

We are here primarily to ask why it is that rulings of this commission have not been complied with. We simply have not received particulars, any particulars of allegations under section 5(2) yet we know things are happening. It was, in our submission, plain beyond argument and at least as far as the ruling of this commission is concerned there was to be nothing more than stage 1 - - -

SIR G. LUSH: That depends on an analysis of the word collection, does it not? In trying to ascribe this to the previous ruling, that seems to be what you must stand on.

MR GYLES: Yes. If I could just go back to page 31, the second paragraph, fourth line:

> The act provides for the elimination in the first place of any allegations which are not sufficiently particular.

It does not provide for the amendment of them, the variation of them, or the refinement of them; it provides for the elimination of them. Collection, where it appears, must be read, in our submission, in the light of that which precedes it. Either an allegation is made in conformity with the act or it is not, and if it is not it should be rejected as the commission indicated that it would. That is our first point.

SIR R. BLACKBURN: Would that amount to this, Mr Gyles - I only ask for clarification - the function of counsel assisting then would be to bring before a hearing of this commission the very words which people who gave information used when they gave it - - -

MR GYLES: Yes, the very words.

SIR R. BLACKBURN: Provided that it appeared on its face to be a specific allegation in precise terms and nothing else.

MR GYLES: Nothing else. That is what the commission must consider. Of course, the consideration of it can follow various courses. Also, the commission will

(Continued on page 69a)

understand, we are not putting ourselves in an absurd position saying that individual grammar makes any difference. It is the substance of the allegation - - -

SIR G. LUSH: Not yet, anyway.

(Continued on page 70)

MR GYLES: It depends, does it not? When we see something we will be able to give you a little more assistance, perhaps, but it is the substance of the allegation to which we are directing our attention, not the precise words of it, but the words will delimit the allegation. We cannot go beyond what has been said about it.

SIR R. BLACKBURN: Or rather, the alleger - if I may use that word - must be somebody who would give direct evidence of it himself.

MR GYLES: I am not sure it would go that far, if the commission pleases. It may be that an allegation can be made precisely although not by the person with the original evidence. That will appear soon enough, of course.

SIR R. BLACKBURN: What happens then? What are counsel and the staff of the commission allowed to do if they get an allegation of that sort?

MR GYLES: They are allowed to seek to have the commission summons people before it or produce documents. If there is no indication of where those people or documents are, that is the end of the allegation. We are not here to investigate allegations apart from the methods laid down by the act. If counsel assisting tells the commission that we have allegation X but that there is no material in the possession of counsel which could bear upon it by admissible evidence, then one presumes that will be the end of that allegation.

There will not be haring off of policemen around Australia to endeavour to find something to back it up. I am just looking at what the commission said last time. We understood that most of it was not what we submitted but that is what it said, that there will be the elimination of those which are not sufficiently particular and we submit we are entitled to take it as meaning that and that far from that, what has been done is to apparently receive oral information and at least set out upon the path of framing some allegations and investigating them.

SIR R. BLACKBURN: Because we said there would be a process or a possibility of elimination, it does not follow that nothing was to happen between the presentation of the allegation and the elimination of it.

MR GYLES: But we have not seen the presentation of it. We thought we were coming back - - -

SIR G. LUSH: Why should you see the presentation of the allegations until such time as they are decided, the view is taken and you are informed that the view is taken that they are worth this commission's handling?

(Continued on page 70a)

MR GYLES: Who makes that decision and why are we not entitled to natural justice in the process, with respect?

SIR G. LUSH: Are your rights affected at any stage before an allegation is put forward?

MR GYLES: My very word they are.

SIR G. LUSH: How?

MR GYLES: They are affected in very many ways, very many ways. What about the production of material which is inconsistent with the allegations? What about two inconsistent allegations? Why should we not see this material? This is an inquisitorial procedure. The commission has said this is an inquisitorial procedure, that the commission itself will look at all material, it will not accept what counsel tells them about it, it will look at it all and make the decision about it. If that is the case, we have a similar interest.

SIR R. BLACKBURN: But it has not said it will do so, Mr Gyles, has it - it has said that it may do so.

(Continued on page 71)

I think it is safer if I looked to see what was said rather than paraphrase it. I have read from 32 over to 33 and as I understood it the commission held that it was its responsibility to make the inquiry and that there was no role for counsel under the act apart from assisting the commission. If I may say so, I would like to separate out the question of whether we should see all material which is a later issue from that which I am now arguing. But the point I am now arguing is that the role of particulars is to give us the allegations under section 5(2) and there has been absolutely no reason advanced why that should not be done. If there are no such allegations this commission should close here and now. We were brought here urgently on 3 June at considerable inconvenience and we were then told that the matter was so urgent that there would have to be this progress made with it. It is now 23 June and there has not been one particular given to us of any allegation. If that is the case, if it is 20 days and no allegation - - -

SIR G. LUSH: That is the fact but that does not alter the circumstance that when there are specific allegations the act provides for you to be notified of them and heard upon them.

MR GYLES: Quite; quite.

SIR G. LUSH: Your anxiety in the meantime is understandable, Mr Gyles, but it does not seem to have very much to do with obtaining any practical result in the present issues.

MR GYLES: Well I am not quite sure that I follow that. this commission cannot do anything in our submission until you receive a specific allegation.

SIR G. LUSH: Yes, we have taken that point.

MR GYLES: That is our submission and I am probably repeating myself by putting it but you asked me why we have a concern as to the position in the meantime. It is that the commission is proceeding beyond the statute; that is our concern.

Put shortly in other words as to the second point, if there have been no specific allegations, then that should be the end of the inquiry. If and when there are any allegations, specific allegations, the questions of lack of particularity or lack of relevance should take place before there is any further investigation of these matters at all. I ask the question, why not? Why should not the procedure which was advanced last time be followed? Why should counsel assisting be able to do a U-turn without consultation with us or consultation with the

commission, presumably? And why is it that it is not appropriate for us to see what these submissions are if there are any, and be able to put submissions to this commission that they are not particular, or that they are not relevant?

Now as to the third point, the question of the services of investigators; much that I have put already is relevant to that, but might I remind the commission of some other features of the statute. Sections 5 and 6 indicate, as I have put on the last occasion, a very particular type of inquiry into specific allegations, in precise terms, with no findings except upon admissible evidence. The powers of the commission are the powers to summon witnesses at a hearing to give evidence and to produce documents, on oath. There is power to issue search warrants; access given to certain materials; and then the provision of hearings, where my client is entitled to appear and to be represented at any time during the hearing.

SIR G. LUSH: Any significance in the sequence of the subject matters in the act, Mr Gyles?

MR GYLES: I would submit not, if the commission pleases. I do not think one way or the other one can read much out of that. I think it probably suits me to say one can but we certainly submit that the assumption which is made in this part of the statute - and I read on - hearings, of course we looked at; counsel assisting - and he is appointed to assist as counsel. Now that is a very significant point. Counsel is not an investigator, he is here to produce to this commission the evidence in an orderly fashion in the course of a hearing. 16 deals with statements of witnesses; 17 deals with the arrest of witnesses; and 18 deals with the powers of the commission:

> May inspect any documents or other things produced before, or delivered to . . . . . matter that is relevant to the commission's inquiry.

And then there are provisions about retention and so on.

In our submission, bearing in mind the subject matter of this inquiry and the statutory purpose, it is inconceivable that there should be any activities of this commission to which my client is not a party. This commission should operate at hearings in which people are called to give evidence and at which documents are produced by them, where we see what is happening and can participate in it: not pre-prepared; not witnesses proofed; but witnesses called. If in the course of giving evidence one witness

indicates the possible location of other evidence, it is for the commission to then, if it thinks it appropriate, call that other evidence, whether it be documentary or oral.

There is no suggestion that this is a police proceeding, or an investigatory proceeding beyond the inquisitorial powers conferred upon the commission by its power to summons and invoke persons and documents and call evidence at hearings. This is not, as the commission said on the last occasion, a situation in which my learned friend is in any sense a prosecutor. It would be not right to put him in that role. It is not for him to make any decisions about what evidence he leads and does not lead. We are as entitled to know this material as he is. Things may readily appear to my client as being helpful to him which may not be perceived by my learned friend. We are as entitled to the benefit of it as are the other members of the commission.

This is an unprecedented - since Federation there has been no attack upon judicial independence which ranks anywhere near this inquiry, and it is inconceivable that a parliamentary commission or committee would operate without the judge who is the subject of it being fully aware of all that is going on. It is not a prosecution where prosecutors can keep things up their sleeve, make decisions as to what they do and do not call. There is nothing in the statute to authorise any person to go anywhere, or do anything, apart from receiving the allegations and calling the evidence before this commission if those allegations are particular enough and fall within section 5(1).

My friend talks about qualified privilege applying to what people do outside the commission. Let there be no misunderstanding, if this commission authorises it, it will be responsible.

SIR R. BLACKBURN: What do you say is the effect then of section 12, dealing with search warrants? How could that be used? How can that be a useful section?

MR GYLES: Whatever section 12 authorises, it authorises - that is the issue of a search warrant. And the warrant will be executed, and it is the substitute for a summons where it is figured the summons will not be operative. It brings the documents here. That is the only effect of that section. It certainly does not authorise anybody to make any inquiries or to ask any questions. If it had been the contemplation of parliament that there would have been policemen around the place, they would have been provided for and there would have been a privilege attaching to what they were doing, presumably.

This is not an inquiry into breaches of the law; this is not an executive inquiry to see whether the law is being complied with and to ensure that the law enforcement takes its course. This is an inquiry where certain advice will be given to parliament, and the existence of section 12, we submit, assists our present submission greatly, that if there were any implied power to go out and make inquiries, it is strange that it was not spelled out. We rely on what the commission said last time: counsel assisting the commission are given no responsibilities under the act, nor are they given the role of prosecutors.

Now, once something is in the actual or constructive possession of the commission, it is our submission that we are as entitled to see it as is counsel assisting, but I am perhaps at that point verging into the last matter. I am on this point putting the submission that there is no warrant in this statute for the engagement of investigators to perform any investigatory function, there is no warrant in this statute for any roving inquiry into the whole of the life of Mr Justice Murphy, there is no warrant in this statute for any invasion of his rights or privacy, save for the strict rights under this statute.

He objects as strongly as he can to the notion that this commission is engaged upon the task of finding out whether he has ever done anything which is liable to leave him open to being removed. That is a frightening submission that we have heard this morning, and it is a pity it is in private, although we note from the act, and we propose to act upon the view so far as submissions are concerned there is no inhibition on their publication. It is a frightening submission in relation to any judicial officer that parliament may set up an inquiry, not as to whether a particular allegation has been established but whether there is any allegation, whether there is any conduct somewhere out there which might preclude that judge from sitting.

SIR G. LUSH: Is this one of the submissions about which you are reserving your liberty to publish, Mr Gyles, is it really made to us?

MR GYLES: Yes, my word, indeed it is, because it has been put to you this morning that you may send investigators out into the community, not in relation to a specific allegation which is being made in precise terms, but generally in order to develop an allegation. It is put to this commission, and put very seriously, that it is impossible to imagine

a greater invasion of judicial independence than is contemplated by that submission, and to attribute it to parliament in our submission is ridiculous.

SIR R. BLACKBURN: But really, Mr Gyles, the act itself is an unprecedented inroad upon previously accepted notions of judicial independence; is that not so?

MR GYLES: Yes, Sir Richard, but with the protection given by section 5(2), and given the protection involved in admissible evidence being the basis of the finding, and given the protection that what will happen will happen with us present and being able to put to you that what is being investigated, looked at by the commission, is outside the statute because of A, B or C reason. However, what is proposed is that we will not hear anything and presumably you will not hear anything until the full investigation has taken place.

Now, I put, and I am entitled to put the submission that the result is so startling as to throw considerable light upon the true construction of the act, and insofar as there is discretion involved, as there plainly must be, in matters of procedure, they should not be exercised so as to oppress my client.

Why should we have to justify, receiving allegations, why should we have to justify saying we require to see the material that is produced? What is the problem about it? What is the disadvantage? I listened to my friend's submission carefully this morning as to why it was they did not propose to give us access to the material which has been received. He provided no answer. He said it is not appropriate, I think was his word - no basis. My note was, why not. There is certainly no reason advanced why we should not see it.

This is not a criminal investigation, although one wonders at the way it is being conducted. It is bearing all the hallmarks of a criminal investigation. We cannot see anything; we get no particulars until we are charged.

Well, we protest, with respect, about that. We submit that natural justice, procedural fairness and the terms of the statute all require that we be given access to the material which has so far been alleged, if any. Then we may be able to assist those assisting you and assist this commission by being able to indicate, put points of view as to the particularity or relevance of the allegations.

We may even be able to point to evidence which would give the lie to the allegation. We may be able to point out how eternally inconsistent the allegations may be. This is all speculation on our part, and if it transpires that there is no information received from the public apart from journalistic scuttle-butt, then the sooner that is known the better, because certainly we do not propose to permit proceedings, so far as we are able, to permit that the powers of this commission are to be used to assist in a journalistic witch-hunt, and all we can say is that we see no bona fide reason for the secrecy which has surrounded the inquiry to date. It fills us with trepidation.

As to the future of the inquiry, we see no reason why the rulings of the commission on the last occasion have been breached, why submissions by counsel assisting have been put today which are quite in the teeth of them, and we respectfully put that the rulings given on the last occasion should now be adhered to and insisted upon.

The very time limit which operated so heavily upon the minds of the commission on the last occasion is the strongest possible indication that the notion of any inquiry not by hearing into particular identified allegations must be wrong. Already it is proposed that no particulars be provided before the middle of July. Is it seriously thought that parliament were considering the sort of proceedings which we are now faced with when setting the time limit it did?

Now we have been told about this flood of information. What is this information? Is it written? Is it verified? Is any of it verified? We know, of course, about the previous trials, we know about the senate inquiries, we know about the Stewart report. What is there apart from those things? If there is anything at all, why cannot we see it this afternoon? If there is nothing, why should not that be revealed to us? Because, as my friend said - I forget his precise words - this is not a tactical game we are playing; it is the life and future of a judge of the High Court that is being dealt with, a present member of the High Court. Is it suggested that he or we cannot be trusted with the information that has been received? I assure you it is no burden upon our time to look at it. I assure you we do not wish to have it verified before we see it.

This act should be construed and understood and applied so as to avoid interference to judicial independence so far as is possible. We have had cited, as it were against us, Senator Gareth Evans, and I have put the proposition already that what individual members of parliament may or may not say will not affect the true construction of the statute. But if his words are to be taken against us, they can also be taken for us.

There is one thing that is plain, I think, from the page my learned friend referred to, that it is precise allegations being dealt with rather than an open-ended investigation into topics or lines of inquiry that might appeal to the commission. We adopt that as being a satisfactory paraphrase of our submission today.

But to say that X has come in and told us something which may lead to Y is the very notion of following lines of inquiry that the act does not countenance, and indeed what the senator said makes it quite plain that general allegations of association with persons of ill repute or defamatory allegations of various kinds are not sufficient; they have to have a degree of specificity as to time, place, particularity, as to make them susceptible of effective investigation. I put that as being a correct statement of the statute itself, and just as an act of parliament is construed to interfere as little as possible with vested interests and property rights, so much more should that be the case when dealing with the fundamental constitutional principle of judicial independence.

Now, it is perhaps not the time to address about the constitutional background, although perhaps one should to understand the role that the authorities

are here playing, that if there were any motion in parliament for removal, and I hasten to say there is not, but if there were it would have to be a specific allegation of a fact or matter which would, if proved, warrant removal, it would have to be backed up with something. Now, that is the common law of parliament, and this legislation should be construed with that in mind.

I should give you reference to the passages in that, but the commission may recall the Boothby controversy in South Australia many years ago, in colonial days, and a controversy arose as to the constitutional position. Advice was received in relation to that matter and other colonial matters which indicated that the procedure of removal required a specific charge, that natural justice accorded, and must be a charge which is something which would warrant removal. I can provide the material about that in due course. The book Shetreet's Justice on Trial also is a useful summary of the principles.

It is, of course, that which forms the substratum of this statute. I will make inquiries to have that material brought over this afternoon, if I may. I think that completes the submissions I wish to put, we, of course, adopt the letter which was written, but we do point to some matters in response to my learned friend's submissions.

SIR R. BLACKBURN: I wonder if I could raise with you a very small point? I think if I have understood you properly you suggested that Senator Evans' speech in the senate was not a second reading speech.

MR GYLES: He did make a second reading speech but the remarks, I think, which have been picked up - - -

SIR R. BLACKBURN: You are referring to other remarks.

MR GYLES: - - - are part of the debate. I think the pages that we have referred to are 2703 in the senate.

SIR R. BLACKBURN: And he was the member representing the minister in the upper house, was he?

MR GYLES: That is so. My friend reminded us of his submissions on the last occasion about counsel being a filter. We have never objected to that as a filter is an inert thing, and we think that is a very good analogy. He should let this information filter through him so that we distil from it, if there is one, a specific allegation. What he should not be doing - I have been trying to think of an appropriate analogy - - -

SIR G. LUSH: The metaphor seems to be getting dangerously confused at present anyway.

MR GYLES: I think I might leave it at that, but the commission takes what I have in mind. Secondly, we, I think, have already said that we do not agree with his distinction between the commission operating when it is considering and the commission operating otherwise. We submit the commission - all it is doing is considering. There is no room for an inquiry outside of its consideration under section 5(2).

SIR G. LUSH: Suppose it is said against you that the essence of the act is that the judge is not to be called upon to answer anything except specific allegations, and when there are specific allegations he is still not to be called upon until there is prima facie evidence aliunde. Can it be said against you that the thrust of your comments is that you want to involve the judge in all the non-specific allegations as well?

MR GYLES: Not for the purpose of answer but for the purpose of - - -

SIR G. LUSH: Pointing out that they are non-specific.

MR GYLES: Non-specific, yes, or pointing to evidence which may counter them, which should be called not by the judge but by counsel assisting; the lack of relevance of those - we know from the letter which has been written that a number of the allegations plainly, in our submission, fall outside any question of 72. That is a matter for a later day, but that argument is very much assisted by knowing, or the bounds of that argument would be known when the allegations are made. Yes, we do not shrink from that consequence that we would be participating, if you like.

SIR G. LUSH: You are really participating in the framing of the allegations. We do not need to keep on reminding one another that there is no precedent for the whole of this situation, but it may be put that that is a curious consequence.

MR GYLES: We would put it would be even more curious to think that allegations made is being construed as allegations made by counsel assisting the commission. Unless we can be satisfied of the source allegation - surely, I can put it this way, we must be entitled to be satisfied that there is such a thing as a specific allegation. That is the foundation of it all.

SIR R. BLACKBURN: Cannot it be said that procedure envisages that in due course you will be able to be so satisfied or not and to put your point of view?

MR GYLES: It is the equivalent really of a statutory precondition that there be such an allegation, otherwise, we are here without any substance.

As I put last time and I will not repeat, it is strange enough that there should be the ability to make ambulatory allegations or that there should be allegations made after the statute, but even assuming that is correct, surely it cannot be that the allegations are to be made from within the commission or initiated by the commission, whether directly or indirectly. Surely we as the person at the other end of the machine are entitled to say please let us have what you say are allegations. My client has or may be confronted with the necessity for very substantial means to protect himself by way of obtaining evidence. The time limits of this inquiry are such that it will be a monstrous thing if he were suddenly confronted with what my learned friend describes as a flood of information or a flood of allegations and told well, now we will get on with it - this beiong the basis of an advice to parliament which might ultimately be to proceed for the removal of a High Court judge. It is a straw in the wind which we consider - - -

SIR G. LUSH: I understand that, if I may say so, that one of the time difficulties that we have contemplated from the start was that time would have to be afforded for the preparation of the defence. Time is getting away from us at a tremendous rate.

MR GYLES: I think all we can put about that is that one asks the question why is there any necessity for us to be deprived of the opportunity of putting what views we have about the material which has come in and taking whatever steps we may be able to take for our own protection in the meantime? What is wrong with progressing allegations? My friend said on the last occasion, he stood here and said, "I could give you some now". He has retracted that for reasons which, with all respect to him, we cannot follow. As we followed it, he said, "We got some allegations but in the light of further allegations we have decided that they do not mean what we thought they meant, we would like to vary them". I am not quite sure where we get to there, either you have received them or you have not received them. Why the secrecy, why cannot we be told is there an allegation against us? That is what this statute is about, and yet nobody will tell us and we will not be told apparently until the middle of July, if my friend's argument succeeds.

If the commission pleases, and I do not want what I said before to be misunderstood, I am not here putting submissions with a view to making any press statements about it, I am simply saying as we read the statute it does not inhibit us saying anything about the submissions which have taken place and the rulings which have been given. If we are wrong about that, we would like to be corrected. Indeed, we expressed the view on the last occasion, and we repeat it here, for matters like this we would prefer them to be in public. It is an unprecedented situation and it raises questions of the highest public policy where there may well be grave misconceptions as to what the commission is about.

My friend put an argument that there are no compulsive powers or no coercive powers being used by counsel assisting in seeing witnesses. That may be so, but he is doing it as your delegate, and if there is no power to do it and it is unauthorised by statute, it is no part of this commission's functions. If this commission wishes to see witnesses it should do so by seeing them in the witness box, not by having them seen by somebody in the name of the commission where we do not know, framing what they are saying, proving them and bringing them in. Giving them a bit of assistance with their allegations

perhaps, not improperly perhaps in one sense but improperly in another becaue we say it is all contrary to the statute, as it surely must be to initiate, to use as a springboard an imprecise allegation to spring into a precise one. that is surely an initiation.

We would like to know, with respect, as to whether any search warrants have been issued, whether any request has been made of the National Crime Authority, and whether any information has been received from the National Crime Authority, and whether any material has been received from the Senate, and it goes without saying that our greater request for access to everything includes the lesser. If there are other topics, other sources of information that we do not know about, we would certainly like to have access to them.

I have been reminded that my learned friend said that in effect they must ask questions of people coming forward so that they could put forward the allegations. That perhaps focuses attention on the question: is that appropriate, is that proper, is that what the statute authorises or requries? In our submission the answer is no. Also, we are assuming that the material which the commission has seen is that which was referred to on the last occasion, nothing more.

MR CHARLES: If the commission pleases. I will try to follow my learned friend's argument. If that means that I end up going all over the place, that is because I am following him.

MR GYLES: You might be wise and better informed.

MR CHARLES: I do not propose to make any comment on Mr Commission Wells position unless invited to do so. Next, it has been put that the transcript at page 32 to 33 of the hearing on 3 June shows that counsel assisting is given no role to inquire. We would simply say as to that that examination of the transcript shows that the argument there was directed to something entirely different, namely the question of whether members of the commission were entitled to look at material, and as to that we say it gives no support to the argument that my friend sought from it. May I turn next to the question of the relevance of comments made in Hansard and in particular by Senator Evans.

Senator Evans was speaking in the Senate as the minister representing the Attorney-General. On examination of what was said by the Senator in Hansard, pages 2703 and following, demonstrates as clearly as we would wish that the Senator was stating the government's view on a variety of different points to enable members of the Senate to vote on the proposed bill and individual sections of it, and we would say that there is much assistance to be gained by looking at what Senator Evans had to say for that reason. My friend in his argument was in effect trying to go back to the pre-historic or at least pre-1984 days when he could not look at what was said in parliament and he was putting forward some of the very good reasons that were said in those days to be the basis for that viewpoint.

Of course, there are different arguments being put by different people as to the meaning or potential meaning of sections of the proposed act

but what we have here is Senator Evans on behalf of the government saying what is intended by the government to apply. When one looks at section 15AB one sees in the first part that subject to subsection (3), the interpretation of a provision of an act:

> If any material not forming part of the act is capable of assisting . . . . . manifestly absurd or is unreasonable.

Whatever else may be said of my friend's arguments, a number of them would lead to conclusions which are manifestly absurd and wholly unreasonable.

When one turns to section 15AB(2), that commences by saying, ":without limiting the generality of subsection (1)", so it is not intended to be exhaustive. It then refers to the material that may be considered and includes the speech made to the House of Parliament by a minister on the occasion of the moving by that minister of a motion that the bill containing the provision be read a second time in the house. Then (h) any relevant material in the journals of the Senate, the votes and procedures of the House of Representatives. I accept that the passages to which I am about to refer appear in Hansard after the motion that the bill be read a second time has been completed and that that is by a vote that the bill be read a second time and when the house has moved into committee, so on that view it may not be strictly covered by subsection (f) of subsection 15AB(2) but we would say that if you bear in mind that what is set out in subsection (2) simply sets out certain explicit parts that may be looked at, but without limiting the generality referred to in (1); when one bears in mind that Senator Evans'speech on this occasion was directed to the subsections one after the other and what the government intended for them to carry, there is particular relevance and assistance to be gained from reading what Senator Evans said.

I have read already this morning portions of what Senator Evans said at page 2703, the left hand column. In relation to the remainder of what Senator Evans said, some part of the senator's comments bear directly on the argument that has been agitated in this commission today. On page 2703, the right hand column, Senator Evans said as to the language, specific allegations made

in precise terms:

> This is not a term of art . . . . . .
> . . . in responding to the kinds of concerns.

On page 2704, right hand column, Senator Durack asks:

> We are talking about judges of the calibre I presume the minister would propose to the parliament . . . . . in very precise terms.

Exactly what my friend has been putting to this commission today and the answer is:

> I do not think it is a necessary condition of the commission being able to act . . . . .
> . . . . . .constricting in that sense.

Again on page 2705, Senator Evans says:

> I hope that . . . . . .
> at the end of the day. That is the starting point.

At page 2707 Senator Evans says:

> The language of the latter part of 5(3) is obviously such as to make accessible to the commission all the material . . . . . released for that purpose.

Then the Senate turns to section 6(2) which is the fact that the commission is required to avoid making findings save on the basis of the evidence that would be admissible in proceedings in court. Senator Durack raises the concern on page 2708, left hand colum, point 6:

> What disturbs me is that the provision may be understood to mean . . . . .
> . . . . . in order to get the commission off the ground.

Senator Evans continues at page 2708:

> Bearing in mind again section . . . . .
> . . . . . which satisfies the criteria of admissibility.

We would say, with respect, that the passage appearing on page 2708 supports what we have said before in relation to all of Senator Evans comments

demonstrating what the government saw as being the intention of its proposals in this legislation. When one bears in mind all of those comments, we would say that the commission is entitled to look at those words for assistance in interpreting the act and if the construction is one which is absurd or which would lead to unreasonable results, the commission is entitled to bear that in mind. On the function of counsel assisting, may I remind the commission briefly of what McClemens J said in Volume 35 of the Australian Law Journal. The article appears at page 271, the legal position and procedure before a royal commissioner. At page 275 point 7 his Honour said:

> So far as the investigation of the availability of documentary evidence was concerned . . . . . and arranging for their attendance.

THere is a quotation on page 276 in the left hand paragraph from the remarks of Sir Charles Lowe set out in Mr McInerney's article which had appeared in the Australian Law Journal in volume 24 pages 386 and 438:

> Generally speaking where a royal commissioner is appointed . . . . . to depart from that general procedure.

My friend then put to the commission the question of whether material which came to us in fact came to the commission and referred to pages 31 to 32. He did so in support of his assertion that these materials in effect came to the commission in support of an argument that my friends were entitled to see everything that came to us in this way. As we have put to the commission, the remarks appearing at pages 31 and 32 are directed to a different argument. Also, there is a second argument, not conflicting but which runs a different course, which is rolled up and confused in my friend's argument and which needs to be taken out.

We would say that when a commission receives material there is no ordinary entitlement to see material that has been received. On this occasion we concede that the judge is entitled to natural justice and we intend to ensure, so far as we are concerned, that the laws of natural justice are followed. Therefore, with that in mind, anything that is put to the commission in the way of evidence will be disclosed to my friends in advance but we would say that material that we receive by way of evidence which we receive for the purpose of sifting, while we recognize that we may gain some assistance from my friends in explanation of it, we would say there is no principle of natural justice that requires us to hand to our friends everything that we receive - vague, irrelevant, unnecessary or otherwise - which is not to be put in evidentiary form before this commission.

It seems to us to be entirely unnecessary and something upon which the rules of natural justice do not abide at all. My friend in part of his argument put that we had said no allegations had been received within section 5(2) and that there is some process going on of creating some and suggested that in effect we were generating allegations. With respect, I did not make any such comment. I did not say that no allegations had been received in specific terms capable of being precisely stipulated. I did say that we had received a very considerable quantity of material. I did say that some of this arguably raised allegations but I did say that other material had since arrived which threw a different light upon that material first received and which we desire to pursue by inquiry on the part of counsel assisting before we refine the drafting, before in other words we say what is the precise allegation that is to be put forward, if any is to be put forward.

My friend then argued that section 5(2) binds this commission that it may only consider a specific allegation made in precise terms and that that inhibition by section 5(2) binds all others acting under the authority of the commimssion. We say that that argument is nonsense, it is wholly unreal and it flies directly in the face of the act and the intention of parliament. My friend said that we had no business fashioning allegations. We certainly do not regard it as our function to fashion evidence or to torture evidence in such a way as to produce an allegation but if our view of our function at the present time is that if someone comes to us and makes an allegation which may be capable of being made specific and of which there is sufficient substance to suggest that we should pursue, that we should then ask the questions.

It is not up to us to torture material but if an inquiry makes something precise then our present view is that we should pursue it for that purpose.

If on the other hand the inquiry demonstrates, as it may well do, that there is no precise allegation to be made, we would not pursue it. My friend this afternoon submitted that it was the function of counsel assisting to bring before the commission the very words that people have used, nothing else, and that that is what the commission is to consider. We suggest that my friend has there departed into cloud cuckoo land. That is a manifest absurdity. The result would be to stolify the commission activities and deprive the commission of the opportunity of carrying out any of the purposes that parliament intended. It has been suggested that we are not here to investigate apart from the methods laid down by the act. We say that the act and those framing the act plainly contemplated that some investigation, some process of question and answer would be engaged upon by counsel. It was suggested that their rights would be affected by any other course being taken. We say that natural justice ordinarily does not require an accused person - and this example was put by analogy by my friend - to participate in a decision as to what offences that accused person shall be charged with or to participate in the framing of the presentment, the counts and the particulars.

That in our submission is what is being put to this commission. As to the suggestion that we are in some sense unreasonably withholding material from those advising the judge, we would say with respect that that submission is wholly unreasonable in the light of the correspondence that has been exchanged. We have given our reasons which we would hope are clear and compelling as to why it is we have not yet been able to supply our friends with particulars even in progressive form. In the hope of giving them every reasonable assistance we have attempted to set out on the second page the lines that are being perused in relation to information that has been supplied so that if my friends wish to make submissions to this commission they are permitted to do so. They are enabled by the provision of that information to take such action as they may be advised.

On the services of investigators my friend put it that counsel was not an investigator and in effect that I am not the chief superintendent of the police force of this inquiry. Well, I readily accept that. I do not for a moment propose to accept the role of either prosecutor or police superintendent. We are here to do a great deal more than provide evidence in an orderly fashion. Counsel can regularly draft

charges that are to be laid in criminal proceedings, and of course these are not, but we would say we do have a function to perform in drafting and making sure that allegations appear in proper form.

We refer to the passages in Hansard that we have already put before this commission at pages 2703 to 2708. If we did not perform that function then the proceedings in this commission would be wholly disorderly and would take a great deal longer to unravel. My friend said that the judge should be fully aware of what is going on, that it is not for the prosecutors to keep things up their sleeve. I quite understand the force or I sympathize with the force of the submissions that had been made to this commission. I recognize that that force is an indication of the concern of those representing the judge and of the judge himself to know what is taking place, a concern that not being given information would doubtless increase. The fact is that we are simply not able at this time to give the particulars they want immediately. It may very well be, if we are allowed to continue the process of inquiry, of asking questions of those who have given us information, that we now contemplate pursuing, it may very well be that we will find that there are no specific allegations in precise terms that we could make or none that we would wish to proceed with under section 72.

Equally, we do not regard ourselves as in any way generating allegations to be put to this commission. It has been suggested that we have said that in effect we have a warrant for the engagement of a roving inquiry - has the judge done anything that would have him removed? In the way in which that submission was put to this commission it was put with an overtone that that is going to be made pretty soon. I suggest with very great respect that if any material is made public with or without the consent of this commission it would be desirable to get it right because that is precisely not what we are doing. We certainly do not see it as our function in any way to do so. We are here acting at the dictate of the parliament, acting as counsel assisting this commission to look at material supplied to this commission and to see whether on the basis of that material there are specific allegations made in precise terms which this commission should consider. That is our function and no other.

A number of submissions on this point were redolent of Macbeth, full of sound and fury, and I need not complete the quotation. As to the request for information as to what material has been received, unless the commission desires us to take the course of specifying at this stage the material received, I do not at present propose to do so unless the commission

rules that that information should be given. I am prepared, if the commission wishes me to do so, to indicate in general terms what has been said but as we have submitted we would say at the present time it is neither necessary nor obviously helpful and certainly not required by the dictates of natural justice that we should give information of that kind, or that we should make the information available to my friends. Unless there is anything further that the commission wishes to put, those are our submissions.

There is one last thing I ought to say before stopping. We have said - and in our letter did say - to my friends that they should assume that our inquiries would proceed tomorrow if no other course was dictated today. We are very conscious that we should go as speedily as possible. We do very much want to proceed as quickly as we can by making those inquiries and unless some ruling were made or other good reason given why we should not, I simply repeat that we want to proceed in those matters in accordance with our letter tomorrow.

SIR G. LUSH: Out of this debate you in fact want directions that you are entitled to continue with the investigation of material received and you want a direction that the judge is not at the present stage entitled to access to all your documents?

MR CHARLES: As we understand it we are not here in a sense arguing for directions but my friends by their letter and by their submissions have in effect asked for directions of a particular kind. If the commission says that they are not entitled to those directions in effect the commission would then be ruling in a manner that the presiding member has just put to me by rejecting those submissions.

SIR G. LUSH: Thank you, Mr Charles. Mr Gyles, at the end of your address I had intended to ask you specifically what you submit the commission should say at the conclusion of this debate.

MR GYLES: It should say there has been no reason shown for the failure by counsel assisting to - - -

SIR G. LUSH: Those are words of blame. What shall we tell them to do?

MR GYLES: Carry out the previous direction; give particulars of the allegations. What we are concerned with is the identification of the precise allegation or allegations which are being considered or which have been received, I suppose. That was the direction before. We submit nothing has happened which should make any change in that. If there has been no allegation of that sort received, we should know it.

Secondly, the commission should refrain from, and make clear to counsel assisting that he must refrain from, any actions which could be called investigation of any material or information received unless and until we have seen those allegations and have had the opportunity of putting submissions to the commission as to what should happen about them. Without repeating the submissions, we submit there has simply not been any reason advanced - - -

SIR G. LUSH: I was not inviting you to repeat the submissions, Mr Gyles, but to formulate the propositions that you are inviting us to uphold.

MR GYLES: Yes.

SIR R. BLACKBURN: Could I just ask you to repeat the first of those points? Your second point was there should be no investigation unless and until you have seen the material being investigated.

MR GYLES: No. The first order or direction was that we should be provided with the allegations which are received.

SIR G. LUSH: Particulars of the allegations in the form in which they have come in.

MR GYLES: That does not encompass all the material received - that is a later point. The first one is of allegations.

SIR R. BLACKBURN: That means that counsel assisting us must sift the material to see what in it consists of allegations and what material does not consist of allegations.

MR GYLES: Yes. He has had 20 days to do quite a bit of that and he said last time - - -

SIR R. BLACKBURN: You do not want to see the material that does not consist of allegations?

MR GYLES: We do, but that is not our first point. If I could just go through them one by one. Our second point is that there should be no investigation in relation to any allegation until we have had the opportunity of putting submissions to the commission as to what should happen about them including submissions that they are not precise enough to answer the statutory description of section 5 subsection (2).

SIR G. LUSH: Yes, we have that.

MR GYLES: And that there should be no investigators engaged by the commission as there is no role for them to play. The next particular order we want is that we be given the opportunity of inspecting all material which has been received whether pursuant to the advertisement or otherwise.

SIR R. BLACKBURN: That is merely a larger claim than the first.

MR GYLES: It is. We also wish to know any search warrants have been issued, whether there has been any request

made or information received from the National Crime Authority or the Senate, Director of Public Prosecutions or any other body of that sort. We would like confirmation that the commissioners have only seen that material which was tendered on the last occasion.

MR CHARLES: I should say to that for the assistance of my friends: the commissioners have received a number of documents taken from material such as the Australian Law Journal, things of that kind, cases.

SIR G. LUSH: I think Mr Gyles was referring to evidentiary material.

MR CHARLES: I should say I am quite happy to give my friend a copy of all of that material. It is general reading. It is not material that is of any private kind or of any evidentiary nature but I am perfectly willing to let him have a copy of that.

MR GYLES: We would certainly like to know what the commissioners are seeking. I really do not know to what my friend is referring and we certainly would like to know what background has been looked at. We might be able to help.

SIR R. BLACKBURN: Supposing after we have risen this afternoon I go and read the Act of Settlement in the law library over at the courts; do you want me to tell you about that tomorrow?

MR GYLES: We would prefer it, your Honour. We would - - -

HON A. WELLS: We will have to keep a running sheet.

MR GYLES: Sort of a running sheet, yes. As far as the law is concerned, we remain very happy to give assistance about that topic at any time. We would submit that the normal way of handling it might be helpful, to let us each put a coherent argument on a particular topic. I did refer earlier to, I think, the Boothby matter. I think I was incorrect. It was the Victorian debate between the judges and the attorney in the course of which opinions were expressed by the English law officers.

SIR G. LUSH: The Victorian judges are Willis and Barry.

MR GYLES: Yes, Barry. This arose out of the Barry controversy. I think really it takes a little explaining to go into it but the point of it was, there needs to be a specific charge.

SIR G. LUSH: The act covers that.

MR GYLES: I am trying to underline that, if I may say so. The specific charge, section 5(2), the legislators

are not inquirers until the charge comes before the house and should be treated to the same effect.

SIR G. LUSH: Thank you, Mr Gyles.

(Continued on page 94)

SIR G. LUSH: The commission will adjourn now until 10 o'clock tomorrow morning. If for any reason we find ourselves unable to give the decisions that have been required in the course of today's arguments at that time, we will communicate as early as possible with those involved. We will adjourn now until provisionally 10 o'clock tomorrow morning.

AT 4.01 PM THE MATTER WAS ADJOURNED
UNTIL TUESDAY, 24 JUNE 1986

Ruling on Argument of 23 June 1986

On 3 June 1986 the Commission indicated that specific allegations relating to the conduct of the Judge should be delivered to the Judge's advisers on 20 June. It was at the time contemplated that the particulars then to be given might be incomplete. It was further indicated that argument upon the interpretation of S.72 of the Constitution might begin, upon the basis of the then particulars, on 23 June.

Senior counsel assisting the Commission spoke to senior counsel appearing for the Judge on 17 June, with the result that a letter was written by the solicitor acting for the Judge to senior counsel assisting the Commission, which raised the following points:

1. That the Commission was in default in the delivery of specific allegations, and that to the extent that that was due to examination of, or inquiries initiated as a result of, information received, there had been a violation of directions given by the Commission on 3 June;

2. that the Commission had no power to use the assistance of investigators in the examination of allegations received, and in particular to use the services of law enforcement officers;

3. that the Commission had no power to take steps to verify information received;

4. that investigation should cease until a further hearing session of the Commission had been held;

5. that the Commission should make available to the Judge all information and documents as and when received.

This letter was answered on 20 June by the solicitor instructing counsel assisting the Commission, saying that delay was due to the volume of material received, and that it would be impossible for counsel assisting to draw and settle proper particulars before some investigations were made and statements obtained from potential witnesses. The letter also contained other information which may be relevant to another issue.

In opening the debate, Mr Charles identified six points in the letter of 18 June. There is, however, some overlap between them as there is even between the five set out above. The statement above adequately indicates the origins of the argument which the Commission heard.

Mr Gyles based his argument on S.5(2) of the Parliamentary Commission of Inquiry Act 1986. The essence of the argument was that that subsection lays down that the Commission's inquiry begins with the receipt of a "specific allegation in

precise terms", and that it can properly proceed by, and only by, sitting in hearings to receive evidence and documents. It follows that it cannot, by investigative process, act to confirm, elaborate or develop allegations received. It also follows that the Judge should have immediate access to all materials received.

So far as this argument was said to be in accordance with any ruling given on 3 June, it is unfounded. The passage referred to in the letter deals with phases of the inquiry designated (a) collection, and (b) consideration, of allegations. In the context of S.5(1) - which directs the Commission to "inquire" and "advise" - this dichotomy places "consideration" as beginning with the framing of particular allegations, and "collection" as including steps taken up to that point. It in no way suggests that no investigative activities would be or should be undertaken, and it does not imply that the Judge will be provided with materials before specific allegations are made.

The argument included the proposition that the Commission could not engage in any work upon allegations which were not, at the time of receipt, in the required form, and since the Commission could not do so, neither could its counsel.

The Commission is unable to accept the argument. The Act does not say who is to make, or to prepare, the allegations. It would be unreal to suppose that outside sources would supply, in all cases, allegations in a form complying with S.5(2), and

it would be equally unreal to suppose, particularly in the presence of S.5(1), that the Commission was to discard all information which was not, at the time of receipt, in the required form.

The Commission's view is that it is entitled to gather information, examine it and conduct investigations, if necessary with the assistance of investigators (including members of the police forces if made available) based upon the information to ascertain, with what precision is possible, exactly what the relevant point, if any, of the information is; and that it is its duty, and specifically the duty of counsel assisting, to formulate the specific allegations which emerge from materials received. It considers that this is no more than a realistic interpretation of the various provisions of the Act. In particular, it rejects the submission of counsel that the terms of S.5(2) confine the consideration of the Commission to allegations in the required form originating outside the Commission's activities. If confirmation of this view were required it may be found in the statements of the Minister in charge of the Bill in the Senate, in the course of the second reading.

The Act protects the Judge's position by requiring that only those things which can be reduced to a specific allegation shall be raised against him, and that he shall not be required to give evidence unless there is evidence supporting an allegation or allegations sufficient to require an answer. It

is not consistent with this appreciation of the Act's provisions to construe this Act as requiring or entitling the participation of the Judge in the preparation of the specific allegations, nor can the requirements of natural justice extend to such participation.

The Commission notes an argument that to take the view which it has now expressed would be inconsistent with statements made in the course of the ruling given on 3 June. The passages referred to are to be found at pp 31-33 of the transcript. The subject then under discussion was whether the Commission should look at documents which are identified at P 31. The statement which counsel for the Judge submitted was inconsistent with the course actually taken after June 3 by counsel assisting the Commission was that the Act assigned no role to counsel assisting the Commission. The stataement dealt with responsibility for the final report: it is in no way inconsistent with counsel's being assigned duties by the Commission. They cannot be given duties which take them outside those things which the Commission is empowered to do itself. The Commission has in this ruling stated its view of the powers, relevant to the present submissions, which the Act confers on it

Mr Gyles, at the request of the Commission, formulated declarations or directions which, upon his submissions, the Commission should make or give. These in substance were:

(a) that the Commission should declare, and direct counsel assisting it, that particulars of all allegations so far received be delivered to the Judge forthwith;

(b) that the Commission should allow the Judge's representatives to inspect all material so far received;

(c) that the Commission and its counsel should make no investigation and should not use investigators to make investigations arising out of any material until it has been seen by the Judge's representatives and those representatives have made upon it such submissions as they think appropriate; and

(d) that the Judge be informed forthwith of the issue of any search warrants, and of details of any material received by the Commission from the National Crime Authority or the Senate.

For the reasons stated, none of these declarations or directions will be made or given.

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

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 TUESDAY, 24 JUNE 1986 , AT 10.35 AM

Continued from 23.6.86

Secretary to the Commission

Mr J.F. Thomson
GPO Box 5218
SYDNEY 2001

Telephone: (02) 232 4922

SIR G. LUSH: I invite Mr Wells to say anything he may care to say about the point concerning his position which was raised yesterday.

HON A. WELLS: I am in no way embarrassed in discharging my duty as commissioner by what I said in the South Australian Supreme Court on 23 February 1984, nor in my opinion is there any reason why I should be.

What moved me to say what I did were remarks to which my attention had been directed by another Supreme Court judge, which were reported to have been made by Mr Justice Kirby, who was then presiding over the Australian Law Reform Commission. Mr Justice Kirby had said, according to the report, that the intervention of judges in public service appointments was part of the "nether world" of the legal arena and that it was a practice inherited from Britain.

Those remarks seemed to me to apply to me as a Supreme Court judge in Australia. The occasion for Mr Justice Kirby's remarks was immaterial. I shall therefore continue to act and sit as a commissioner.

SIR G. LUSH: The following is the ruling of the commission upon the argument which we heard yesterday.

On 3 June 1986, the commission indicated that specific allegations relating to the conduct of the judge should be delivered to the judge's advisers on 20 June. It was at that time contemplated that the particulars then to be given might be incomplete. It was further indicated that argument upon the interpretation of section 72 of the Constitution might begin, upon the basis of the then particulars, on 23 June.

Senior counsel assisting the commission spoke to senior counsel appearing for the judge on 17 June, with the result that a letter was written by the solicitor acting for the judge to senior counsel assisting the commission, which raised the following points:

1. that the commission was in default in the delivery of specific allegations, and to the extent that that was due to examination of, or inquiries initiated as a result of, information received, there had been a violation of directions given by the commission on 3 June;

2. that the commission had no power to use the assistance of investigators in the examination of allegations received,

and in particular to use the services of law enforcement officers;

3. that the commission had no power to take steps to verify information received;

4. that investigation should cease until a further hearing session of the commission had been held;

5. that the commission should make available to the judge all information and documents as and when received.

This letter was answered on 20 June by the solicitor instructing counsel assisting the commission, saying that delay was due to the volume of material received, and that it would be impossible for counsel assisting to draw and settle proper particulars before some investigations were made and statements obtained from potential witnesses. The letter also contained other information which may be relevant to another issue.

In opening the debate, Mr Charles identified six points in the letter of 18 June. There is, however, some overlap between them, as there is even between the five set out above. The statement above adequately indicates the origins of the argument which the commission heard.

Mr Gyles based his argument on section 5(2) of the Parliamentary Commission of Inquiry Act 1986. The essence of the argument was that that subsection lays down that the commission's inquiry begins with the receipt of a specific allegation in precise terms, and that it can properly proceed by, and only by, sitting in hearings to receive evidence and documents. It follows that it cannot by investigative process act to confirm, elaborate or develop allegations received. It also follows that the judge should have immediate access to all materials received.

So far as this argument was said to be in accordance with any ruling given on 3 June, it is unfounded. The passage referred to in the letter deals with phases of the inquiry designated (a) collection and (b) consideration of allegations.

In the context of section 5(1), which directs the commission to inquire and advise, this dichotomy places consideration as beginning with the framing of particular allegations, and collection as including steps taken up to that point. It in no way suggests that no investigative activities would be or should be undertaken, and it does not imply that the judge

will be provided with materials before specific allegations are made.

The argument included the proposition that the commission could not engage in any work upon allegations which were not at the time of receipt in the required form, and since the commission could not do so, neither could its counsel.

The commission is unable to accept the argument. The act does not say who is to make or to prepare the allegations. It would be unreal to suppose that outside sources would supply in all cases allegations in a form complying with section 5(2), and it would be equally unreal to suppose, particularly in the presence of section 5(1), that the commission was to discard all information which was not at the time of receipt in the required form.

The commission's view is that it is entitled to gather information, examine it and conduct investigations, if necessary, with the assistance of investigators, including members of the police forces if made available, based upon the information to ascertain, with what precision is possible, exactly what the relevant point, if any, of the information is; and that it is its duty, and specifically the duty of counsel assisting, to formulate the specific allegations which emerge from materials received. It considers that this is no more than a realistic interpretation of the various provisions of the act.

In particular it rejects the submission of counsel that the terms of section 5(2) confine the consideration of the commission to allegations in the required form originating outside the commission's activities. If confirmation of this view were required, it may be found in the statements of the minister in charge of the bill in the Senate in the course of the second reading.

The act protects the judge's position by requiring that only those things which can be reduced to a specific allegation can be raised against him, and that he shall not be required to give evidence unless there is evidence supporting an allegation or allegations sufficient to require an answer. It is not consistent with this appreciation of the act's provisions to construe this act as requiring or entitling the participation of the judge in the preparation of the specific allegations, nor can the requirements of natural justice extend to such participation.

The commission notes an argument that to take the view which it has now expressed would be inconsistent with statements made in the course of the ruling given on 3 June. The passages referred to are to be found at pages 31 to 33 of the transcript. The subject

then under discussion was whether the commission should look at documents which are identified at page 31.

The statement which counsel for the judge submitted was inconsistent with the course actually taken after June 3 by counsel assisting the commission was that the act assigned no role to counsel assisting the commission. The statement dealt with responsibility for the final report. It is in no way inconsistent with counsel's being assigned duties by the commission. They cannot be given duties which take them outside those things which the commission is empowered to do itself. The commission has in this ruling stated its view of the powers, relevant to the present submissions, which the act confers on it.

Mr Gyles, at the request of the commission, formulated declarations or directions which, upon his submissions, the commission should make or give. These in substance were:

(a) that the commission should declare, and direct counsel assisting it, that particulars of all allegations so far received be delivered to the judge forthwith;

(b) that the commission should allow the judge's representatives to inspect all material so far received;

(c) that the commission and its counsel should make no investigation and should not use investigators to make investigations arising out of any material until it has been seen by the judge's representatives and those representatives have made upon it such submissions as they think appropriate;

(d) that the judge be informed forthwith of the issue of any search warrants and of details of any material received by the commission from the National Crime Authority or the Senate.

For the reasons stated, none of these declarations or directions will be made or given.

The commission suggests that it adjourn now for a period of about half an hour for the purpose of enabling counsel to consider what has just been said. If it will assist counsel, copies can be made available of the ruling just given, though I would wish it to be understood that these are working copies

and the physical documents ought to be returned. The ruling in due course will appear in the transcript.

MR GYLES: It would be very helpful if that could be done. Might I just, before adjourning, ask for confirmation of what we believe to be implicit in what the commission has ruled this morning, that is, that the commission expressly authorises the course which is proposed to be adopted by those assisting the commission in the letter from the solicitor instructing my learned friend to my instructing solicitors. I refer in particular to page 2.

SIR G. LUSH: Perhaps you would be good enough to take a copy of the letter and read us the passages that you want us to give attention to.

MR GYLES: Yes, thank you. I am reading from paragraph 2:

> The commission may appoint persons (including policemen) to assist it with its inquiries as from Tuesday 24 June and that the taking of statements may commence on that date. In order that you and your client may be fully informed as to the approach which is being taken by counsel assisting the commission, I am instructed to add the following comments. The information now being considered by counsel falls into two general categories (a) allegations relating to Mr Justice Murphy's conduct in judicial office; (b) allegations relating to Mr Justice Murphy's conduct but not pertaining to judicial office. None of the information supplied includes any allegation that the judge has been convicted of any offence.
>
> The information contained in category (b) relates both to allegations of breaches of the general law and other matters, not constituting breach of the general law which, if proved, would arguably constitute misbehaviour sufficient to justify removal from office. In each case the allegations cover periods of time occurring both before and after 14 February 1975, being the date of the judge's appointment to the High Court bench.

SIR G. LUSH: Do you want me to speak to what you have just said or do you want to add something, Mr Gyles?

MR GYLES: I merely wish to say as the commission will appreciate both from the letter and from what my learned friend said yesterday, that it is proposed to start instanter with that activity.

SIR G. LUSH: Mr Gyles, subject to the qualification although even that word may not be correct but stating so that a contrary inference would not be drawn that the descriptions given in the two lettered subparagraphs and the following paragraph are a result of counsel's study and not the study of the members of the commission, the commission recognizes that the letter is written not on its behalf by the instructing solicitor and does not resile from it.

MR GYLES: We would take it nothing would be done between now and the time we reconvene? I do not want to be silly about it - - -

MR CHARLES: I can give an assurance that nothing will happen this morning.

SIR G. LUSH: We shall be at counsel's disposal. I suggest half an hour. You, Mr Gyles, may be needing to take instructions.

MR GYLES: I was going to ask whether 12 o'clock might be stretching it a little. I think we do need to take stock of matters. If we can be done earlier, may we put it on that basis?

SIR G. LUSH: I will adjourn until 12 o'clock but I indicate we would like to begin earlier than that because we will rise at a quarter to 1 today in any event. But we shall be available to counsel when counsel are ready. We shall adjourn now nominally until 12 o'clock.

SIR G. LUSH: Mr Charles, the purpose is to attempt to reach some statement about what we ought to do next. Would you prefer to begin?

MR CHARLES: I think, Mr President, it may be better if I follow rather than begin in the light of something my friend said to me.

SIR G. LUSH: Mr Gyles, are you willing to accept that?

MR GYLES: Yes. I have been instructed that the judge wishes to test the rulings made this morning. Involved in that testing will be a contention that not only were the rulings not authorised by the statute but that the statute itself if it authorised those rulings was not constitutional and that in any event it is not constitutional. Whilst these decisions have only been made in the last half hour, no particular procedure has yet been determined upon, it is more likely than not that an approach will be made to the High Court rather than the Federal Court; we understand those being the two alternatives but something may turn on practical considerations which would lead to a choice in one direction or the other. As it happens, this week the High Court is in Brisbane and it will require us, if we do take that option, to make arrangements to see a single judge in Brisbane this week. I do not imagine there will be any difficulty about that but we cannot, of course, speak for the High Court.

My learned friend tells me that the view he takes - and he can speak for himself, of course - is that he would not be appearing in those proceedings. We have no particular wish to go up ex parte. We would prefer any hearing to be an interlocutory hearing with both sides present and if that can be arranged, so much the better. We imagine that if the choice is taken of going to the Federal Court there should be judges available in Sydney this week to at least hear an interlocutory application.

SIR G. LUSH: Both courts proceed by order nisi - I suppose a good deal depends on whether you seek a prerogative writ or some form of injunction.

MR GYLES: Quite. We would probably do both and see what happened.

SIR G. LUSH: At the risk of giving the court the impression that you are not quite sure of either, Mr Gyles.

MR GYLES: I am trying to avoid that, yes. I should say this so there is no misunderstanding, that the challenge may well include a question as to the position of Commissioner Wells. It is our application therefore that the commission adjourn, directing counsel

assisting the commission and the staff of the commission that nothing happen at all until we have an opportunity of getting to a court on an interlocutory basis. Obviously we do not ask for that to be open ended and we accept that the commission would wish to keep control over it. We will be certainly seeking to do what we can to have something heard this week, and we would suggest that perhaps the matter be put over to next Monday to await progress.

SIR G. LUSH: Yes, Mr Charles?

MR CHARLES: Mr President, in the light of the application my friend has just made I would be prepared for my part to give an undertaking on behalf of those assisting the commission that there would be no investigators appointed for a reasonable time, which I am sure we can agree, and that no investigations would be carried out by us - that is to say, attempting to see witnesses or anything of that kind - for a reasonable period, again as agreed. We are concerned about two matters. The first is that there is a date for report facing this tribunal, 30 September, and we would not wish it to be said that we had been party to delay by not doing anything in that period; that is to say, by giving an undertaking that was not forced upon us by a court.

We would be prepared to accept, in the light of the request that has been made, that for a reasonable period at least we should not take those two steps. However, we would submit that to suggest that we do nothing would be unhelpful and unnecessary. The commission knows and my friends know that we have a lot of material to read and we fail to see how there can be anything other than advantage to be gained by our reading the material for the purpose of, in that limited way, sifting material for allegations. Otherwise, everything has to stop, everyone goes home and then on any view time we would say is wasted. So I would not offer an undertaking that we would not continue to read. I do not know if my friend asks for that.

MR GYLES: That is probably de minimus. At the moment I cannot see any particular danger to us in that. We do not authorise it as it were because we are saying that the procedure is not authorised but I cannot see any particular damage which I wish to point to.

MR CHARLES: Accepting that my friend does not want to compromise any argument in any way by giving up that argument, unless it is a matter that was positively the subject of direction by the commission we would continue, and I state here that we would continue to read material for the purposes of attempting to distil possible

allegations from it and, of course, we would be subject to any directions that might be given in any court as to what may be the subject of proper allegations. We have said to my friends and if I may repeat it now; in the light of the court's, particularly the High Court's attitude on recent appeals involving governmental bodies, we would not regard it as appropriate for us to appear in any proceedings in the High Court, particularly in this case because the challenge would inevitably involve a challenge to actions of ours and decisions we have taken as to the way in which counsel assisting should act. We recognize the attack being made and therefore we would think it inevitably necessary that other persons appear.

There is one last matter that we want to raise and it is this: although we accept that for a reasonable period we ought not to have any investigators appointed to assist this commission, there is one person who stands in a peculiar position, who has considerable familiarity with the files that have been made available to us from various quarters such as the Director of Public Prosecutions. We would wish to have the assistance of that person, not as an investigator but simply someone to lead us through the files and shorten the work we put in reading those files. I raise that to enable my friends to comment on it if they wish to do so. I stress that that person would not be appointed as an investigator but simply his services would be made available to us to give precision to our thinking and shorten our reading.

SIR G. LUSH: In relation to documents already in the commission's possession?

MR CHARLES: Already in the commission's possession.

MR GYLES: I am able to respond. My friend was kind enough to mention this and to identify the person as a police officer who had taken part in a prior investigation. We do object to that course being taken, at least for the time being.

Might I also say in relation to my friend's position, it is his choice not to appeal and we do not make any attack on his professional activities. He has taken a view of the law and the commission has taken a view of the law. To be critical, that is not to be critical of his professional capacity; it is a matter for him.

SIR G. LUSH: Mr Charles, the time factor to which you refer as the first of the concerns that you enumerated, if the commission adopted Mr Gyles's suggestion that it sit in effect for a reporting of progress next Monday, is it in your submission appropriate for the undertaking relating to investigators and investigations to be made at this stage until next Monday?

MR CHARLES: I am perfectly prepared to give an undertaking as to next Monday, if that is appropriate and if my friends think that is - I gather from my friend that he hopes to get the matter on before some court, probably the High Court, by Friday. If that turned out to be impractical, then no doubt there may be an extension of the undertaking by consent or that sort of time could occur.

SIR G. LUSH: Subject to anything that Mr Gyles may say, I think that the commission is entitled to an early assurance that active steps are going forward. Counsel will bear in mind that almost immediately after next Monday we encounter the problem arising from personal difficulties at the bar table, personal commitments at the bar table, which the commission said it is prepared to accommodate and it is still prepared to accommodate, but it is still another factor in the time problem which is becoming a major one.

MR CHARLES: In the light of what has been said, Mr President, in the first place we would not make use of the services that we might be able to achieve of this gentleman to assist us with the reading we will have, we will leave that also until next Monday, but we will continue to read the material that has been supplied to us and our undertaking in the terms I have stated is given effective until next Monday and subject to what may happen on or before that date, is that - - -

MR GYLES: Yes.

SIR G. LUSH: Thank you, Mr Charles. Mr Gyles, I understood you to be content with these undertakings. Is that correct?

MR GYLES: That is so, yes.

SIR G. LUSH: In the light of what we have been told by counsel, we accede to the application that the commission should adjourn until next Monday in the expectation that at a hearing on that date the commission will be informed of steps taken and progress made. We note an undertaking by counsel assisting the commission that steps will not be taken to appoint investigators or to carry out investigations outside the immediate purview of the commission until next Monday. We note also that the intention of counsel assisting is to continue the study of the material already in the commission's possession.

I feel that I should make a comment which no doubt is perfectly to counsel but perhaps ought to be placed on record. The organization supporting this commission has been set up, it is substantial and therefore expensive, and it would be unfortunate if it were, so to speak, switched off into a state of total inertness for any period of time.

I think there is nothing else that can usefully be added in the hearing at this stage. I would like to see senior counsel in chambers in relation only to the personal matter to which I adverted earlier. We shall adjourn and I think we will fix the sitting time at 12 o'clock on Monday.

AT 12.22 PM THE MATTER WAS ADJOURNED
UNTIL MONDAY, 30 JUNE 1986

G.H.L.

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

TRANSCRIPT OF PROCEEDINGS

Transcript-in-Confidence

PARLIAMENTARY COMMITTEE OF INQUIRY

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

TRANSCRIPT OF PROCEEDINGS

AT SYDNEY ON THURSDAY, 17 JULY 1986, AT 10.40 AM

Continued from 24.6.86

Secretary to the Commission

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MR CHARLES: If the commission pleases. We have delivered to my friends some 12 allegations at this stage. As to nine of them, they were delivered two days ago and as to three, one last night and two this morning. I take the commission to them for the purposes of introduction. Allegation number 1 is what might be called the Thomas allegation. If the commissioners have had the opportunity of reading these, I will not read the document in full. May I take the commission to the second page of that allegation.

In the middle of that page it will be seen that it is said that this conduct amounted to misbehaviour in the following respect: firstly, an attempt to bribe a Commonwealth officer. That if proved would be an offence against section 73(2) of the Crimes Act 1914. That is the Commonwealth Crimes Act. Secondly, urging or encouraging a Commonwealth officer to publish or communicate to unauthorized persons official information which it would be his duty not to disclose. That would be an offence against section 7A taken with section 70(1) of the same act. Thirdly, for improper purposes offering to intervene to secure for the Commonwealth officer an appointment to a higher rank.

It is not suggested that any offence would be involved in that conduct. It is simply put that if proved it would constitute conduct contrary to accepted standards of judicial behaviour. We say at once that in relation to this allegation and the remaining 11, it is not suggested that any conviction has occurred in relation to this conduct or any of this conduct and if it were found that a conviction was necessary to constitute misbehaviour then none of these allegations would suffice for the purpose. So far as each of those three allegations is concerned we would say that it is the inherent nature of the conduct and not its criminality which is relevant for the purpose of misbehaviour if one takes the widest view of misbehaviour.

May I say this in relation to the numbering of the allegations that has been used: in the material that is in the hands of counsel assisting a number of matters have been raised and we have raised separate files for each of the matters that has come before us. No significance is to be attached to the numbering. A substantial number of the files contain material which in our view plainly does not raise any suggestion of misbehaviour or offence at all and on other files that have been used there is no evidence of any kind to support them. So I say now that as to, I think it is at least ten of these matters we shall be shortly putting to the commission and our friends that they are matters on which we certainly shall not be wishing to proceed. They will simply be disclosed and then our intention is that nothing further will be said about them. We will

be submitting at some stage that having regard to the commission's obligations under the act it will probably be necessary to include some mention of them at an appropriate portion of the report simply to indicate that they have been raised either as an allegation or put before the commission by way of complaint but the commission did not proceed with the hearing in relation to them for the reasons given.

In relation to allegaiton number two, that is the Lewington allegation, it will be seen that what is suggested appears near the bottom of the first page. The allegation of misbehaviour is made in the middle of the second page - entering into an agreement to investigate the possibility of bribing or otherwise improperly influencing Australian Federal Police. That is conduct which in our submission if proved would amount to a preparatory act short of a criminal conspriacy. We do not allege a criminal offence. We simply assert that if proved it would constitute conduct contrary to accepted standards of judicial behaviour.

The third matter which is now before this commission is entitled allegation number 11. It is an allegation that appears in substance near the bottom of the page. What is said of that conduct at the top of the second page is that it was misbehaviour in that it involved entering into an agreement to threaten or coerce a party to a cause in order to persuade him to discontinue his part therein. If proved we submit that that would amount to a conspiracy to commit a contempt of court. The alternative form is, entering into an agreement to pervertthe course of justice in relation to the judicial power of the Commonwealth. It is the judicial power of the Commonwealth because it was an offence against a Commonwealth law that was asserted in the charges that were laid by Mr Sankey and if proved that would amount in our submission to an offence against section 42 of the Commonwealth Crimes Act.

The fourth matter is allegation number 14. That is an allegation that raises two matters which occurred in the second trial of the judge that took place in April of this year. The two matters are the making of a statement pursuant to section 405 of the Crimes Act 1900 of New South Wales - that is referred to on the second page - and the making of remarks in the course of that statement by the judge which were said by the trial judge to amount to an allegation of recent fabrication against the principal witness, Mr Briese in circumstances where recent invention had been expressly disavowed by the judge's counsel, Mr Barker, at the end of cross-examination of Mr Briese. The suggestion was that that amounted to a violation fo the principles laid down in Browne v Dunn.

The two matters therefore which it is said amount to misbehaviour would be in the first palce the making of the statement and secondly in paragraph (b) on page 4, the contravention of the rule in Browne v Dunn. It is said that as to the first of those two matters, the making of the unsworn statement, that it may constitute misbehaviour if the widest view of that expression is the correct one in two ways; putting the judge's own interests above the standing and esteem of the court and secondly, bringing himself and the court into disrepute.

The fifth allegation, number 18, may be called the Jegarow allegation. The substance of it, having been set out is, the allegation of misbehaviour would be entering into an agreement to cause the making of a Public Service appointment and actually intervening to achieve that purpose. It is not suggested that that amounts to a criminal offence: it is simply put that if proved it constitutes conduct contrary to accepted standards of judicial behaviour.

The next allegation, which I think is the sixth, allegation number 20, is an allegation relating to actions which it is said took place in relation to Mr David Rofe of Queen's Counsel after Mr Rofe had been involved as prosecuting counsel in a prosecution laid against the judge.

It is said that the judge urged or encouraged Mr Morgan Ryan to cause harm to Rofe, and on the second page the thrust of the allegation is put in the alternative, that it was urging or encouraging another person to take revenge upon a person for what that person had done in the discharge of his duty in the administration of justice, which in our submission would amount to contempt of court, and alternatively urging or encouraging a person unlawfully to cause harm to another.

It is not suggested that that is a criminal offence, but it is put that in both cases, if proved, the conduct would constitute conduct contrary to the accepted standards of judicial behaviour.

The seventh is allegation 23. The conduct in question is set out on the first page. It relates to an attempt to prevent a member of parliament from making speeches attacking Mr Morgan Ryan in relation to certain matters, and it is suggested that that attempt was made by means of a meeting which was to be arranged with a different member of parliament, Mr Milton Morris, to whom pressure was to be applied by threats and exposure of his alleged involvement in a tax evasion scheme.

It is said that, if proved, that conduct would amount to misbehaviour as an agreement to assist another in making an unwarranted demand with menaces without reasonable cause, and in the alternative that a breach of parliamentary privilege would be committed by agreeing to assist another in making an unwarranted demand with menaces upon a member of parliament acting in his parliamentary capacity. We say that this conduct, if proved, would amount to a breach of parliamentary privilege but would not otherwise be in breach of the law.

The next allegation, number 24, is an allegation the substance of which is set out on the first page. It is said that at that time Mr Morgan Ryan was under investigation by the Australian Federal Police and that allegations had been made in the New South Wales Parliament that Mr Ryan had been involved in perverting the course of justice in ways there set out, and that in a conversation between the judge and Mrs Ryan, the judge suggested that Mr Ryan should arrange to have a government member of the New South Wales Parliament assert that that member had made inquiries about Mr Ryan and that he had come up smelling like a rose.

The allegation of misbehaviour is set out on the second page in terms that it involved urging or encouraging a person to cause a member of parliament to make false statements for the purpose of misleading or preventing legitimate inquiries into matters of public concern.

Again, it is not suggested that any criminal offence was involved, but that, if proved, the conduct would constitute conduct contrary to accepted standards of judicial behaviour.

The next allegation is entitled allegation 25. It relates to an alleged agreement that the judge would make or cause representations to be made on behalf of interests associated with Abraham Gilbert Saffron in order to influence the award of a contract to remodel the Central Railway Station in Sydney, and it is alleged that the judge did subsequently make those representations.

It is alleged that at that time Saffron was a person of ill repute, and known to be so, and the allegations of misconduct are entering into an agreement to intervene to influence the award of a public contract to a particular tenderer, and acting for that purpose, and entering into an agreement to intervene to influence the award of a public contract to a tenderer associated with a person of ill repute.

In neither case is it suggested that a criminal offence is involved but that, if proved, that behaviour would constitute conduct contrary to the accepted standards of judicial behaviour.

A like allegation is contained in allegation 27. In this case the contract sought would be a lease over premises in Sydney known as Luna Park, which was public land. It is said that the judge made these representations to the then Premier of New South Wales, and again that the interests on behalf of which the representations were made were associated with Mr Saffron.

The like allegations in relation to misbehaviour set out on page 2 involve entering into an agreement to intervene to influence the grant of a lease of public land to a particular tenderer, and acting for that purpose, and in the alternative entering into an agreement to influence the grant of a lease of public land to a tenderer associated with a person of ill repute, and acting for that purpose.

Again, there is no allegation of criminal conduct, but simply behaviour which would constitute conduct contrary to accepted standards of judicial behaviour.

The eleventh allegation, allegation number 33, relates to a conversation which is said to have occurred with the Chief Judge of the District Court of New South Wales, Chief Judge Staunton, in which it is alleged that the judge asked the Chief Judge to arrange for Mr Ryan to receive an early trial on certain charges and sought to persuade him to that view. The misbehaviour which is alleged on the basis of that conduct is alternatively abusing his office as a justice of the High Court, or alternatively improperly attempting to influence a judicial officer in the execution of his duties.

As to the second of those matters, it is submitted that, if proved, the conduct would constitute contempt of court and a breach of section 43 of the Crimes Act. As to the first of those allegations, it is not suggested that a breach of the criminal law is involved.

As to the twelfth allegation, allegation 39, the allegation is based upon a conversation which is said to have occurred in relation to the Greek conspiracy case, a conversation with Mr Briese, at a time when that case was being heard before Mr Bruce Brown, a stipendiary magistrate, in which the judge is alleged to have described that case as being one of the greatest scandals in legal history, and as having said that it was oppressive that 180 people could be charged with a single conspiracy, and asserting that the magistrate would be a hero in the community if he dismissed the case and for emphasis in one paragraph.

The allegation of misbehaviour is that if that conduct is proved, it would involve an expression by the judge of his views about a case which might come before him to a judicial officer of an inferior court in strong and concluded terms, and secondly, it would involve making a statement of that kind in circumstances where it was inherently likely that those views would be conveyed to the magistrate who was hearing the case and where that might influence the second magistrate in the performance of his judicial duties.

That would not amount, as alleged, to a breach of section 43, which would require an intent to bring about that result to be alleged and proved, but it would, in our submission, arguably constitute contempt of court by virtue of the tendency of the acts rather than their intention. In any event, it is submitted that, if proved, the conduct would constitute conduct contrary to the accepted standards of judicial behaviour.

Those are the twelve allegations, if the commission pleases, which are as yet before the commisison, and as we have said, and as we have warned our friends, there will be other allegations which certainly will be framed on the basis of the material now being looked at by counsel assisting. I do not know whether my friends

have submissions they desire to make on the basis of what has been said so far in the allegations presently put.

SIR G. LUSH: Before you sit down, Mr Charles, I am not quite clear what you say about the last two allegations, 33 and 39. The first statement of the argument that is to be based on the facts which are alleged is that the conduct constituted an abuse of office of a justice of the High Court of Australia. If that was to be misbehaviour at all, is it to be classified as misbehaviour in office in a matter pertaining to the office?

MR CHARLES: We do not say, Mr President, that it was conduct of that nature. We say that for a very senior judge to speak thus to the chief judge of a district court, a very substantially inferior court, was abusing his office, but we do not say that it was conduct in his judicial capacity.

SIR G. LUSH: Yes, and in 39 - both the allegations are classified as constituting conduct contrary to accepted standards; is that correct?

MR CHARLES: That is so, yes.

SIR R. BLACKBURN: Mr Charles, it was my fault, I probably was not attending, but what was it that you said about number 24, that is the telephone conversations with Mrs Ryan? Did you say that that - - -

MR CHARLES: If proved, Mr Commissioner, we say that that conversation would constitute urging or encouraging a person to cause a member of parliament to make false statements. We do not suggest that there is criminal conduct involved in the allegation and it had seemed to us that it was probably preparatory to a breach of parliamentary privilege rather than a breach of parliamentary privilege in itself.

SIR R. BLACKBURN: Thank you.

SIR G. LUSH: Is breach of parliamentary privilege a crime?

MR CHARLES: I believe not, Mr President.

SIR G. LUSH: Thank you, Mr Charles.

MR GYLES: Might I suggest that counsel assisting perhaps could outline what he sees as the future progress of the inquiry, to which we could respond?

SIR G. LUSH: Could you do that, Mr Charles? Is it convenient?

MR CHARLES: Yes, indeed. As to that, our views had been formed in part on the last letter that had been received from Mr Masselos, the judge's solicitor.

SIR G. LUSH: What is the date of that?

MR CHARLES: 4 July, Mr President. In the course of that letter, Mr Masselos had said:

> We give you notice that when those allegations and their particulars are received, we may contend that there should be no hearings of evidence prior to the resolution of the matters for argument before the High Court, and this contention would embrace the argument that the possible invalidity of the whole inquiry makes it inappropriate that

the commission's coercive powers and its activities beyond mere inquiry and the formulation of specific allegations in precise terms be utilized.

It is said:

> So much was envisaged by the High Court when they declined interlocutory relief.

We replied to that. That is a letter in response dated 10 July. Mr Durack's reply said that we did not accept that that paragraph accurately recorded the views of the High Court but that no doubt the matter would be raised today before this commission. We had said when we first raised these matters before the commission that we would give our friends reasonable time to prepare a defence to any allegations before we sought to bring evidence before this commission. I think the time stated was something like 14 days.

If that process had been followed there would be a gap of the order of 12 days from now before the time when this commission were first to be hearing evidence in relation to any of these allegations. That would have brought the commission within a week of the hearing in the High Court which is to occur, I think, on 5 and 6 August. If that had been the case, we would certainly have understood a submission being made by my friends that they were preparing at that stage to put argument in the High Court, and in the light of Mr Masselos's submissions that they did not want the matter to proceed anyway before the High Court had passed on the matter, we would certainly not then have pressed this commission to receive evidence in the week before the High Court hearing.

If my friends do not want to make that submission now, and if it is not sought to prevent the commission from hearing evidence, we would be ready in something like a fortnight to commence putting evidence before this commission and we would be perfectly willing to proceed in that way unless some other matter is sought to be raised now by my friends.

SIR G. LUSH: There was a time at which it was contemplated that the commission might hear argument on the misbehaviour question at this stage, that is when the allegations have been delivered and could be identified, as you have now identified them, as not involving allegations of criminal conviction and in

a number of cases not involving allegations of criminal conduct.

From the initial proceedings in the High Court, of which I have seen the transcript although the only matter in it which I have read in detail was the reasons for judgment, from those reasons it did not appear whether the High Court intended to tackle the construction of section 72 itself or not, but since then we have received the statement of claim which appears to raise the matter squarely and conceivably might be introduced into the High Court proceedings as an argument supporting a lesser injunction than that which was sought. I mean, seeking a lesser injunction by way of alternative. As to those matters, I suppose you can say nothing?

MR CHARLES: All I can say is this: it is clear enough that the statement of claim in paragraph 5 and the particulars under it, and in the prayer for relief in paragraph 7(3)(b) squarely raise the interpretation of section 72 and we have assumed that my friends would be arguing these matters in the High Court in the first week in August and no doubt for that purpose would have placed before the High Court on affidavit the allegations that have been so far raised and any others they have received in the intervening period.

That will enable, clearly enough, an argument to be put, if the High Court permits it, in relation to the meaning of section 72. In those circumstances, the matter certainly having been raised in argument before the High Court when the matter was last there, there might be some embarrassment about this commission now being asked to consider questions of the meaning of misbehaviour. The matter seems to be fairly and squarely before the High Court now, but I think it is a matter for my friend to say whether he wants the commission to look at questions of misbehaviour in the interim.

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

MR GYLES: If the commission pleases, there are a number of points I wish to take up. The first, and our fundamental position, is that the inquiry should proceed with the greatest possible despatch. We now have the allegations which are to be pursued, having had the opportunity of considering them, some I admit in a fairly short time. We have received instructions that in the light of those allegations it is our desire that the inquiry

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proceed with all possible despatch regardless of the existence of the High Court proceedings. We will have to deal with the High Court proceedings the best way we can but we do not ask the commission to refrain from proceeding. Indeed, we urge that it do proceed.

SIR G. LUSH: Perhaps you are coming to it: proceed with what?

MR GYLES: Yes, I am coming to that. I just wish to say that my friend, I think, slightly misquoted the letter from Mr Masselos on this point, if I may say so, or he slightly misunderstood it. What that letter expressly said was that:

> In the absence of specific allegations in precise terms we are unable, of course, to express a final view but we give you notice that when those allegations and their particulars are received we may contend there should be no hearings.

Having received the allegations, we do not wish to make that contention. Of course, as my friend has pointed out, his solicitor did not accept the basis for it anyway, so lest there be any suggestion that Mr Masselos's letter in some way has led to any delay, we repudiate that suggestion.

Proceed with what: as far as the argument as to proved misbehaviour is concerned, we see no particular barrier in the commission hearing argument and giving a ruling upon it and we can see some merit in doing so, provided that does not interfere with our fundamental position that the hearing should commence as soon as possible.

In other words, our primary position is that we would be happy to start hearings whenever the commission likes to start hearings. We would suggest Monday next week. If that were the case, then we would accept that the argument as to proved misbehaviour would have to follow the taking of evidence, and whilst there are considerations of convenience on either side, our position is that we would accept that if evidence can start next week, it ought to start - or tomorrow.

We are happy to start whenever the commission wishes to start, and we suggest that should happen, and we accept that that means the argument as to proved misbehaviour would have to follow rather than precede the taking of evidence.

As to the High Court proceedings, it is true that the statement of claim makes the allegations to which reference has been made and raises the issue. The problem there is that the High Court, of course, is not bound by our framing of the issues and, in particular, is not bound as to when it hears particular parts of the case, it has been urgently fixed. There was some indication on the last occasion, although rather slight, that the High Court would proceed to hear the constitutional points simpliciter without at that stage entering upon - they would enter upon the constitutional points as to validity of the act simpliciter without dealing with proved misbehaviour at that stage. One possible view which they could take is that so far as the judge is concerned the matter is academic until he is called upon to answer. We do not agree with that, but that is a view the High Court may take. In that event, they would decline to hear the arguments as to proved misbehaviour at this stage and deal only with the bare constitutional point. In any event, we are happy to, ready to, and prepared to argue proved misbehaviour, and suggest that would be convenient unless it interferes with the starting of hearing of evidence.

May I go to a number of other matters? The first is that my friend has not - I am left in doubt as to whether there are any allegations which may be made. He has not said anything about that this morning and I do not trespass on inter-counsel discussions about the matter, but if I am correct in apprehending that, there are still some allegations outstanding which may be raised against us. If I am incorrect in thinking that may be so, my friend will immediately put me aright.

SIR G. LUSH: That was inaudible here.

MR GYLES: Mr Charles confirms that my apprehension is correct and that there are still some outstanding matters which they may wish to put as allegations in due course. It is our respectful submission that that is not a procedure which the commission should countenance.

Secondly, the letter we got supplying these allegations reserves the right to, in effect, vary, alter or amend them. Again, it is our submission that this is a procedure which should not be countenanced. It should not be countenanced, in our submission, because the evident purpose of this act was to deal with specific allegations in precise terms against a judge of the High Court in a narrow time frame. We have put and will put later this morning the submission that

at least primarily and possibly exclusively those allegations should have been allegations which were in existence at the time the commission was established and are readily identifiable as being specific allegations in precise terms.

We have been over some of this ground before and I do not wish to re-argue it in detail, but it is not, in our submission, within the contemplation of parliament that material will be gathered which is not in the form of specific allegations to be converted into specific allegations by the commission itself. We would have thought, with respect, that if allegations have been made, then they should be put on the table for argument, as was envisaged when the first ruling was given as to whether they were specific allegations in precise terms.

It is now many weeks since the commission was established. There is absolutely no basis, in our submission, for any delay occurring in bringing forward these allegations. May I remind the commission of the progress which has taken place? The commission was appointed on 27 May and the first sittings was on 3 June. At that time my learned friend indicated that he had then on 3 June before him material which would enable allegations to be drawn with specificity. It was then envisaged that there would be a set of particulars delivered by 20 June, although not necessarily a final set. It had been anticipated, we thought, that the final set would be provided by the end of June. When 20 June went and passed without particulars, there was the second hearing on 23 June, extending to 24 June, when for reasons which have still not been explained, my learned friend simply declined to give us allegations.

It will be apparent as I go through these allegations later that, with the possible exception of one of them, they have all been well and truly in the public domain for many months, if not years, and there is simply no explanation as to why we have had to wait till 15, 16 and 17 July to receive a wording of matters the substance of which has been well known.

I put again we have simply been given no explanation. It is nonsense, with respect to my friend, to talk about a volume of information having to be dealt with. These matters were well known. The particulars were received, as I have said, on 15, 16 and 17 July, which is almost a month beyond the date on which it was originally contemplated that the particulars would be received. They have been received at a time when it will be obviously difficult, if not impossible, to finish this inquiry within the time span allotted. Now, I say possibly because as we run through the

allegations there are some important questions which need to be decided now and decided openly, so that this commission can tell us what the timetable is going to be, and my friend will have to, in my submission, expose a little of what he proposes to do.

It will be very soon two months since the commencement of this commission and, in our submission, it is quite unacceptable in the circumstances to permit any leeway being given for further allegations. Of course, if suddenly tomorrow there is an allegation that Mr Justice Murphy had - I do not want to think of stupid examples, but if something contemporaneous has happened, something new, some new information comes in to the counsel assisting, then there would be a question of construction of the act as to whether something which has happened subsequently comes within it, and that argument would take place. There may be a case for saying if it does come within the terms of the act, the fact that it has only just come to their attention is a possible basis for extending leeway, but if it is simply material which has been worked over time and again through various inquiries, then the inability of counsel on the staff of this commission for whatever reason to grapple with those things in the time available provides no excuse for leaving an open-ended inquiry. If these allegations have not been received in a form which can be presented on the table, they should never see the light of day, with respect.

The second general matter I would raise is that there are within these allegations some which can only be described as vexatious, and I will identify those shortly and ask this commission to say this morning without any argument or any elaborate argument about section 72 of the constitution, or anything else, that they are so absurd as to be vexatious, and that they should not detain the time of the commission any longer. I will put the bases for that submission in a moment.

The next matter I wish to raise is that we have not been provided with anything but this statement of allegations. We do not know what the source of the allegation is, in what form it was received by the commission or what supported it. Was it verified, was it not? We respectfully submit that we are entitled as a matter of natural justice to all of those things. If we are correct in our submission that this commission has no role to play in fashioning allegations or procuring allegations or making allegations, then we are entitled to know who made it and in what terms so we could then put our argument both here and in the High Court that they are not matters which are within the purview of the act. It will also be our submission and is our submission that we are entitled to see those documents.

SIR G. LUSH: Is not there some inconsistency between that last statement and some things you said earlier, Mr Gyles? It may be that your right to see materials on which allegations have been based will not be contested, but how does knowing what those materials are affect your position before the High Court in relation to matters which you have earlier said have been in the public domain for months and years?

MR GYLES: One has got to take them one by one. It may be one thing to have a report which counsel then comb through to produce counsel's own allegation - we will take examples later when I go through them one by one, but the most startling - - -

SIR G. LUSH: You still seem to be in the realm of inconsistency. If one simply takes the documents in hand, it must be the fact that counsel have imposed their wording on the allegations.

MR GYLES: Yes, but we want to be satisfied, with respect, there is an allegation by somebody else other than my learned friend and those who are assisting him.

SIR G. LUSH: You started here by complaining everybody knew there had been.

MR GYLES: Some of them are and some of them are not. Take the most startling of all, this business about the second trial. I do not think anybody would have made an allegation - we will wait and see but I would be staggered if anybody had made an allegation arising out of the second trial.

MR CHARLES: It was made in parliament.

MR GYLES: Well, there you are. There you are.That answers that.

It may be that one has to look at it item by item to see what the source of it is and we submit it is most revealing when one does that. Whatever I said I said and I do not resile from it, even if it is inconsistent with something I later said. The other general submission that I will put is that there is a necessity for further particulars in relation to some of them.

SIR G. LUSH: They can be made the subject of an immediate request presumably.

MR GYLES: Yes. My numbering of these is a little different. We think it is unfortunate that this numbering has been adopted and that there has not been a renumbering for the purposes of the proceedings. If there were a jury here one would think it was calculated to give rise to the view that there was a great deal of this is the tip of the iceberg sort of argument but it is also inconvenient so I will deal with these matters by name and try and work out which numbers they have been given.

It is my submission that the allegation concerning conduct at the trial or the judge of the trial which is number 4.

SIR G. LUSH: Possibly others have done as I have done and that is arranged them in the numerical order which they bear.

MR GYLES: I think it is number 4. It is my submission that without further ado this commission should this morning rule that that allegation is not an allegation which will be pursued because without argument, elaborate or otherwise, it is quite plain that it could not on any view amount to misbehaviour within the meaning of section 72 of the constitution. It, to us, is a startling and sinister proposition that a judge confronted with a criminal trial is not entitled to pursue his defence of that criminal trial by whatever means are available to him within the law. I do not wish to elaborate that submission any further. It should not be dignified by any further waste of public time and money.

There are two aspects to it, the first is the judge made a statement to the jury pursuant to section 405 of the Crimes Act and secondly there was the so-called Browne v Dunn point. As I said, the fact that a judge exercises his statutory right under section 405 is so plainly not a topic of misbehaviour that I do not dignify it with any further submission. As far as the Browne v Dunn point is concerned, even assuming that the

construction of what happened which has been put on it in this document is correct, and I hasten to say that on its face it is wrong, but let me accept that there was some procedural transgression which took place at this criminal trial in the way that is alleged, in my submission whatever happens at a criminal trial in public presided over by a judge of the New South Wales Supreme Court is dealt with at that trial and that what any accused person does, judge or other, in the course of his defence of the criminal trial in public in this way is plainly not something which can be regarded as even potentially within the area of section 72 of the constitution. I do not go on to say what the trial judge could or could not have done and how these things are cured and go into the facts of the case because that is to invite this commission to enter upon what in my submission would be a serious contempt of court.

I notice with interest that the judge is charged with contempt of court in that counsel was to be punished for having taken part in a case. It would be in my submission plainly against public policy that any inquiry of this sort set up by the Commonwealth parliament for these purposes should have any business at all in investigating the manner of conduct at a criminal trial in public presided over by the New South Wales Supreme Court. It is just simply contempt of court. It is also, in my submission, simply irrelevant.

There is a collateral point turning on section 5 subsection 4 of the act which I will come back to about this allegation. I do not propose to put that at the moment. Secondly under the same heading, we would put the Staunton allegation, number 33, my number 11 - in relation to this allegation it should be clearly understood that evidence both at the senate committee and the trial establish that the judge and Judge Staunton of the District Court have had a long standing personal acquaintanceship. They are mere contemporaries, practised in the same field at the bar and have a history going back some 40 years.

SIR G. LUSH: What is its number?

MR GYLES: Thirty-three, my number 11.

SIR G. LUSH: I am afraid that I was trying to locate the document while you were speaking. Perhaps you would go back a sentence or two.

MR GYLES: I will recapitulate. May I put what are certain incontestable facts well known to my learned friend and those instructing him - - -

MR CHARLES: Well I should say that these facts are not well known to me. There should be some limits if the commission pleases to the extent to which factual material can be introduced in this way. I do not want to stop my friend making any proper submissions but if he is saying in effect as a pleading point that this material could not raise an allegation, that is one thing. If he wants to seek to explain it by other facts as being on this basis you could not, that is another.

MR GYLES: What I am doing is dealing with an allegation made against us in the real world which is going to take real time and energy to deal with. Counsel assisting - - -

SIR G. LUSH: I will hear what you have to say about it, Mr Gyles but as it develops we may see that there is a problem we will have to resolve.

MR GYLES: Counsel assisting has available to him, and the commission, indeed, has available to it a great deal of material about this conversation between Mr Justice Murphy and Judge Staunton. I am staggered to think that my friend has put forward this allegation without his team of people having made themselves familiar with it. It has been tendered as I understand it, before this commission. I cannot believe for a moment that this vast research team would not know, and it would be a disgrace if they did not know - - -

MR CHARLES: I am sorry, may I object to this. I am not seeking to stop my friend making proper submissions. The point I am seeking to make is that my friend is descending into areas of fact which really have nothing to do with the question whether the document as raised puts forward any form of arguable case.

MR GYLES: I am not here dealing with a demurrer. This is a tribunal which does not conduct itself like a court. We have been told that. It is a - - -

SIR G. LUSH: Quite so, Mr Gyles, but it really cannot help us very much to listen to a deriding of the researches which have gone into placing the document before us. It is there and if there is an issue about whether it represents the material which is said to support it or not, that will have to be resolved as a matter of fact.

MR GYLES: We are here today to deal with a number of allegations which in our submission are vexatious and we are entitled, with respect, to put that point of view. We do not put it based on a pleading point, we put it based on what material is before this commission in the form of senate inquiries, royal commissioners reports and trials. We have allegations here based on the second trial. I have just dealt with one. It is our submission that the facts - - -

SIR G. LUSH: Let us come back to what was being said. If you say that there are publicly available accounts of these conversations which are inconsistent with what appears here, then you had better refer to them but again I am for myself inclined to doubt the utility of getting engaged in a debate about the facts of the matter at this stage.

MR GYLES: That is something which the commission will judge when I have finished my submission no doubt. The incontestable facts which are available in the material which my learned friend has and the commission has are that the chief judge of the District Court and Mr Justice Murphy had a long standing personal acquaintanceship. Further, that not only Mr Justice Murphy but another judge in New South Wales approached the chief judge of the District Court with a similar request and further, that the chief judge of the District Court in evidence before the senate committee said that he saw nothing improper in the request having been made.

It is my submission that not only because of that background but because of the inherent nature of the allegation itself, to suggest that a request that a trial be brought on early is in any fashion to be criticised in terms of section 72 of the Constitution is fanciful, baseless and vexatious. To describe it as an abuse of his office is absurd because what will happen if this matter is pursued is that there will be many examples given - and indeed, we will ask this commission to use its compulsory powers to ascertain them - of courts doing all sorts of things with lists and judges doing all sorts of things with lists - I would venture to say probably every court in Australia, certainly a number that I am familiar with - in order to meet what it perceives to be public or private convenience.

It may be one thing to say, do not bring that trial on. It is quite another to say, let us have an early trial. We can give examples of special listings of matters. There will be no doubt, if this allegation is seriously persisted with, then the conduct of various courts of this country will be gone into to see what list judges do, who approach list judges and who they listen to in arranging their lists. In my respectful submission it is bizarre to suggest that a request by a judge who knows another judge for an early trial for a solicitor is judicial misconduct.

SIR R. BLACKBURN: What is the relevance of the fact that the judge and Chief Judge Staunton were old friends?

MR GYLES: I heard my learned friend this morning say that this was an abuse by a High Court judge overbearing a junior judicial officer. That is just, with respect, arrant nonsense. It has never been put and never could be put. Judge Staunton has been called to give evidence before the Senate and in both trials. In the second trial the Crown expressly disavowed the suggestion that the approach to Chief Judge Staunton was improper. If this commission, set up to deal urgently with a matter involving a High Court justice, is going to concern itself with what the listing arrangements are and what is and what is not an appropriate submission to be made to a list judge, then in my submission it is a gross waste of public money and time, and a gross abuse of the compulsory powers given to this commission. We submit that should be said and said this morning.

The next major point is that I invite my learned friend to agree that a number of these allegations and I will list them now - the Lewington matter which I believe is the second, the Jegarow matter which is number 5 or number 18 depending which way you look at it, the Rofe matter number 6, the Morris matter, number 23 or 7, the Central Railway matter, number 25 or 9, the Luna Park matter, number 27 or 10, the Dorothy Ryan matter, 24 or 8 - all depend upon proof of transcript

said to be notes of tape recordings of illegally intercepted conversations or tapes. In other words, the well known National Times or Age transcripts. Assuming for the moment that that is correct, in my submission it is again vexatious to present allegations with that being an ingredient in them.

The statute provides, as the commission well knows, by section 6 that the judge shall not be required to give evidence on a matter before the commission unless the commission is of the opinion that there is before the commission evidence of misbehaviour within the meaning of section 72 of the Constitution. And, in the conduct of its inquiry the commission shall not make a finding except upon evidence that would be admissible in proceedings in a court. Secondly, by section 5(3) the commission is enjoined to have regard to the outcome of any previous official inquiry into an allegation and only consider it to the extent that the commission believes it necessary or desirable to do so.

I will perhaps tomorrow or on some other occasion when it is convenient if it is necessary go through the earlier inquiries which have dealt with the so-called transcripts. It may for present purposes suffice to know that they have been considered by a special prosecutor appointed under the Special Prosecutors Act who has reported, as he must, under that act. That was Mr Ian Temby. They have been considered by a committee of the Senate which has reported upon them. They have been considered by a royal commission specially appointed with terms of reference in relation to them. The results of those inquiries make it quite plain that there is no possibility of those transcripts being regarded as admissible in proceedings in a court. If there is any dispute about that, I will have to comb through the various reports and make good that submission but I put it now and my friend may or may not agree with it.

This commission is surely not a show trial. It is surely not, given its function and its time limits, intended to be a second royal commission into the authenticity of the Age transcripts. It cannot be contemplated that there would be a duplication of the efforts made by the special prosecutor, the Senate committee and then a royal commission to establish what is notorious by now as a result of those inquiries, that these transcripts are not reliable. They cannot be proved, they cannot be authenticated and cannot form the basis of any subsequent action. I am not at the moment dealing with the substantive arguments which can be easily demonstrated to reveal their unreliability, I am simply putting the results of these earlier inquiries as such, that to go through the task which will take many months of seeking to tender before this commission unauthenticated transcripts is simply not something which this commission should countenance.

If required, we can go through them and show what those inquiries have found about them. It is not just unreliability, it is tampering and all sorts of problems with them. I leave aside for the moment the whole question of the illegality. In my respectful submission it would not be in accordance with this act and what lies behind it that this tribunal will enter upon that task. We, with respect, are staggered to find that matters plainly relying upon those transcripts are to be pursued. For what end? Is this commission going to become the investigative arm of the National Times and the Age newspaper in an endeavour to give credibility to something which has no credibility, for the fourth time?

Is this commission going to lend itself to that task of enabling those people to give themselves credibility for the gross slanders and libels they have perpetrated upon this judge for the last two years? Is this to be a show trial, to say, we have tried again to give authenticity to these documents when we all know it cannot be done? I submit that this commission would be astute to prevent it being used as a tool by those outside the commission and would be astute to avoid being used to go through what is in my submission a useless show exercise.

The next point that arises is that a number of these allegations have been considered as a matter of substance by other inquiries, have been shown to be baseless and certainly not to provide any evidence of misbehaviour but again, I would need if required to have some time to develop this point because in the time available we simply have not got all the transcript references organized.

The following allegations have been the subject of previous inquiries and there has never been any suggestion that they would themselves form a basis for a finding of proved misbehaviour: allegations Lewington number 2, Jegarow number 18, number 5, Rofe number 20, number 6, Morris number 23, number 7, Dorothy Ryan, number 24, number 8, Central Railway number 18, number 9, Luna Park number 27, number 10, the Briese Greek conspiracy allegation which is number 11 - the original number is 39 - and Staunton 33 number 10 have all been considered by other relevant bodies.

Those bodies amount to the same. There is the special prosecutor, Mr Ian Temby, the first Senate inquiry and the Stewart Royal Commission. It is my submission that none of those allegations has been considered to even give rise to any prima facie case of proved misbehaviour.

Now, why is it that that having happened, these matters are now being raised before this body? This body was surely to deal with those allegations which have not been the subject of other inquiries, and as far as we can see, the only allegations which properly fall within that category are the Thomas allegation, number 1, and number 11 or 3, Sankey. The conduct at the trial would also fall within that category, and I have sought to deal with that already.

The next point to be considered is that subsection (4) of section 5 inhibits the commission from considering the issues dealt with in the trials leading to the acquittal of the Honourable Lionel Keith Murphy on 5 July and 28 April. Put shortly, they are the Briese and Flannery matters.

Now, in those trials the following matters were issues, at least in one sense. First of all, Thomas. Thomas gave evidence of the luncheon. Secondly, number 33, the Staunton approach was led in evidence. Number 39 or 12, the Briese Greek conspiracy matter, was led in evidence. It is true that in relation to Thomas, the part of the conversation which is now relied upon was not led, and it might therefore be said that that was not an issue at the trial, and I do not want to put any significant argument about that matter.

In our submission, parliament's intention as evidenced in the act was to deal with what could properly be described as unresolved matters, not matters which have been considered and, as it were, rejected. It must be understood that the so called Age transcripts, which form the substantial basis for this whole misconceived affair, were considered in whole by Mr Temby and in whole by the Senate first committee. All of these allegations which go back to those transcripts were dealt with, and the only two that the first Senate committee thought were worthy of considering separately at all being put were the Briese and the Lewington matter. Now, the Lewington matter, it is plain from that report and others - - -

SIR R. BLACKBURN: Which Briese allegation are you referring to?

MR GYLES: The Briese allegation in relation to Morgan Ryan. As far as Lewington was concerned, all of those who looked at it clearly concluded no case.

The Senate said there was arising out of the Senate committee a matter to be gone into in relation to the Briese allegation, and so that went off, but as for Rofe and Jegarow and Milton Morris and this sort of thing, nobody, in our submission, would ever have suggested that they are worthy of consideration as judicial misbehaviour in any sense at all, and found not misbehaviour.

As I have said, I am outlining the position in relation to these matters now in a fairly shorthand way. If it is required or desired that we elaborate, then I would certainly like the opportunity to do so and would wish the opportunity of getting it altogether so we could take you to the various findings which have been made by those bodies.

That then brings me, I think, to the last point at this stage. We do think that there should be some open discussion as to what course of procedure is to take place. We have put that we seek access to the allegations themselves. We do submit that we are certainly entitled, before witnesses are called, to have available to us not just a statement that they have made, but all of the statements that they have made and all of the material which has emanated from them.

HON A. WELLS: They are the people making allegations?

MR GYLES: Yes, they are the people making allegations, and witnesses who are to be called, and indeed all surrounding material. It is, as the commission has said, an inquisitorial procedure. There are no parties and - - -

SIR G. LUSH: We will see what Mr Charles has to say about that.

MR GYLES: We would also like a timetable, given the usual qualifications, as to who is going to be called on what issue in what order. We also assume, and I do not think there is any misunderstanding here, that counsel assisting does accept the responsibility of calling all relevant evidence, and we will take the opportunity of giving him the benefit of our views as to whatever might be relevant.

SIR G. LUSH: What view do you take about the witnesses whom you may desire to have produced who have either been rejected or are unknown to counsel assisting?

MR GYLES: We say that if they are relevant they should be called by the commission, and I suppose if that does not happen for some reason - - -

SIR G. LUSH: If you wanted a witness previously unknown to counsel assisting to be called, would you accept that you should not only supply his name and address but a statement, if you have one?

MR GYLES: It would depend, I think, probably - - -

SIR G. LUSH: Then that would be in the hands of counsel assisting for the initial part of his evidence?

MR GYLES: Generally speaking, we would accept that, yes. I mean, we do not accept the burden of obtaining statements. If we have one - - -

SIR G. LUSH: You would want to hand over the witness and then have his statement handed back to you and then the witness produced?

MR GYLES: That depends. That assumes we have some sort of property in them.

SIR G. LUSH: That is a theory that you must not take me as advancing, Mr Gyles.

MR GYLES: There may be questions which arise about particular witnesses during the course of running but - - -

SIR G. LUSH: Within my very limited experience of these inquiries, the usual practice, and the word usual is to be understood in conjunction with the word limited, which I used a moment ago, the usual practice is that anybody wanting a witness called inform counsel assisting and if possible supply the statement to counsel assisting had in the first place charge of the witness at the hearing.

MR GYLES: Yes, I do not disagree with that as a general proposition. There are certain obvious witnesses whom we are assuming that counsel assisting will call. We have had some informal discussion about it - - -

SIR G. LUSH: Well, if counsel assisting expresses the view, if he is in possession of statements by other witnesses inconsistent with the evidence of the witnesses that he wants to call, that those inconsistent statements ought to be produced to you, that seems to resolve that particular - - -

MR GYLES: Yes, we would think normally the inconsistent witness also should be produced to the commission.

SIR G. LUSH: That is a matter for you to request then. I think we can waste a lot of time debating these things in the abstract, but at the same time I agree with your approach that it is just as well to ventilate these matters so we come to some common understanding of where we are going.

MR GYLES: Yes. I believe there is a fair measure of understanding about it, and perhaps we can leave it to any difficulty which occurs in the course of running.

The other question which I have briefly raised with my friend is this, and perhaps the Thomas case is the best one to illustrate it.

There may be circumstances where we would wish to indicate to counsel assisting, not witnesses but information which we would see as being material to the inquiry and invite him to have the commission exercise its powers to obtain it. For example, Thomas was a police officer at the time of the alleged conversation. We would like to have produced the instructions to Commonwealth police officers as to note keeping, diary keeping, reporting of matters to their superior officers and so on. We would like, for example, his then current diaries and notebooks to be produced, any reports he made about the topic to be produced and the like. We will indicate to counsel assisting or his solicitor the matters of that type, and we would expect that unless our request is plainly, in their view, outlandish and ought not to be accepted withoutsome consultation with the commission, they would if relevant accept the suggestion. Again I do not think there will be any difficulty about it, and perhaps we can leave it until there is.

That then brings me back to the practical position. I have put some submissions which would have the result, if accepted, that some or many of the allegations would be, as it were, struck out now without any extensive argument about it. It may be that the commission would wish to hear some more extended argument about the effect of the earlier inquiries upon the tapes and upon the allegations, and we are very happy to do that, whatever the commission thinks convenient. The result of that will make a difference as to what is left in the inquiry and as to its timing.

Because of the constraints of time we do return to where we began, that is that it really is necessary, if the time limit is to be kept, for evidence to start almost immediately. Now that will provide strains for everybody, not the least upon ourselves I am afraid. But the inquiry was for good reason limited in time. The subject of the inquiry is a current justice of the High Court; whether or not he is sitting does not matter. But the fact is that the inquiry should be cleared up at the first possible opportunity. There will need to be give and take obviously in the course of it. It may be that either counsel assisting or ourselves will need to recall witnesses as other material becomes available. It may be that the order of witnesses will have to be changed and the like. But we do not envisage there would be any requests for any substantial adjournments during the course of running provided there is goodwill on both sides.

SIR G. LUSH: There will be an interruption for a High Court proceeding.

MR GYLES: Probably not; what we envisage at the moment is that they will be conducted - either we will bifurcate ourselves or other counsel will be engaged. At the moment we do not envisage seeking any adjournment because of the concurrence of the High Court proceedings. If the commission pleases, I think that covers all the points I had written down here to raise. We place ourselves in the hands of the commission.

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

MR CHARLES: If the commission pleases, the last point was also the first. I understood my friend to say that if the question of a ruling on what is proved misbehaviour should arise, my friends and the judge would now be happy for hearings to start as soon as possible and for argument on what is proved misbehaviour to follow the evidence.

MR GYLES: We are happy either way.

MR CHARLES: If that is the appropriate course, and we do not wish to suggest - - -

MR GYLES: Perhaps I should be clear: if there is going to be any delay in the start we would prefer to argue in that interregnum proved misbehaviour. If there is to be no delay we would not wish that to be done.

MR CHARLES: If there is not to be argument on what is proved misbehaviour first, we would be ready to start calling evidence we believe on Monday week. That would be, I think, 28 July. If my friends wanted to argue first the question of what is proved misbehaviour,

that argument could take place, say, on Tuesday and Wednesday of next week; but I would expect the consequence of that to be that the commissioners would probably wish to reserve their decision on that and that that would result in a delay in the start of the hearing of evidence if that is so.

Now if, therefore, the question depends on there being no delay to the start of hearings, my submission would be that evidence can begin on Monday, 28 July, and that is when it should do so; and if we did have to argue in the meantime the question of proved misbehaviour we might need a little more time before we start calling evidence as well because we would not be able to see the witnesses in the meantime.

SIR G. LUSH: In view of the statement that has been made this morning, that Mr Gyles on the judge's behalf is willing, if it seems appropriate, to hear the argument on misbehaviour at the end of the evidence, there would seem to be no reason why we should not hear argument about it next week but not postpone the start of evidence until judgment is given.

MR CHARLES: The only disadvantage, Mr President, to that course is that we will have to spend two days preparing the argument now and two days involved in it; time which we would otherwise be able to spend on seeing witnesses who we propose to start calling on Monday week. It is an argument that will take place in the High Court in any event as it seems likely.

SIR G. LUSH: Does it?

MR CHARLES: It may or may not, but that certainly seems likely in the light of the pleadings. The only thing that concerns us is that that would involve some delay in our own preparations for starting to call evidence.

SIR G. LUSH: Can you divide your forces, Mr Charles?

MR CHARLES: Obviously we will have to. We will do whatever the commission asks us to do but we think at the moment that Monday week is a reasonable estimate of the time when we could start calling evidence. It must be appreciated that we asked for assistance to see witnesses. We only got that assistance at the start of this week and that is simply the first time it was made available to us. Now we have a large number of witnesses to see and it is just a question of doing as much as we can. But in any event we would put it to the commission that if my friends are prepared to accept that the argument on proved misbehaviour should take place following the evidence, in our submission that is the best time for it to occur.

I have told my friends that they should be in no doubt there certainly will be other allegations which will be placed before the commission. I am not yet in a position to say what they are. My friend has put it that there should be no variation or amendment to any allegation that has been made. We would submit that that course is one which would involve a wholesale destruction of parliament's purpose if it were to be followed. This commission's function is to make inquiries into conduct; to look at specific allegations; and then to advise parliament whether that conduct on admissible evidence is proved.

SIR G. LUSH: I do not think the commission ought to concern itself today with this question of whether amendments may or may not be made, Mr Charles. The question may never arise; and a lot of light on what ought to be done is almost certain to be shed by the nature of the applications which may be made if there are any.

MR CHARLES: I was simply seeking to deal with my friend's points in the order in which they came.

SIR G. LUSH: I quite understand that.

MR CHARLES: As to the suggestion that my friend made early in his address that allegations should have been in existence when the commission was established; there my friend was travelling over old and somewhat infertile ground as he found, and we have already had substantial delay in the commission's activities in consequence of High Court proceedings taken in relation to it. Those proceedings did delay the activities of this commission by of the order of two weeks.

MR GYLES: Absolute rubbish.

MR CHARLES: The commission's activities will proceed more quickly - - -

SIR G. LUSH: Mr Gyles, you were heard in silence I think the same - - -

MR GYLES: If I have a reply I will desist but that really is grossly misleading.

SIR G. LUSH: Mr Gyles, there is still no justification for the audible interjection.

MR CHARLES: My friend also said that we had declined to supply allegations and for reasons which have been wholly unexplained. That is simply untrue. Precise reasons were given in our letter to Mr Masselos and are there to be seen on the face of the letter.

My friend has said that they wish to know all the material that we have received. They want to know in what form we received it; was it verified or not; that we have no role to play in fashioning allegations; they are entitled to know how they have been received. We with respect wholly reject that argument. We accept that any evidentiary material that is to be put before this commission should be shown to my friends in advance of it being shown to this commission. We do not accept that material which is not the evidence we propose to call which comes to us as counsel assisting by way of complaint or allegation - we say that is not material they are entitled to see. It is simply intimidatory and we for our part do not accept it.

Then turning to the allegations that were made, it has been put that a number of these allegations so far served could not amount to misbehaviour. I do not know whether there is advantage seen in dealing in detail with these submissions that have been made on this. I am prepared to if the commission wishes me to. But what we would submit in general terms is that if one takes the wider view of what may amount to misbehaviour that, for example, taking the first, that is the Thomas allegation, offering to intervene for improper purposes to secure a promotion of a commonwealth officer to a higher rank. We would say that in matters of this kind that on the wider view, that is that behaviour is not limited to criminal behaviour or behaviour where a conviction has been recorded; if one makes that assumption, that there is no reason why one should not say that that is conduct which is simply inconsistent with accepted standards of judicial behaviour.

Now we would say that if parliament were so advised and if that were the sole piece of conduct which was regarded as proved, that it might very well be, indeed it would be likely to be the case, that parliament would say that one act of this kind, even if proved, even if potential misbehaviour, would not be an appropriate ground for removing a judge from office. That one must in other words look at the totality of the conduct. And whereas one might find that on simple proof of A, if the parliament were satisfied that the conduct was A plus B plus C plus D, in other words that it was not a simple act on its own, a single instance, but if there were evidence of repeated behaviour which could probably be regarded as misconduct, that that was a ground for removing a judge from office.

If one takes by way of example the matter of which the first somewhat hysterical complaint was made, which was the allegation in relation to the second trial, it might very well be that parliament would say that the fact that an unsworn statement was

made was something for which alone one would not remove a judge from office, even though it was behaviour which might amount to misbehaviour. One must bear in mind that there will be this matter, if parliament accepts it is potentially proved misbehaviour, a matter put to a vote by two houses; and plainly the totality of conduct will be looked at.

SIR G. LUSH: I suppose your submissions in relation to totality are relevant but we do not intend to make orders for summary removal of any of these allegations today. The fact that they are vulnerable or may be vulnerable does not make it improper for them to be before this commission and reported upon by this commission.

MR CHARLES: That will shorten very greatly what I have to say. May I deal with, however, some points very shortly that my friend has made. My friend put it that in relation to a number of allegations, that all depended on proof of transcript which were notes of tape recordings of illegal recorded telephone conversations, and that they were vexatious in consequence.

My friend said: is this commission to be the investigative arm of The National Times. That was a submission that was simply grossly offensive to this commission. These transcripts will, of course, be most unlikely to be evidence put before this commission. It may well depend in part on how these matters are put by my friend but plainly what will occur is that this commission may be asked to hear evidence of police who heard the conversations in question.

The only way in which those transcripts are likely to come before this commission is if they are put in cross-examination by one or other party. We would say that there are plainly, from the nature of the allegations, persons involved who were parties to those conversations. They will have to be called. Mrs Ryan, for example, will have to be called to be asked whether she recalls a conversation of that kind. It is quite plain that this commission will not be left in a situation where its evidence will be solely left with a transcript of an illegally recorded conversation.

It is quite plain, with respect, that this commission was set up to deal with allegations which include some of the ones which have been attacked this morning and was set up precisely because these allegations appeared in public, in the press, for example in The National Times. It was put that a number of these allegations had been dealt with by other bodies. I do not propose to deal with that submission at all.

It was put that various of these allegations had been dealt with in the second trial. Instanced were the Thomas allegation, the Staunton allegation, and the Briese allegation. We say that they were not issues dealt with in those trials; they were

matters raised in evidence but plainly not issues dealt with in those trials. I do not propose, in light of what has been put to me by the presiding member, to say anything further about any of the individual allegations.

As to the procedure that is to be followed, my friends will get, before witnesses are called, a proof of evidence from that witness if that witness is prepared to talk with us, and, of course, some will not. As to each witness, they will be given any inconsistent statements of which we have knowledge and any other statements of which we have knowledge made by those witnesses before they are called. As to the calling of all relevant evidence, my friends have said they will tell us what evidence they want called. We accept that we are not prosecutors; we are counsel assisting and that it is our obligation to call all relevant evidence.

That does, however, require us to make an assessment of what is relevant and if, for example, my friends say they want every judge of every court in Australia called to prove the listing procedures of that court, then they will have to undertake that course themselves. We will call relevant evidence and I think they may receive some opposition from the commission if they seek to call all such judges themselves.

We expect to be ready to start calling evidence on Monday week if that course is appropriate. As I have said, we will let my friends have proofs of witnesses beforehand. Unless there is anything further the commission wishes me to address myself to?

SIR G. LUSH: Thank you, Mr Charles. Mr Gyles, in relation to the High Court proceedings, would you regard it as facilitating the canvassing of the issues proffered in the statement of claim if the commission had ruled by the hearing date on the meaning of misbehaviour or otherwise?

MR GYLES: It probably would. It certainly could do no harm, if I could put it that way, and it may well be of advantage. I do not know how highly I can put it as an advantage but it would be an advantage.

SIR G. LUSH: If at one end of the spectrum you achieved from the commissioners the highest result you could hope for, that would end the matter before the High Court.

MR GYLES: Yes.

SIR G. LUSH: One of the peculiarities of this kind of proceeding is that there is no interested party to challenge conclusions of that kind by way of appeal. On the other hand, an intermediate position would give you specific matters for challenge and the extreme position against you would, of course, leave you with the whole scope of it.

MR GYLES: If I could just put - and leaving aside the High Court for a moment - it is probably obvious, but if it could be done, a ruling would be desirable because it might make the matter academic. It may remove from the field the existing allegations. If that is the case, as we submit it ought be, then the sooner that is decided the better because challenges and so on at that point become - - -

SIR G. LUSH: If I may say so - these things will appear on transcript - there is something to be desired, from the commission's point of view, in having the High Court take this matter up at the beginning of August, because if that does not happen it may very well be that the High Court will be invited to take it up at some subsequent time.

MR GYLES: Yes. I think I can add a little to what I have said. We do see it as an advantage both here and for the purposes of the High Court that the argument take place and a ruling be given. We do not quite understand why it is my friend needs extra time to call his witnesses. We would have thought he should be ready to go with some of them sort of immediately but we are in the commission's hands about that.

SIR G. LUSH: It is always possible to deal splendidly with the other man's problems, Mr Gyles.

MR GYLES: Yes. In any event, I think the commission understands we are saying that we would like the inquiry to start now, tomorrow or whenever, and we do not resile from that. We have heard nothing from my friend as to why that could not take place. If his submission is accepted and we start in the week after next, there seems to be no reason why the argument as to proved misbehaviour could take place - that is next week or tomorrow or whatever time is most convenient to the commission.

Whilst I am on my feet, can I just deal with two things, one which caused my regrettable lapse of good taste. The statement that our High Court proceedings led to two weeks delay is something we cannot let pass without disagreeing. The commission

very properly submitted in the High Court, the Attorney-General taking up the burden of argument. In any event, the High Court proceedings took one day plus a judgment the following day.

SIR G. LUSH: Mr Gyles, I am not sure for what purpose you are pursuing this but if it is for the purpose of getting a record on to the transcript, I think that the matter will have to be dealt with a good deal more widely than there has been any sign of its being dealt with at the moment.

MR GYLES: We simply do not wish an assertion to be there unanswered. We take the view, with respect, that is a misstatement which should not be permitted to be said without being answered. If it requires fuller examination, we are very happy to participate in any examination.

SIR R. BLACKBURN: But even if it were true that your initiating proceedings in the High Court has caused two weeks delay, we could not possibly hold that against you, could we?

MR GYLES: No. I do not want to take more time than is necessary on the point, but we will take whatever time is - - -

SIR G. LUSH: There is nothing to be resolved by us in this dispute and I think it is probably best abandoned, Mr Gyles.

MR GYLES: The next matter that should not go unanswered is the suggestion of my learned friends totality argument. There is no such allegation and we are not here to meet it until it is made.

SIR G. LUSH: I think that is a matter of argument at a much later stage, Mr Gyles. I take it that you do not concede it and, if I may say so, I consider it a fairly difficult question. One view is that if there were a series of actions considered to be misbehaviour established by the appropriate evidence, every one of them would have to be looked at singularly as a matter of penalty so that the final result would be rather like the final result of a presentment with a number of counts.

The alternative view is that there are not a number penalties to be involved; there is only one, if parliament is going to impose any penalty, and that that penalty must be imposed. I suppose this commission's advice should be given on the total effect of all that is proved. Those are the two

(Continued on page 145a)

positions, and we would expect to hear debate about them in due course.

MR GYLES: Yes. I simply put there is no such allegation before the commission of repetitive behaviour or cumulative behaviour, and we are not here to meet it.

(Continued on page 146)

May I inquire as to whether the commission proposes to give reasons for not ruling on my submissions as to certain of the allegations?

SIR G.LUSH: Yes, we will pay you the courtesy of saying what we think about it after lunch.

MR GYLES: I have drawn the attention of the commission to section 5 subsections (3) and (4). My friend chose not to put submissions about subsection (3) but we submit that the commission cannot so easily escape the responsibility.

Lastly, it is critical for a number of reasons that the timetable as to what is to happen in this commission be now discussed. If evidence is not to start until Monday week, what does my friend estimate and what does the commission estimate as to the length of hearing? It will be recalled that when it was expected particulars would be given by 20 June the commission said that by a process of working back the time was critical. The elapse of time beween then and now makes time much more critical and, in our respectful submission, we would ask the commission now to ask counsel assisting for his estimates of future progress.

SIR G. LUSH: I am not certain how this is put, Mr Gyles. We are all experienced enough to know that estimates of time are about as high an order of inaccuracy as one can imagine, they always have been. Is it really the problem that if the commission - that you want to know if the commission asks the presiding officers for further time? Is that all it amounts to in fact?

MR GYLES: This particular question, that is a major - it is a major concern, not the only concern. Whilst one concedes a great rubbery quality to counsels estimates, it is rare that they are too long. I do not know. If the unspoken assumption behind all of this is that a request for extension is either inevitable or has been made or will be made, then we would like to know, but it appears to us from the timing it is exceedingly critical.

SIR G. LUSH: With that, if I may say so, I agree, because the tasks of preparation and printing and so on, all have to be fitted into the time set.

MR GYLES: We certainly would not - it is implicit in all I have said in our approach to the matter that there should be any drift into an extension which is said to be inevitable, we do not accept that.

SIR G. LUSH: I think that that has become apparent in the past. Do you want to say anything further, Mr Charles?

MR CHARLES: Can I say some short things about what has been put, simply by way of reference to the argument on proved misbehaviour. If the commission decides in light of my friend's comment it would be helpful in the High Court if the matter were decided, could I ask the commission to hear that argument beginning on Tuesday of next week, to hear it on Tuesday and Wednesday, and if it needs to go to Thursday, at that time. What that means obviously as to when evidence starts will have to be seen then in the light of the commission's own view as to its ability to produce a finding which may bear on when evidence begins.

I do not seek to say anything about the question of the totality of the conduct at the moment. We are not suggesting that there is an allegation of repetitive or cumulative behaviour. It is not our argument that one has to find cumulative behaviour to establish misbehaviour. What we have put forward is that on one view of misbehaviour each of those allegations is capable of amounting to it as a single allegation. This commission is not asked to advise the parliament whether the judge should be removed but whether particular allegations if proved amount in themselves to misbehaviour, a quite different thing. Parliament in turn then has to make a different decision for itself.

As to the question of timetable and the length of hearing, with the best will in the world and all desire to help I am wholly unable to give this commission any assistance at all, or my friends, as to that. We would expect our evidence consistently to be comparatively short. We would expect our friend's cross-examination to outweigh by a factor of up to ten the evidence given in chief. That means that any estimate I give will not be rubbery, it will be hopelessly out of place. If I can say, for example, one could contemplate that Mr Thomas, who would be likely to be our first witness on the first allegation, his evidence in chief would take maybe an hour and a half. It would be a brave man who would say that my friend Mr Einfeld will cross-examine him for less than a week.

SIR G. LUSH: I hope the transcript records Mr Einfeld's laughter.

MR CHARLES: I simply cannot help the commission with an estimate.

SIR G. LUSH: Thank you. We will now adjourn until half past two this afternoon.

LUNCHEON ADJOURNMENT

SIR G. LUSH: This morning the commission heard some submissions made by counsel for the judge relating to the sets of particulars of allegations which had been recently delivered to them. Some of these submissions call for comment by us. In the first place it was said that further sets of particulars beyond those already delivered should not now be received.

The commission's view on this submission is that the recently delivered papers have been delivered as soon as they were prepared and that there is no reason to issue a general prohibition on the delivery of any other sets of particulars. The commission's observations within its offices lead it to believe that the allegations could not have been delivered earlier. The commission, however, will hear submissions if the delivery of any subsequent item of allegation is considered unfair for reasons of timing or otherwise.

Related to the first matter was a submission that a right to amend the particulars delivered should not be reserved to counsel assisting the commission. It was indicated during the course of argument that that was not a matter appropriate for any general ruling. If there should emerge applications to make amendments to existing particulars, the commission will deal with them as they come.

It was then submitted that certain of the allegations should be summarily dismissed by, in effect, being eliminated today from the matters for consideration. The first of these was the set of particulars which bears the file number 14 and relates to matters connected with the making of an unsworn statement by the judge at his second trial. The commission's view is that this was an allegation which has been made publicly and the commission concedes it to be its duty to say in due course whether the facts alleged constitute misbehaviour. The commission will do this but it will not single out this allegation for summary disposal at the present time.

Next the allegation bearing the file number 33 and relating to Judge Staunton was the subject of an argument that it was untenable. Some attempt was made to introduce facts said to appear in existing public documents in support of this argument but as in the case of the matter in file number 14, this was an allegation which has been made and should be the subject of appropriate findings and conclusions by the commission. Again we do not think that it should be disposed of at this stage.

Next counsel referred to a group of allegations relating to matters appearing in the so-called Age tapes. It was contended that protracted investigation by previous official inquiries had resulted in the expression of views that the tapes could not be substantiated. The

material referred to did not appear to us to cover all the things that have been said about the tapes but putting that matter aside, if it be assumed for present purposes that the tapes and the transcripts themselves are inadmissible and will never be shown to be otherwise, the commission must still investigate the question whether there is other and admissible evidence which support the notoriously made allegations in them. If there is no admissible evidence, the commission will so report in due course.

Next, counsel referred to another group of allegations which it was submitted was shown to have been baseless in the course of earlier official inquiries. It was put that the actions alleged had been held not to constitute misbehaviour. The commissioners during the adjournment referred to the terms of reference of the two Senate committees and to their findings and are not as at present advised prepared to accept the argument that these allegations were found to be baseless in those inquiries. It proposes to retain this group in the list for investigation and it makes - conscious that it does so without having heard argument - the comment that section 5(3) does not contain a prohibition of the consideration of any allegations but confers a discretion on the commission.

Lastly, counsel referred to a group of three sets of particulars with the file numbers, one relating to Thomas, 33 relating to Judge Staunton and 39, the Greek Conspiracy Case which it was said had been dealt with in the course of the judge's trials. The commission is of the opinion that there are questions whether the way in which these matters came up at the trials is such that they can be described as having been issues in the trials, and it is also of the opinion that a question arises whether they can be said to have been dealt with in any way relevant to section 5(4) in the trials.

Besides the submissions to which reference has been made there was discussion about the conduct of the commission's inquiries in the immediate future. The course which the commission proposes to follow is to hear argument on the meaning of the word misbehaviour in section 72 beginning on Tuesday, 22 July. It then expects to begin the hearing of evidence on Wednesday, 30 July and it notes, without regarding the statement as immutable, that counsel have advised that an adjournment will not be sought during the period of the coming High Court hearing. Does what has been said give rise to any queries or need for any observations by counsel?

MR GYLES: Not on our side. The only outstanding matters I think relate to our application to see the allegations and the material in support of them,

SIR G. LUSH: We have not included that in what has been said, Mr Gyles, simply because we thought that what Mr Charles had to say, as it was not followed by any comment, might have been satisfactory to you.

MR GYLES: We have reached a reasonable degree of satisfaction about the presentation of evidence but I think not as to the making available of the allegation itself. I thought my friend opposed that,

and I think that is an outstanding issue.

SIR G. LUSH: I am not quite certain what is involved here. I have said in the course of giving the commission's ruling that the commission would not give a general prohibition on the delivery of further sets of particulars.

MR GYLES: I have not made myself clear. One of our applications this morning was to be given access to the allegations which - - -

SIR G. LUSH: The allegations which give rise to the allegations?

MR GYLES: Yes. I think that matter is outstanding.

SIR G. LUSH: You also said this morning that these had been about for a long time.

MR GYLES: With some I did. The application I made I made and I am just drawing attention to that fact.

SIR G. LUSH: We found, Mr Charles, that none of us was satisfied with his note of exactly what you had said you would make available. My own note is, where possible, that referred to cases where you would not be able to get a statement from a witness but if possible you would give a proof of a witness to counsel for the judge and you would also make available copies of any inconsistent statements by the witness which you had. The remarks on the paper indicate that you said something further which I did not get.

MR CHARLES: I did go one step further, Mr President. I said that indeed we would give copies of every statement. The obligation of the prosecutor is to give copies of inconsistent statements. We would propose to give our friends in addition to the proof of the witness copies of any other statements the witness may have made relevant to his evidence in these proceedings. In relation to other matters like diaries and police instructions that my friend referred to, if they will tell us what material they have in mind in relation to particular witnesses, in principle I can see no reason why we should not do exactly what my friend suggested; that is, where it is necessary to subpoena material of that kind we would do so, alternatively if it is made available voluntarily then equally that would be made available.

SIR G. LUSH: What of the request for the originating material behind the allegations?

MR CHARLES: I put as to that, Mr President, that we opposed that course. Our submission in relation to that material was that what we had undertaken to do was

to let my friends have material of an evidentiary nature that was to be put to the commission before we put it to the commission. The distinction that I sought to draw this morning was that the material given us, the complaints as it were that had come to us are not evidentiary material in many cases. I cannot quantify it at the moment but in many cases they are not from people who would be witnesses at all. It would seem to us to be quite wrong to be passing on and breaching the confidence of those who have supplied us with information or made complaints to us and we would submit that that would be simply intimidatory of those people. It would inhibit the whole process of making complaints or allegations if that course were to be followed. In our submission what is relevant and what my friends are entitled to is evidentiary material and that we have undertaken to produce before either the document or the witness gets into the box.

SIR G. LUSH: It may be that counsel for the judge wished to pursue an issue of fact relevant to a submission as to the validity of these allegations. That is, for the purpose of proving as a fact that the allegations originated within the commission and not externally.

That, of course, is not at the moment an issue with which the commission is concerned. In the event that the High Court said that we have gone about all this in the wrong way and that it was the external allegations which have a sufficient precision, then it might either be necessary to set about delivering new particulars altogether or justifying the existing ones.

MR CHARLES: We would submit, Mr President, that that position is premature. If the High Court were to say that this commission could only act on the basis of as it were allegations which sprang into life in statements made to the commission, or out of documents in statutory declaration form that came to the commission, then an entirely new position would arise and entirely new ground for possible objection to these proceedings.

I am quite happy to state to the commission and for my friends to know that some of the material on which we have acted has come to us orally and that there is no document in existence at all in relation to it. But we would maintain the position, if the commission pleases, that until the High Court indicates that that objection is open in principle we would submit that the proper course for us to take as counsel assisting is to submit that these sources are confidential and that that position should be maintained; and we would oppose making that complaining material as it were available to my friends on those grounds.

SIR G. LUSH: Anything you want to add, Mr Gyles?

MR GYLES: Only this, if the commission pleases: we have put in various ways the legal basis for our point - and I do not wish to repeat that - but in our submission there could be no suggestion that the type of inquiry which is involved here carries with it any requirement for confidentiality on the part of any complainant or alleger. This is not part of law enforcement; it is an inquiry by virtue of statute in which the commission sought inter alia public advertisement. It is not a situation in which any informer is entitled to secrecy. There is no public policy; indeed the public policy would be to the contrary and would rather point to the fact that the party most concerned about it should have access to the material upon which the commission is acting. As the commission has ruled previously, counsel simply is here to assist it; it is the commission which is doing the inquiry. And if it has regard to this material, then we should have regard to it.

The act itself by providing for private hearings and the secrecy of witnesses is the protection. There is no warrant for any notion that the commission must hold within its breast something secret from us. Indeed, we should have thought that the requirement for verification in the advertisement was consistent with the view we are now putting.

MR CHARLES: Could I put two short things in relation to what my friend just said with the commission's leave?

SIR G. LUSH: Yes, Mr Charles; yes, go on.

MR CHARLES: My friend put it that the commission has this material; therefore my friends are entitled to it. As a matter of fact that is simply not so. The commissioners do not have the material to which my friend has referred which is now in issue. Counsel assisting has it. My friends have everything that the commissioners have. That is the first point.

The second, the requirement of a statutory declaration we would submit does not supply my friend's contentions. That was sought by my friends and inserted in the advertisement to prevent the making of vexatious complaints. It was to provide some assurance that people were prepared to place their own truthfulness on record in the making of those complaints. It was not to ensure that that document made its way to the commissioners.

SIR G. LUSH: The commission's view on the matter discussed is this. The discussion assumes a situation in which the original informant is not to be a witness. In that situation, assuming the information was conveyed by a document, the document itself as a document is not relevant to any issue which the commission is engaged in hearing.

So far as the fair and adequate preparation of the defence is concerned, the commission is of the view that if a situation arises, as it possibly may, where it becomes important to the defence to see an originating document, the commission thinks that an application should be made specifically to deal with the current situation. The commission does not think that a general edict should be issued in terms which it might be sought to apply to all situations.

MR CHARLES: Might I inform the commission that I have at lunchtime given my friends amended copies of allegation 14. There was one passage in the judge's unsworn statement which bears on the Browne v Dunn contention which had not been included in the first form of that allegation. It is contained on page 3 of a new set, which may I now hand up to the commission, and results in the document becoming a five page rather than a four page document. The passage is marked with red markings on that page, black in some cases I am told.

SIR G. LUSH: There were references during the debate this morning to the possibility of sitting tomorrow, but as far as I can see at the moment, we next meet on Tuesday of next week for the debate on misbehaviour.

MR CHARLES: That is my understanding, Mr President, and as I follow it, my friend is ready to commence the argument at that time.

SIR G. LUSH: It is common ground that Mr Gyles opens, is it?

MR GYLES: My friend suggested that, and we are happy to do that.

SIR G. LUSH: That is quite acceptable to the commission. The commission will adjourn until 10 o'clock on Tuesday morning.

AT 3.15 PM THE MATTER WAS ADJOURNED
UNTIL TUESDAY, 22 JULY 1986

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

TRANSCRIPT OF PROCEEDINGS

Transcript-in-Confidence

PARLIAMENTARY COMMITTEE OF INQUIRY

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

TRANSCRIPT OF PROCEEDINGS

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

Continued from 17.7.86

Secretary to the Commission

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

Telephone: (02) 232 4922

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SIR R. BLACKBURN: Of right conduct?

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

SIR R. BLACKBURN: Yes.

MR GYLES: Then the learned author goes on:

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

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

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

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

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

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

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

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

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

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

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

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

> And that should not be so.

Mr Barton said:

> You must read sections 1 and 3 together.

Mr Kingston said:

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

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

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

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

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

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

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

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

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

MR GYLES: No with respect not.

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

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

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

SIR R. BLACKBURN: Yes.

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

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

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

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

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

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

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

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

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

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

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

> I should be content with putting in misbehaviour.

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

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

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

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

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

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

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

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

At page 311 - - -

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

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

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

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

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

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

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

Mr Reid said:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR GYLES: Well, may I read it?

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

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

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

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

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

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

MR GYLES: Yes. Todd quoted that.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Abusing or misusing -

which is the first of the three -

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

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

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

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

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

MR GYLES: I confess that I had thought so.

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

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

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

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

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

(Continued on page 174a)

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

(Continued on page 175)

Continuing:

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

etcetera. Looking at three of the digests - - -

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

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

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

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

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

Forfeiture is the only relevant heading. Continuing:

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

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

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

102:

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

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

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

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

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

HON A. WELLS: What does it do?

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

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

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

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

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

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

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

Thirdly, by misdemeanour in his office:

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

(Continued on page 176a)

I presume that means gross negligence.

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

MR GYLES: May I come back to that?

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

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

SIR R. BLACKBURN: Yes, all right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

and so on.

Just below 520 in the original report:

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

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

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

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

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

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

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

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

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

and so on. That goes on to another point.

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

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

SIR G. LUSH: The decision was what?

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

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

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

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

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

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

SIR R. BLACKBURN: About 1730.

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

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

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

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

and so on. Half way down the page:

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

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

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

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

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

The defendant was claiming to be the replacement:

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

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

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

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

MR GYLES: Yes.

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

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

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

This appears by Magna Carta, and then:

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

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

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

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

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

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

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

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

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

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

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

MR GYLES: Yes.

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

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

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

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

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

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

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

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

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

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

MR GYLES: Yes.

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

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

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

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

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

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

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

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

SIR R. BLACKBURN: That implies that a number of these specific allegations that are before us come under the category of conduct which has no immediate relation to the office.

MR GYLES: Yes, and no convictions. All of them. As to the point put to me by the presiding commissioner, it is correct to say that the decision, or one of the points of the case was that contrary to what had been understood from Bagg's case a corporation does itself have power to amove for misconduct in office without there being a conviction in relation to matters which are against the duty of the office. What this case leaves open is - I withdraw that because it is not necessary to be troubled by it. The passage from Bagg's case which is recited in Richardson's case does not itself turn on any procedural problem about trying somebody, as far as one can read it.

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

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

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

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

> This objection -

that they had no power to amove -

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

That is the resolution in Bagg's case.

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

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

SIR R. BLACKBURN: Unless there is conviction.

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

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

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

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

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

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

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

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

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

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

SIR G. LUSH: Proscription.

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

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

MR GYLES: Yes.

LUNCHEON ADJOURNMENT

SIR G. LUSH: Yes, Mr Gyles?

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

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

And then as to the first question:

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

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

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

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

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

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

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

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

etcetera:

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

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

MR CHARLES: 1615.

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

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

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

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

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

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

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

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

The Chief Justice at page 102 of the original report:

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

I do not think I need trouble about that:

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

and so on.

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

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

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

SIR R. BLACKBURN: Yes.

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

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

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

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

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

With respect, we agree with that.

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

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

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

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

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

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

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

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

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

MR GYLES: Yes. Quite.

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

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

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

SIR R. BLACKBURN: Did they hold that?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR GYLES: The words "misbehaviour in office".

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

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

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

MR GYLES: Save for conviction.

SIR R. BLACKBURN: He does not say that.

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

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

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

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

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

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

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

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

MR GYLES: I am not familiar - - -

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

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

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

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

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

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

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

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

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

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

MR GYLES: Could I ask where?

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

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

It is used again.

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

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

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

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

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

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

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

HON A. WELLS: That is right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SIR G. LUSH: What are his qualifications?

MR GYLES: He is an Israeli academic.

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

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

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

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

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

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

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

MR GYLES: I will withdraw my apology.

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

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

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

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

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

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

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

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

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

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

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

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

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

SIR R. BLACKBURN: Quite.

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

MR GYLES: It was a course of lectures.

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

MR GYLES: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

HON A. WELLS: 1954 or 1955.

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

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

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

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

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

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

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

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

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

Of course, we rely on that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR GYLES: Yes.

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

MR GYLES: Yes.

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

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

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

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

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

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

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

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

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

(Continued on page 217a)

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

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

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TRANSCRIPT OF PROCEEDINGS

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 WEDNESDAY, 23 JULY 1986, AT 10.08 AM

Continued from 22.7.86

Secretary to the Commission

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

Telephone: (02) 232 4922

SIR G. LUSH: Mr Gyles?

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

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

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

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

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

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

But consider the scope for oppression which lies within that concept. If there is a judge who persistently, because of a conviction as to the law, finds a particular way, contrary to the views of the governing party or contrary to the interests of a pressure group, however large or small; they then put a private inquiry agent to investigate the judge's conduct and then make allegations, well or ill-based as to his conduct and his associations 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?

MR GYLES: Quite.

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

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

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

(Continued on page 232)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

HON A.WELLS: Oh, yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR GYLES: I think it must be.

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

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

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

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

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

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

SIR G.LUSH: Yes, Mr Gyles?

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

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

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

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

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

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

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

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

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

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

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

Again, with respect - - -

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

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

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

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

SIR R.BLACKBURN: Yes, I have it.

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

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

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

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

MR GYLES: Yes.

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

MR GYLES: Yes.

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

MR GYLES: That is the critical defect.

HON A. WELLS: Right.

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

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

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

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

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

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

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

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

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

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

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

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

MR GYLES: Not when he was Attorney-General.

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

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

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

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

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

SIR R. BLACKBURN: That was much earlier.

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

> Inasmuch -

he says -

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

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

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

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

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

(Continued on page 243a)

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

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

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

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

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

MR GYLES: Yes.

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

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

HON A. WELLS: Quite.

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

SIR G. LUSH: Yes, we have.

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

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

MR GYLES: Yes.

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

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

SIR G. LUSH: Misbehaviour lies in being convicted.

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

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

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

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

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

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

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

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

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

SIR G. LUSH: The county court clerk.

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

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

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

HON A. WELLS: Quite. It could happen.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR GYLES: We will certainly check that.

SIR R. BLACKBURN: I am worried about the possibility that the distinction between misbehaviour in office and misbehaviour not in office is more subtle and complicated than you have allowed for in your argument. Let me take an exaggerated case. The only resemblance between this imaginary case and one of the allegations we have before us is that my hypothetical example is much stronger and more clear-cut.

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 that 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)
Transcript-in-Confidence

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, then it would follow that each of the allegations which has so far been put to the commission would not raise misconduct within section 72, with one possible exception which may involve an allegation of abuse in office. However, if one can take the submissions to their logical conclusion, it would also follow that a judge who had committed murder whilst overseas in a country with which Australia had no extradition treaty, who had returned to Australia and of course was not prepared to return to that other country, who had publicly admitted in Australia his guilt of that murder, would not be guilty of misbehaviour and could not be removed from the bench. Secondly, if the judge had been tried for murder, had been found not guilty by reason of insanity - - -

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

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

MR GYLES: What about of another judge?

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

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

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

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

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

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

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

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

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

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

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

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

SIR G. LUSH: Thank you, Mr Charles.

LUNCHEON ADJOURNMENT

SIR G. LUSH: Mr Charles?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr Isaacs said:

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

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

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

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

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

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

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

Again going back to the start of that last paragraph:

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

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

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

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

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

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

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

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

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

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

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

Sir John Downer says:

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

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

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

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

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

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

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

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

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

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

Then Mr Isaacs comes back to his point:

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

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

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

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

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

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

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

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

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

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

He says he has to vote against the amendment.

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

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

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

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

Again misconduct:

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

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

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

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

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

Again misconduct:

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

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

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

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

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

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

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

"or something else", your Honours:

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

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

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

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

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

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

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

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

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

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

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

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

At the bottom of the page:

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

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

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

Mr Isaacs again:

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

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

> Subsection as amended agreed to.

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

(Continued on page 270a)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

that is the one in the middle of the page:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr Fraser is still at it:

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

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

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

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

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

And Sir George Turner:

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

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

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

And Sir George Turner:

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

And he sets out his view. And:

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

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

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

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

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

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

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

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

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

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

> I understand that the drafting committee will not be . . . . shall be unchallangeable.

Now, your Honours, that is as far as the debates went and we would submit that there is nowhere in the debate in either place any justification for it to be asserted that any person taking part in those debates had a view of misbehaviour confined to criminal conduct of an infamous nature resulting in a conviction. It simply is not there.

SIR G. LUSH: It is misbehaviour outside misbehaviour in the duties of the office?

MR CHARLES: Yes, we would say it is perfectly clear that what was being talked about was misbehaviour, or misconduct, or gross misbehaviour, or reckless conduct - a variety of different expressions are used which follow from the first description of

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the situation by Mr Isaac Isaacs where misbehaviour is used twice in reference to two quite different types of conduct: those that would entitle the person to move in the narrow sense that my friend has referred to, and also those that would be proper to be taken into account by the Houses of Parliament in England as a basis for praying for removal.

Now what the real argument was was how the situation could be left in the hands of parliament safely so as to secure independence. It was to be left in the hands of parliament and there had to be an allegation of misbehaviour and that had to be proved. And in that way the judge knew what was being complained of against him and was given an opportunity of answering it and also, because that did not entitle them, parliament, to act on mere whim or caprice. It did not entitle parliament to seek to remove a judge who was behaving with perfect propriety. And we say that it was in that context that the independence of the judiciary was seen to be protected.

(Continued on page 277)

SIR R. BLACKBURN: Am I right in saying what you are contending against is not merely that misbehaviour out of office cannot be limited to misbehaviour shown by a conviction but much wider than that, misbehaviour referred to in section 72 is not limited by the common law rules about the misbehaviour which would entitle the grantor of an office to terminate the office?

MR CHARLES: Indeed, your Honour.

SIR R. BLACKBURN: You do take that wider?

MR CHARLES: I do. My learned junior tells me that the Fraser in question was the former prime minister's grandfather. Obviously a man of determined streak who may have passed on certain characteristics to his grandson. We would say that there is simply in the convention debate no justification shown for what my friends have sought to derive from it in argument.

SIR R. BLACKBURN: There is one other possibility, of course, that although the founding fathers may not have had that intention, it is the only one which you can properly read into the words they have used.

MR CHARLES: That would only be the case if it were clear beyond argument that the words mean that or that misbehaviour could only be seen in a particular light at that time, and I am going to turn to that argument next.

We would submit that as to the first point, the general meaning of the words, the debates suggest in the strongest terms that the members did not have a clear view of what misbehaviour was. What they were saying was we cannot judge it now, we are going to have to leave it to parliament as the will of the people to decide from time to time, but there must be misconduct of some kind, it cannot be whim or caprice. They were, we would submit, preserving for parliament a right to define misbehaviour having regard to the circumstances alleged, and no notion whatever, we would respectfully submit, of conviction surfaces at any time in the debates from start to finish, apart from the reference that Sir Isaac Isaacs made to the definition in Todd where one talks of the condition upon which an office can be forfeited.

We would submit on the meaning of the expressions used that neither word that is in the phrase "proved misbehaviour" readily gives rise either to the Bennett or Griffith view, if I can so describe them, in deference to Dr Bennett, Queens Counsel, rather than the Dr Bennett present view as stated in the opinion which your Honours have. I am told to describe them as submissions rather than opinion.

The natural meaning of misbehaviour, we would submit, as a matter of definition would cover a

judge whose conduct had brought his high office into disrepute, and we would also submit that the word, "proved", suggests something entirely different from conviction. A conviction may or may not stand, and witness the very events which took place earlier this year. We find a conviction at the first trial, an appeal, and an acquittal on the second trial. We say it is also clear enough from the form of debate at the convention that the framers expected by use of the word, "proved", that there would be some form of proof tendered to parliament, not that one looked at a conviction obviously outside parliament.

The Bennett view requires the conclusion that those who framed the Constitution intended for the purpose of securing the independence of the judiciary both a new procedure for removal which clearly was contemplated but also to relinquish the right to remove a judge who had disgraced his office in the ways suggested at the start of this argument before lunch.

SIR R. BLACKBURN: Where do we get the Bennett view? You have referred to it more than once. The Pincus view I understand, the Griffith view I understand.

MR CHARLES: If your Honour looks at the report to the senate of the Senate Select Committee of August 1984, your Honour will find three things included. One of those is the opinion of Mr Justice Pincus, the last is the opinion of Dr Gavin Griffith, and immediately preceding that is a series of submissions on the inappropriateness of interrogation of a judge, and in the course of that will be found what is the basis for the Bennett view, page 44.

HON A. WELLS: While you pause there, I just want to make quite sure that I am following that part of your submission which says that broadly speaking the convention finally decided to leave the matter of what was misbehaviour to parliament. I suppose theoretically there are two ways of interpreting that. One way would be to attribute to parliament the right to expand or contract the legal content of what was proved misbehaviour properly interpreted so as to make it suitable to these circumstances or those circumstances. That would be one possibility. The other possibility is to say that proved misbehaviour has a general generic character and its application depends upon matters of fact and degree, and to that extent parliament would have it in their hands to decide what is in application proved misbehaviour. To my mind those are the two alternatives that present themselves. Do you espouse either one of those two, or another, or some mixture?

MR CHARLES: I really espouse neither because I say that what the framers intended but which they may not in law have been able to achieve was to leave it entirely to parliament to say what was misbehaviour, what was misconduct, which would justify the removal of a judge.

HON A. WELLS: The justification for removal is the sole criteria?

MR CHARLES: Yes, but there had to be some form of justification in the form of misconduct stated in the intention of the framers of the Constitution. we will come later to the question of whether in law they may successfully have achieved that because we will submit that the High Court would not permit such a situation to exist, that there is an area in which curial review is possible and, indeed, under the Constitution would necessarily have to exist, but the thrust of our submission on this is that the whole context of this debate was one pointed in a quite different direction from that which has been suggested by my friends.

They have suggested that those taking part in the debates had in mind a settled meaning of misbehaviour. We have submitted that as a proposition that is wrong as the extract from Todd itself shows and, secondly, that the framers of the Constitution in section 72 intended to depart from the area of misconduct which might in the past have permitted a judge to be removed, and to limit that right in the interests of independence to a very very much narrower area of misbehaviour, and what we say is that it is quite plain that neither of those two things was in the minds of any of those debating, that their concerns were entirely different. They wanted judges who were heard to have their debts outstanding and with bailiffs waiting at their front gate and disgracing their office in that way, they wanted them removed just as much after the Constitution had been implanted in Australia as before. It would not have entered anyone's head, with respect, that it was going to be suggested that any conduct outside office no matter how disgraceful, that a conviction was required for a criminal offence before removal could take place.

We would submit that reading those debates that would have been treated with scorn and derision by those present at these functions if suggested to them at that time.

SIR G. LUSH: They were afraid of without cause removal. They may or may not have been afraid of trumped up removal if, indeed, the distinction is relevant.

MR CHARLES: Some such as Mr Fraser were concerned with this possibility, the majority, we would say, were taking the view clearly enough that parliament exercising the will of the people and being bicameral could be trusted, provided that there was to be misbehaviour stated and provided it was to be proved, that those safeguards were sufficient to ensure that a person could not be removed for mere whim because, let us say, he had opposed the government once too often.

SIR G. LUSH: At one stage in the passages which you read there was a suggestion put forward, in effect, that all that should be required was that the address itself should contain the words, "upon the ground of misbehaviour or incapacity" and, "proved" was apparently inserted to make sure, as one of the endeavours to make sure that parliament's decision was final. I referred when I was speaking to Mr Gyles this morning to some references to Harrison Moore, and I will not repeat what I said then about the insufficiency of my reading of the book, but one of the extracts suggest that Professor Moore took the view that even in its final form section 72 was capable of permitting an address which merely made an allegation and which had no substance to it. It may have been a cynical approach, indeed, it may not have been the professor's approach at all, but it does appear by the footnotes to the article.

MR CHARLES: We will come to the writings of Mr Harrison Moore later, your Honour, but certainly that very learned gentleman did take the view that in 1897 and in 1910 judicial review was possible.

SIR G. LUSH: Yes he did, but it was not only that. The footnote in the article to which I am referring is that he said at the end of all this the judges here were not a scrap better off than they were in England. That certainly would have disappointed those who took part in the debate that has been read to us in the last two days.

MR CHARLES: It certainly would.

SIR G. LUSH: Are you leaving the debates at this stage?

MR CHARLES: Not quite.

SIR G. LUSH: Perhaps you would tell me when you are.

MR CHARLES: I have just got to deal briefly with the extent to which one can use the comments in these convention debates. There are limits to the extent to which it is permissible to have regard to them. It is plainly proper to do so for the purpose of seeing what was the evil to be remedied.

MR CHARLES: I wanted to take the commission briefly to two cases for that purpose. The first of these is the Municipal Council of Sydney v The Commonwealth, 1 CLR 208. The relevant passage is at pages 213 and 214. The commission will see at page 213 point 2:

> Counsel then proposed to quote from the convention debates . . . . . evil to be remedied.-

and so forth. In the second case, The Queen v Pearson ex parte Sipka, 152 CLR 262, the reference is in these terms, in the joint judgment of the Chief Justice and Mason and Wilson JJ, at the top of the page:

> It is unnecessary for present purposes to consider the extent . . . . . what was the evil to be remedied.

The convention debates are referred to as showing that the apprehended mischief which section 41 was designed to prevent was that the women of South Australia might be deprived of the federal franchise of the Commonwealth parliament.

We would say that you cannot count heads for or against a particular view. What is clear, we would submit, as one of the evils to be remedied, was that parliament was not intended to be at large in its address to the Governor-General. We would say that in the interests of federation, the position in the United Kingdom was to be departed from, having regard to the special position of the federal courts, in particular the High Court, in a federation, and for the better protection of the judge some formality was to be imposed on the proceedings by the use of the word "proved", but equally again, what mischief was to be remedied, we would say that if one found a corrupt judge in office, and by corrupt I mean someone guilty of misconduct in what I put is the wider sense of the term, parliament was to be the tribunal of fact in what was misbehaviour.

HON A. WELLS: I suppose, rather ironically, to put that within the mould with your basic proposition, the evil to be avoided was the position in the United Kingdom.

MR CHARLES: Yes, certainly. Mr President, I am about to leave the position of the debates.

SIR G. LUSH: When did subsection (1) drop out of this clause? In both the Adelaide and Melbourne debates the proposed clause contained the words "shall hold their offices during good behaviour." When did that drop out?

MR CHARLES: Obviusly 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. Thomsen
GPO Box 5218
Sydney NSW 2001

Telephone: (02) 232 4922

SIR G. LUSH: Mr Charles, do you wish to say anything about the arrangements of the hearings next week?

MR CHARLES: Yes, Mr President; with the consent of my friend we were both concerned, if we could raise the matter, to ask the commission to consider when again evidence should start in the light of the fact that argument will proceed we think at least throughout today. We hope it will finish today on the question now being argued. The commission may have a view as to how long it would take to produce a report. I think I speak for my friend when I say that both of us would regard it as desirable that the opinion of the commissioners on this aspect be delivered before the High Court hearing. Is that fair - - -

MR GYLES: I think our concern is to have it delivered before there is any evidence led, having got as far as we have. Because if we succeeded in our argument that means that evidence led really is irrelevant. I also agree it would be desirable to have it before the High Court hearings but our primary concern is to have the commission's ruling on the substantive aspects of the matter. We do not see this as a sort of introduction or preliminary to a High Court case; we are here primarily to have the commissioners' own views.

SIR G. LUSH: Yes. The present plan, of course, is to sit next Wednesday for evidence. If we postpone the start of evidence until the following Monday I think that it should, unless some misfortune intervenes, be within the commission's capacities to deliver its views on the current matter at the end of next week.

MR CHARLES: I am told, Mr President, that that Monday, which would be 4 August is a public holiday in New South Wales - - -

MR GYLES: No, I have been reminded it is Bank Holiday.

MR CHARLES: - - - and that the courts usually do not sit on that day.

SIR G. LUSH: At any rate we need not pursue the matter. Time is obviously valuable today from what you have already said, but if inquiries can be made during the day or at lunch-time and if it is agreed that we postpone the start of evidence until the first available day that week, that will do for present purposes, will not it?

MR CHARLES: Yes. Can I indicate to assist my friends that unless it is inconvenient to them for some reason, the case I would propose to proceed with first is the Thomas allegation in that week, and that unless they are unprepared, I would propose to commence with that, which is allegation number 1, on the Monday or Tuesday, whichever day turns out to be convenient, in that week.

MR GYLES: Perhaps all I should say about that is that I have indicated to my learned friend that is one of the allegations which, if they are to be pursued, we would like more time to prepare. He has taken that into account and he still says he wants to do that first. We will have to do our best. It seems to us there are a number of other allegations that could be pursued before that.

SIR G. LUSH: Maybe, we have ten days. You will need more than that - or twelve days, if it is Tuesday.

MR GYLES: Because time is valuable, I do not propose to elaborate upon the point at the moment.

SIR G. LUSH: Yes. Mr Charles, we will proceed with the argument.

MR CHARLES: I have been asked yesterday questions about the tenure on which members of the High Court are thought to hold office, and I have referred the commissioners to Alexander's case. Can I give four short references to Alexander's case. I think I have given your Honours the citation of the case: (1918) 25 CLR 434. The first reference is that of the Chief Justice at page 447, and after reference to the term, what the Chief Justice said was:

> The word does not of itself import any particular duration or tenure of office. Whenever used its meaning may and indeed must be controlled by the subject matter and the context.

SIR G. LUSH: What word is he speaking about?

MR CHARLES: He is speaking of a point in relation to the President of the Arbitration Court:

> Whenever used its meaning may and indeed must be . . . . . in section 12 of the Arbitration Act -

I think there is nothing further of particular relevance to be found in that passage there. Indeed, I ought really to have read the preceding paragraph. The Chief Justice said, after reference to the appointment of the President of the Court:

> The language demands careful examination . . . . . holds judicial office during good behaviour.

Then the second passage is in the judgment of Sir Edmund Barton at page 457.

SIR G. LUSH: That means that in successive paragraphs the Chief Justice referred to tenure during good behaviour and appointment for life.

MR CHARLES: Yes.

SIR G. LUSH: There is perhaps no difference between the two.

MR CHARLES: Yes, indeed. I will not read - I think the relevant passage in Sir Edmund Barton's jdugment is at page 457.5 for the rest of the page; in the judgment of Sir Isaac Isaacs and Sir George Rich at pages 469 to 470; and in the judgment of Mr Justice Powers at page 486.

SIR R. BLACKBURN: How did the question arise?

MR CHARLES: The question arose, your Honour, in the context of whether in the case of the Commonwealth Court of Conciliation and Arbitration the appointment could be made for a term of years or as a chapter 3 court had to be for life and it was incidentally in the course of that examination, in the course of deciding that the appointment had to be for life as a chapter 3 court that the incidental reference is made to the members of the High Court holding during good behaviour.

I had been dealing with the convention debates and had finished that examination. The next part of our argument relates to the position as to misbehaviour generally and that is whether there can properly be said to have been a received or technical meaning of the word which in some way the framers of the Constitution unknowingly translated into section 72. My submission is that it must have been unknowing because we assert that it would not be the ordinary meaning of misbehaviour and examination of the convention debates does not suggest that that is what they intended the word to mean. We make three broad propositions. The first of them is that in our submission misbehaviour never had the meaning at common law which is claimed for it. In our submission misbehaviour was a generic term used in relation to judges to describe conduct which justified removal from office.

One of the ways in which removal from office was obtained was in cases where forfeiture was claimed by the writ of sci. fa., scire facias.

SIR G. LUSH: That was a procedure.

MR CHARLES: Indeed, your Honour, in circumstances where it was claimed that the office had been forfeited by breach of condition. In that situation there may be justification for limiting the grounds giving rise to forfeiture and seeking certainty for those grounds and particularly in the light of the feudal nature of the tenure of offices, that officers frequently were passed on through a family. It would be in the highest degree desirable that the circumstances under which an office might be lost through breach of condition and vacated should be known with precision. But in relation to judges, it is our primary contention that it never had the meaning which is claimed for it.

Secondly, our second proposition is that if misbehaviour did have the meaning attributed to it in relation to forfeiture of offices, we say that misbehaviour in relation to removal from judicial office

had a wider meaning covering all forms of conduct justifying removal from judicial office. Our third proposition is that if misbehaviour has at common law a narrowly defined technical meaning in relation to grounds for removal from judicial office, then we submit that the word was not used in that sense by the framers of our Constitution. We say there that the Constitution coalesces two separate procedures by which removal could be obtained and on the assumption made in proposition 3, operates in differing areas of misconduct. We say that the fact that in order to secure the independence of the judiciary, the Crown's more readily available procedure was relinquished, does not lead to the conclusion that reduced standards of behaviour were thereafter to be expected from judicial officers.

From those three propositions we move to the question - - -

SIR G. LUSH: There is something I would like you to repeat in that third proposition, Mr Charles. You said that the Constitution coalesces two procedures and I am not clear exactly what followed after that. You referred to different areas of conduct. Were you saying with the coalescence of the two procedures the Constitution operates in the two spheres of conduct that were previously relevant to the two different procedures?

MR CHARLES: Can I start my answer, Mr President, by saying the assumption on which the third proposition is based is that our first two are wrong and there is a narrow technical meaning of misbehaviour. The coalescence occurs in this way, there was a right in the Crown to remove a judge using the fact of forfeiture of office on this assumption operating where there had been technical misbehaviour occurring, where there had been misbehaviour in office and misbehaviour outside office on conviction for an infamous offence.

There was a second and quite separate procedure by which the Houses of Parliament could, on any ground, address the Crown praying for removal. No grounds needed to be specified but by convention that was limited to misconduct of the judge but used in a different sense covering moral turpitude and in general terms we would say unfitness for office demonstrated by improper action.

What we say is that the coalescence which occurred was that now only the Houses of Parliament were entitled to produce an address praying for removal but in circumstances not at large but where there had been misbehaviour. We say that what occurred was the removal of one form of procedure, the procedure that entitled - on the one hand the Crown no longer was

entitled to act by sci fa or on any other basis of its own motion and on the other the Houses of Parliament could only act on the basis of stated misconduct. It was intended to bring about a procedural operation but not a variation of the type of conduct that would produce removal from office. I am not sure in so doing I have properly answered your Honour's question.

SIR G. LUSH: I think so.

MR CHARLES: Probably at much more length than was necessary.

SIR R. BLACKBURN: But on that argument coalescing seems hardly the word, does it, because there was nothing left of the power of the grantor of an office. It was a new procedure for removing judges altogether.

MR CHARLES: Yes, precisely.

SIR R. BLACKBURN: Which had nothing in it of the pre-Act of Settlement common law procedure.

MR CHARLES: Yes, precisely. We say that in considering the position at common law one has to recall the purposes of the Act of Settlement. The Act of Settlement were intended to secure the position of the judges against intervention by the Crown by introducing the notion of the judicial office being held during good behaviour in contradistinction with their offices being held at pleasure. It was the stewards encroachments on judicial independence that had brought this about.

Parliament which had not been seen to encroach in that way always retained the right of address without such limitations of cause. We concede that those who have commented on the meaning of during good behaviour in the context of the Act of Settlement have substantial arguments for saying thatits operation in that context should be confined partly because the feudal nature of tenure and the operation of the condition brought about forfeiture vacating the office and partly because Parliament had that residual power, that wide ability to seek removal. Most of the commentators upon whom reliance has been placed have been stating views as to the operation and meaning of tenure during good behaviour against that backdrop. The context of the Constitution is so different we would submit that the views of the commentators can have little bearing upon it.

It is quite plain that there is no thought of vacation of office in section 72. The removal from office can only be brought about by the address of both Houses of Parliament in the same session.

The offices plainly are not vacated by breach of condition. So that the circumstances which caused the commentators to produce the theories they have simply have no operation in this respect, and we submit that when one is dealing with section 72 one is in quite uncharted seas. The commentators have usually, not invariably, but usually not been forced or required to grapple with the precise problems which really are thrown up for the first time in this case.

If we can go back to the various commentators upon whom reliance has been placed and start with Quick v. Garran. The passage that my friend referred to is at pages 731-2 in paragraph 297, and here one sees certainly it is asserted that misbehaviour means misbehaviour in the grantee's official capacity. It reads:

> The quamdiu se bene gesserit must be intended in matters concerning his office . . . . . if the office had been granted for life.

The difficulty with the argument in my friend's terms is that that very description of misbehaviour is in its very nature inconsistent with what is now claimed for its technical operation because that solely relates to misbehaviour in office. There is no necessary relevance to conduct outside office at all, whether with or without conviction, and, of course, one goes back to Coke for that statement of it.

Then one finds following the inclusive definition taken from Todd that it includes a proper exercise of judicial functions, neglect of duty or non-attendance, and then thirdly this question of conviction for infamous offence, and the authority that is assumed to produce that is Todd.

If one goes back to Todd and attempts to see why - I am now about to ask your Honours to look at a different version of Todd from the one my friend has produced. This is the second edition.

HON A. WELLS: Could I just clear my mind of the general direction of your argument and see if I am on the right lines? What you are putting is this, is it, that because these early authorities centred all their reasoning upon a notion of a conditional limitation affecting a tenure of office and hence were naturally circumscribed in their approach by consideration of misbehaviour in office, that type of argument does not apply to the present context of section 72 because there is no question here of holding during good behaviour, indeed, that was eliminated in the convention debates, and what we are concerned with here is simply

a condition subsequent in defeasance, which is quite a different order altogether.

MR CHARLES: Precisely. When one goes back to Todd it may be helpful to draw the commission's attention to the fact that the document that has just been handed up is the second edition of Todd. The chronology was that Todd had produced his first edition in 1866, and the relevance of that, of course, is that that followed the delivery of the opinion of the Victorian law officers in 1864. The second edition was produced in 1887, and the revised edition that my friend has used was in 1892. The second edition is the one that a reference is about to be made to. The revised edition from which my friend has been working is the edition of 1892. Todd had died in 1884 after some 50 years in public life. I think he had gone to Canada at the age of eight, taking, as the book says, his family with him. A man of some natural brilliance, he had written his first book at 19, becoming librarian, I think, of the Canadian Parliament, and it was on the basis of the work he did there in later life that these volumes were produced. At any event, after that entirely irrelevant digression, he produced this work, and may one start at page 855 and following. The work is particularly interesting because it sets out in a number of different places reference to cases where the judges, and particularly colonial judges, had been removed from office.

We find reference at page 855 to the Act of Settlement that the judges commissions are made quamdiu se bene gesserit, and may I add for completeness that that provision had been introduced into the Australian colonies in the 1850s. The Constitution Acts of Victoria, New South Wales and, I think, elsewhere in the colonies usually at around 1855 had introduced that provision, in certainly Victoria and New South Wales. Todd then continues in dealing with the position, and when one gets to 857 where he sets out the legal effect of the grant of an office during good behaviour in terms which are taken almost directly, in fact, probably directly from the opinion of the colonial Crown Law officers. Beginning at the middle of page 857 he sets out what my friend regards as the classic meaning of misbehaviour - we draw attention again to the fact that it is inclusive - and continues over to page 858 with the assertion that in cases of official misconduct the decision of the question whether there has been misbehaviour rests with the grantor, and asserts that in cases of misconduct outside the duties of his office the misbehaviour must be established by a previous convication by a jury.

Then he continues that the legal accuracy of that foregoing definition of the circumstances under which

a patent office may be revoked is confirmed by an opinion of the English Crown Law offices, and then he turns to Barrington's case, how Mr Denman at the Bar of the House of Commons when acting as counsel on behalf of Sir Jonah Barrington had set out what were, it was said, the circumstances under which a judge could be removed, and the writ of sci. fa. to repeal, and the patent, the criminal information, and the other circumstances. The particular passage is set out at page 859 point 5, and if your Honours wish to see it, the passage from the Lords Journal is in the commission at the present time through the courtesy of Mr Darryl Smeaton who succeeded in obtaining it in circumstances we did not think possible.

The passage talks first of cases of misconduct not extending to a legal misdemeanour. The appropriate course appears to be by sci.fa.to repeal his patent, good behaviour being the condition precedent of the judge's tenure; secondly, when the conduct amounts to what a court might consider a misdemeanour, then by information; thirdly, if it amounts to actual crime, by impeachment; fourthly, and in all cases at the discretion of Parliament.

One relevant fact, we would say, is that the references here totally contradict the view that misbehaviour had a limited technical meaning, in our submission, because what is being put is that if misconduct does not extend to legal misdemeanour, then the appropriate course is by sci. fa.

SIR G. LUSH: This passage is in the other edition of Todd verbatim.

MR CHARLES: Yes, indeed, and they all come, as we understand it, from Barrington's case but, in our submission, this set of propositions is quite inconsistent with any view of a limited technical meaning of misbehaviour.

SIR R. BLACKBURN: One of my difficulties with this is to know where the end is of the quotation that begins with the words, "First in cases of misconduct". Where is the closing inverted comma?

MR CHARLES: That we should be able to find if we look at the Lords Journal. I think that the quotation ends, "Fourthly and in all cases". What is happening is that one is reading from the petition of Sir Jonah Barrington. The quotation starts at page 599 of the Lords Journal - "Upon reading the petition of Sir Jonah Barrington", and whoever produced the petition was somewhat verbose because the petition continues over the next two full pages, and on the third page of it in the journal, page 602, in the middle of the page, we find:

> The petitioner humbly suggests that there are four . . . . . inquisitorial and judicial jurisdiction of the House of Lords.

SIR R. BLACKBURN: So that is a second quotation - by the joint exercise?

MR CHARLES: Yes.

MR CHARLES: Yes.

SIR R. BLACKBURN: Are we to take it that Todd, in quoting from Sir Jonah Barrington's petition, is implying approval that the law is correctly stated in this petition?

MR CHARLES: We would say that that form of approval appears to be given by Todd, because what he says is elsewhere the peculiar circumstances under which each of the courses above enumerated would be specially applicable and would be thus explained, and he continues at page 860:

> By these authorities it is evident . . . . . in addition to these methods of procedure.

- and this is the critical passage -

> The constitution has appropriately conferred upon . . . . . on which the office is held.

This passage also appears to be the basis for the passage in Halsbury in paragraph 1107. The passage is:

> Such offices may, it is said, be determined . . . . . vested in the House of Lords.

The authority given is Barrington's case, and presumably it is said by Todd.

SIR G. LUSH: Or it is said in the petition and not with authority. That may be the implication.

MR CHARLES: Yes.

SIR R. BLACKBURN: Is Todd really giving his approval to the proposition that if the judge has committed what he calls an actual crime, then he has to be impeached and that sci fa would not do? Is that what he means?

HON A. WELLS: I thought he was saying that misdemeanours, whatever that means, would ordinarily be done by criminal information.

MR CHARLES: What one appears to have is four situations: misconduct not extending to legal misdemeanour - I must say the inference I had from that is that conduct amounting to criminal misbehaviour leading to conviction is not really covered by that at all; secondly, when the conduct amounts to what the court might consider a misdemeanour, presumably a lesser offence, then by information; thirdly, amounts to crime by impeachment;

and fourthly, in all cases at the discretion of parliament.

That appears to be quite inconsistent with the alleged common law definition of misbehaviour, but what is perfectly plain is that what is said on the next page is totally inconsistent with the asserted common law meaning of misbehaviour because in terms it is so.

> It may be invoked upon occasions when the misbehaviour complained of would not constitute a legal breach of the conditions on which the office is held.

What follows is equally relevant.

> The liability to this kind of removal . . . . . legal consequence thereof.

SIR R. BLACKBURN: Yes, but that is a description of what parliament can do under the Act of Settlement.

MR CHARLES: Yes, and it is said to arise in the case of misbehaviour. Continuing:

> In entering upon an investigation of this kind parliament is limited . . . . . for his removal from the bench.

All we say is that quite plainly what is being contemplated is misbehaviour of certain kinds, but in the fourth class of cases referred to arising from Barrington, one sees it being referred to by Todd as such grave misconduct as would warrant or compel the concurrence of both houses in an address to the Crown for his removal from the bench. But that is also referred to by him immediately before his misbehaviour.

Now, when one proceeds through the passages that follow, one comes to Mr Justice Fox's case at pages 862 and following. Various cases are thereafter set out in which the procedure has been followed. Sir Jonah Barrington's case is dealt with in detail at pages 867 to 869. As far as we know, this is the only case on which an address to the Crown from parliament has actually brought about the removal from office.

Then, your Honours, other cases are referred to leading to the statement of a variety of propositions set out on page 872 and following, as to the way in which parliament should move, the type of procedure that should be followed. I simply draw them to the

commission's attention because they indicate what Todd regards as a fairly set form of procedure, and may I take the commission now to proposition 4 appearing on page 874.

> That the House of Commons should not initiate and ministers of the Crown . . . . . honourable discharge of the judicial office.

We say those last two lines are of particular significance, because it is really critical to the argument of my friends that the term misbehaviour is the same for all offices. My friends put it, as we understand it, that really no relevant distinction is to be made between a superior court judge and clerk of the county court, or a forester, or a filazer - a filazer is someone who looks after files and issues writs in superior courts. We say that it is simply preposterous to assert that there is no relevant distinction between such offices, and we would submit that it is indeed axiomatic in the contrary fashion that misbehaviour must be related to and the conduct tested against the office in question.

SIR G. LUSH: I can understand that this is a submission of what ought to be in the Constitution, but Mr Gyles' argument is that the practices to which you have referred, and particularly those dealt with at page 874 of these references, spring entirely from the second procedure open under the Act of Settlement, and while the word misbehaviour may be attached to this in the literature as a matter of law, misbehaviour is not attached to that second power; it is attached to the first power relevant to the Act of Settlement.

Mr Gyles says it has been carried into the one and only power in the Constitution, and when you look at where it came from, it must mean what it meant in the first power contemplated by the Act of Settlement. The fact that the second power contemplated by that act is very much wider, he says, is nothing to the point. I hope I do him justice.

MR CHARLES: I am sure my friend would say he has been done justice. We would say, your Honours, that my friend's argument is based upon assertions made by a series of commentators and that what one sees on examiantion of the authorities relied on is a series of murky streams consistently rising above their source, because when one goes back to the authorities in question, they in no case provide authority for the assertions claimed by the commentators, and in fact have never, as far as we can find, been actually applied to removal from judicial office.

SIR R. BLACKBURN: What you say really is that when the founding fathers used the word misbehaviour in section 72, they might just as well have been referring to this sort of passage in Todd as to that passage in Todd which describes the strict common law rules for the termination of an office by the grantor.

MR CHARLES: Precisely, your Honour, yes. Indeed, when one examines the convention debates, that is exactly, we say, what is shown to have happened. There is simply no basis for saying that misbehaviour in any case in relation to judicial office has been shown to have that meaning.

We say that when one looks at Todd and sees the heresies that thereafter have got in to the legal literature, one has to go back to the authorities beforehand and examine them to see what justification exists.

Now, from Todd one then has to go back to the Victorian Law Officers on whom my friend placed some reliance. It is always nice for Melbourne counsel to hear Victorian law officers being referred to with such respect, but when it is a person from the Sydney bar doing so, one wonders where the knife in the napkin is. When I say that reference is made to the Victorian Law Officers, I would claim that Victoria has produced better than Sir George Higinbotham and Sir Archibald Michie. However, one finds again indeed the passage to which reference has been made in Todd, but one also finds that the whole authority asserted for it is the King v Richardson in Burrow's report, which your Honours have.

Now, as to the opinion of the Victorian law officers in this troublesome dispute with Sir Edmund Barrie, may we make these points, your Honours. They were talking in the context of section 38 of the Victorian Constitution Act following the Act of Settlement. Secondly, your Honours, they used, as did Todd, the verb "includes"; and we would submit that it is not clear that they were attempting an exhaustive enumeration of the circumstances of misbehaviour. Thirdly, they rely on the authority of Richardson and we will come to that in a moment. Fourthly, they assume that Richardson delimited what may constitute misbehaviour in an unofficial capacity in respect of all officers. Finally - - -

SIR G.LUSH: Would you repeat the fourth, please.

MR CHARLES: The assumption that is made, your Honour, is that Richardson's case delimited what may constitute misbehaviour in an official capacity in respect of all officers. And the last point we make, the fifth, is that the Victorian law officers relied at length on Hallam and we are handing up a passage from Hallam, your Honours. It is Henry Hallam's Constitutional History of England, 5th Edition of 1846 in two volumes. And what Hallam said at the bottom of page 356 after the quamdiu se bene gesserint provision:

> We owe this important provision to the . . . . . tantamount to an act of the legislature.

We would say with respect to Hallam that that seems to have got it wholly wrong in the way in which he has asserted it; and certainly if the statement from Barrington's case is right, that is quite wrong; and Hallam is much relied upon by the Victorian law officers.

Now, your Honours, going back in to the main authority relied on by my friends and by Todd and by the Victorian law officers and everyone else, including Halsbury, who asserted this curious limitation for misbehaviour, Richardson - your Honours have the reference - 1 Burrows 539, dating of course from 1758. One notes that the problem was whether Richardson had good title to the office of portman - not, as unfortunately appeared by misprint in Justice Pincus's opinion, postman -of the town of Ipswich. And it turned on, of course, whether the corporation had the power to amove Richardson's predecessors for not attending the great court. The decision was that the corporation had an incidental power to amove and that the absences from the great court by

Richardson's predecessors was not sufficient to be a cause of forfeiture.

Your Honours, as far as we are aware this is the sole judicial authority for the view my friends have argued as to the meaning of misbehaviour in section 72, the sole judicial authority; and as far as we know it has never been judicially applied to the removal of a judge. There are a number of points we would make about the case. It has been dealt with at length and I do not propose to read the judgment but to point to page 437 of the English Report and to draw your Honours' attention to the fact that in the nominate report the relevant passage begins at page 536 and goes to the end of page 539.

The points to make about Richardson's case in our submission are, firstly, this: Richardson did not concern judges at all. It was after the initial Act of Settlement. Firstly, the case did not concern judges at all; secondly, the judgment is not expressed to contain a definition of misbehaviour; thirdly, it concerned the powers of a corporation, in particular its power to amove and its power to try offences having no immediate relation to the duties of an office; fourthly, we would say it is by no means clear that Lord Mansfield used the word "offence" as meaning anything other than a breach of duty.

SIR R.BLACKBURN: Where did he use it? Can we have a look at that?

MR CHARLES: Yes, your Honour, that appears in the English Report at page 438.4.

SIR R.BLACKBURN: I see, there are three sorts of offences.

MR CHARLES: Yes:

> There are three sorts of offences for which . . . . . indictable at common law.

We say he is talking generally about the breach of duty.

Your Honours, we say, fifthly, that when Todd adopted the limited scope of the word he directly contradicted his own adoption of it by the very passage - - -

SIR G.LUSH: We are leaving Richardson's case, are we?

MR CHARLES: No, your Honour, I am simply glossing it, if

I may put it that way. Todd adopted this case for a particular view but then himself proceeded directly to contradict that adoption in the passages we have referred to at pages 859-60. The last point we make, your Honours, is that when it is said - - -

SIR R.BLACKBURN: I do not quite follow that because Todd did not claim to be citing Richardson except as authority for the common law power of the grantor; is not that right?

MR CHARLES: I accept that, your Honour; I think I was being unfair to Todd in what I was putting to the commission. In so far as it is said that Todd's words amount to an adoption of this narrow and technical meaning of misbehaviour, then that proposition is contradicted by what is set out at page 859-60. One would have to concede that Todd is seen by a number of commentators as having adopted that view but I think for better argument we would say that Todd in fact did not. The assertions made later that he did are wrong and are contradicted by what appears at 859-60.

SIR R.BLACKBURN: Yes.

MR CHARLES: The last proposition in relation to this - - -

SIR G.LUSH: This revives the feeling I had before. This is really a semantic point about the word "misbehaviour", is not it? Todd, one would think, knew what he was doing and he was talking about Richardson's case in Act of Settlement terms in terms of forfeiture. There was no provision for addresses of Houses of Parliament in relation to Portman. He has used the word "misbehaviour" as appropriate to cover both the occasion of a forfeiture and the occasion of an address, but that is all. That is the essence of it, is not it?

MR CHARLES: Yes. Now, lastly, your Honours, implicit in what is put here is that the circumstances under which even an officer or corporator may be discharged are capable of clear definition in three cases; taken from Cook's reports and the Earl of Shrewsbury's case, use, abuse and non-use. Even that in our submission is not clear by any means because at least two of the commentators, Bacon in the abridgement and Hawkins took a different view. We are having some difficulty at the bar table in working out what is meant by Hawkins in the Savoy, unless that is where it was printed. In any event, your Honours, what we say is that Hawkins, the commission will see, looked at the position in relation to offences by officers in general and set out as to, on the first page:

Offences by officers seemed reducible to

the following heads . . . . . .
or extortion.

And at the end of the relevant section on page 168 these words appear:

> But it would be endless to enumerate all the particular instances where an officer . . . . . deserves to be punished.

In other words, we would saw Hawkins in 1716 taking the view that there was no ready classification of these matters but they were at large and readily discernible by common-sense.

SIR G.LUSH: All his examples are within your division misuse, are not they?

MR CHARLES: I draw the commission's attention to what appears on the first page because in that part, your Honours, there had been reference made to his obligation that the grantee ought to execute it diligently and faithfully, not acting contrary to the design of it and matters of that kind, so that one is neglectful breach of duty.

SIR R. BLACKBURN: But this triggers on criminal law and all he is talking about is possible crimes committed by officers, is that right?

MR CHARLES: Yes, pleas of the Crown.

SIR R. BLACKBURN: Yes.

MR CHARLES: In Bacon's abridgement, I think my friend has referred at some length to these passages, but at pages 45 to 46, as spoken in the context of forfeiture of an office, at page 45:

> There can be no doubt that all offices whether such by the common law . . . . . which make bring disgrace on the court themselves.

Then, in the last passage on page 46:

> Also it is said in general that all wilful breaches of the duty of an office . . . . . that it seems needless to endeavour to enumerate them

which we say is really precisely the same proposition as was being made by Hawkins.

SIR G. LUSH: Is this document you have handed up the same as the one we already have?

MR CHARLES: I think there may be a bit more in the extract we have sent up from Bacon's abridgement than the part relied on by my friends.

SIR R. BLACKBURN: Yes, the previous thing - no, it is the same.

MR CHARLES: I am sorry if we have unnecessarily multiplied the amount of paper the commissioners have. I want next to take your Honours to Chitty's Prerogatives of the Crown. My friends made the assertion that all offices are the same. We take the commission now to Chitty's Prerogatives of the Crown. This is of 1820. I ask the commissioners to look first at pages 82 to 83. At 82.7:

> Offices may be granted at will, of which there are many instances . . . . unless sooner removed by the new King.

Then there is reference in the next paragraph to judicial offices. Chitty then continues to deal with public offices in the next paragraph; ministerial offices on the next page. Then, at page 85.2:

> Offices may be lost; among other things; . . . . . determination of the thing to which the office was annexed.

At the end of the next paragraph:

> The most methodical and perspicuous mode . . . . . and thirdly, refusal.

The only point we make of this is that although the assertion is made that all offices are the same, the commission will have noted that the termination of judicial office is dealt with in an entirely separate and distinct portion of the chapter in such a way to suggest that Chitty at least, and well after Richardson's case, does not see them as being necessarily within the same particular parameters.

The stream of authority is not, in our submission, assisted in any way by going back to Bagg's case in 11 Coke's Reports. That simply involved, in our submission, doubt arising from chapter 29 of Magna Carta as to the loss of office unless involving process by decision of the officer's peers or the law of the land. It simply involved, we would say, doubt as to the corporation's power to try which existed at the time of Bagg's case and which had been vindicated by the time of Richardson's case as appears on page 439 of the report of Richardson.

It is for those reasons that we say that when one traces back the stream of authority and finds the source, it is really quite plain that Richardson was not saying what is said for it has never been treated judicially as having said it.' It may be, as was suggested in my friend's argument, not I think by him, that this whole quesiton of forfeiture of office has been confused by the fact that to the conditions which could result in forfeiture of an office, abuse, misuse or non-use, there is inevitably added the fact that attainder for serious offences would also bring about loss of office not because it was in some sense a forfeiture by breach of condition but by the effect of attainder, and that that has been in some way woven in in the course of Richardson's case into the circumstances operating as a breach of the condition of tenure.

It worked with the same result in terms of feudal tenure as a breach of the condition of office. We would say that that is where this misuse or misunderstanding of the position at common law has arisen, and a sufficient oddity that would follow is that the consequences of attainder having come to an end in something like 1870, it would be suggested that the same consequences ought to flow at 1900 at the time of the Constitution, 30 years later. In any event, we say

that when one was looking at the circumstances under which a feudal tenure could be terminated, and seeing that considered in Bagg and in Richardson - - -

SIR G. LUSH: Could you just stop for a moment. I am not sure I am clear about the legal significance of attainder. Was it not a sort of private act of parliament?

MR CHARLES: I believe not, your Honour. It was a consequence flowing from conviction for certain particularly serious crimes.

SIR G. LUSH: What does the expression act of attainder mean?

MR CHARLES: I think that may well have been a particular act, but I think the word has a separate meaning. I will search for it shortly. I do not have it with me at the moment, but my understanding was that it was a consequence said to follow from the conviction for certain serious crimes.

SIR R. BLACKBURN: An act of attainder was brought about in an ad hoc situation by an act of Parliament.

MR CHARLES: Yes.

SIR R. BLACKBURN: I am not quite clear about your argument here, Mr Charles.

MR CHARLES: What I am saying is that clearly enough when one is looking at the circumstances which might cause an office to be vacated and a feudal tenure to be brought to an end, it was necessary to have certainty and one finds in the Earl of Shrewsbury's case and what follows statements made as to how an office can be lost and the phrase misuse, abuse and non-use. Now to that trilogy has been added, not because it was necessarily a condition but because it produced the same result, conviction for a serious offence which by its operation also brought the office to an end.

SIR R. BLACKBURN: Yes.

MR CHARLES: From the fact that now one finds in four circumstances a feudal tenure being terminated, so it seems to have been asserted later that those are the circumstances amounting to misbehaviour.

In relation to Richardson's case, one finds Lord Mansfield saying that there are three sorts of offences for which an officer or corporator may be discharged and one finds them set out in 1, 2 and 3. What he is saying, we would put it, in relation to the first is that the officer or corporator may be discharged if he has committed an infamous offence, the fact being that by virtue of attainder, his office has been vacated. In the second and third one finds the situation is elsewhere set out which would bring about his loss of office. Lord Mansfield we would say has worked the three in together but not in such a way as to leave anyone properly later to say that those were the three circumstances of misbehaviour. The need for - - -

HON A. WELLS: In effect what you have put is simply this, is it not, the consequences of attainder are not a forfeiture of office in any real sense at all. Forfeiture of office is a separate classification concerned with misbehaviour within the office.

MR CHARLES: Yes.

HON A. WELLS: Attainder is simply an incidental consequence that an office should be forfeited.

MR CHARLES: Yes and what one then finds in the very next paragraph is the problem with the necessity for prior

conviction is again nothing to do with the definition of misbehaviour. The whole question of the relevance of a prior conviction simply arose because of the problems of Magna Carta and the question whether the corporation had the right in effect to try someone in circumstances amounting to an allegation of criminal conduct. Again we would say that has absolutely nothing to do with the definition of misbehaviour. It is something which the corporation may have a problem in dealing with.

The Magna Carta says it cannot and unless the power is expressly given it by the law of the land or prescription, a corporation cannot do it but that has nothing to do with the right of the Houses of Parliament in effect to try a judge for his bad behaviour. It has nothing whatever to do with the right under this Constitution of the Houses of our Parliament to look at the behaviour of a judge.

SIR R. BLACKBURN: Yes, but did it have something to do - I mean, was there a general law about the power of a grantor to terminate an office that he had granted or are you saying that the necessity to prove a conviction in the case where the offence was not in the office was limited to corporations for these special reasons that you have just been describing?

MR CHARLES: No, I say that those who had persons in various offices had difficulty in trying someone for what was said to involve criminal conduct because of Magna Carta.

SIR R. BLACKBURN: Yes, I see.

MR CHARLES: It certainly is not limited to corporations but as the law as to corporations developed and from Baggs case to Richardsons case, so the power of the corporation to deal with its offices was seen to enlarge. But we would say it is that notion that has engrafted the wart or quite unnecessary extravagance that some sort of conviction is necessary in criminal cases for there to be misbehaviour.

SIR G. LUSH: We started a little earlier and we might perhaps make a break a little earlier if this is a convenient point for you, Mr Charles.

MR CHARLES: Yes, indeed.

MR CHARLES: Your Honours, the next case to which I wish to make reference is the case of Mr Justice Montagu's deliciously named Algernon Montagu from Van Dieman's Land. His activities appear to in every way merit his name. The reference is VI Moore at page 489, and the year of the decision being 1849. We draw attention in particular to Sir Frederick Thesiger's argument. The argument has been read. We respectfully remind your Honours that two grounds are put as the separate chief grounds of complaint at the start just before the end of page 497 of the nominate report. One sees the chief grounds of complaint against him are first obstructing the recovery of a debt justly due by himself and, secondly, the general state of pecuniary embarrassment in which he was found to be in. My friend has put that being in a state of pecuniary embarrassment or being bankrupt would not be acts of misbehaviour in relation to a High Court judge. This relates, if I may say so, to my friend's axiomatic proposition that there is no difference between officers, what is misbehaviour for a county court clerk is misbehaviour for a superior court judge without distinction.

We would say that the reason why that proposition is so fundamentally wrong can be easily stated. A county court clerk is not affected in the way he carries out his office necessarily by being in a state of financial embarrassment, indeed, if I can say so with no intention of being disrespectful to county court clerks, most of them are in a state of financial embarrassment. They nonetheless act quite properly in their offices, they file files in the right place, and it is not necessary that they be seen to be people of wealth and position to occupy that particular office.

There is the most plain and obvious distinction in the case of a judge. As one saw in the words of Mr Dobson in the debates in the Adelaide convention, what an unfortunate position it is seen to be, how much it brings the office of judge into disrepute if people are saying to one another in the street that so and so cannot pay his debts, or if there is a bailiff waiting at his gate. One can give a more dramatic example of this. If one takes the case of Sir Garfield Barwick of revered memory, the fact was, it is known, that Sir Garfield was once bankrupt in circumstances which reflect nothing but credit upon him for taking upon himself the debts of his brother. He had, however, of course long since recovered from that state when he became a justice of the High Court. It might well have been impossible, probably would have been impossible to have appointed him to that office had he remained

bankrupt, notwithstanding that the circumstances in which he became bankrupt redounded only to his credit. The reason is this. If a person is a member of the Federal judiciary, that person certainly being of the Federal Court rather than the High Court, might well have to preside and was certainly qualified to preside as a judge in bankruptcy. Now we would say it is inconceivable that one could have a judge or potential judge in bankruptcy who was also bankrupt.

SIR R. BLACKBURN: Well, Mr Charles, what about the Family Court?

MR CHARLES: Your Honours, I say nothing of the Family Court. It may be that different standards might be regarded as acceptable in that court having regard to the different functions of that court, but we would say that in relation to judges of the Federal Court and judges of the High Court sitting on appeal from that court that while it is not for me to say but a matter for judges to say what are acceptable standards of behaviour for a judge that reasons why different standards are applicable to a judge is obvious for that reason, the functions they have to perform, the respect they must command in the community in order to be able to uphold the fabric of the administration of justice in our society.

We say, your Honours, that these decisions are replete with references to the high standard of conduct required of judges because only if judges maintain their standards will their dispensation of justice in the community be accepted by the community. That logic, we submit, is perfectly plain from the argument of Sir Frederick Thesiger and from the way in which Montagu case was dealt with in the Privy Council. When one ends the first argument at the turn of the page in the nominate report, one sees:

> This was an act impeding the administration . . . . . another strong reason for his removal.

Then Lord Brougham at page 499 says - this is page 777.4:

> Upon the facts appearing before the governor . . . . . amotion of Mr Montagu.

It plainly did not occur to their Lordships to be necessary to differentiate between the first and second grounds for amoval, and we say that it is plain from that, and would remind your Honours of the circumstances in which the matter was brought to the attention of those debating at the Adelaide convention.

SIR R. BLACKBURN: If you go back to pages 491 and 492, you see what the facts were in much greater detail. The obstructing of the debtor appeared to have been done in this way, that the debtor sued him, Mr Justice Montagu, and Mr Justice Montagu himself went before the Chief Justice and got an order to show cause why the writ should not be set aside, because the court had to be constituted by two judges, and presumably, therefore, Montagu could not sit in it and so the case could not be determined at all, and so the writ had to be set aside.

MR CHARLES: Yes.

SIR R. BLACKBURN: But if you look at the next paragraph on page 492, it appears that a Mr Young had brought several actions on behalf of the Bank of Australasia, in which actions he alleged that Mr Justice Montagu had decided in favour of the defendants upon a technical point, being himself at that time indebted to them. Does that explain the allegation that his general state of pecuniary embarrassment was - - -

MR CHARLES: I think one has to continue reading through page 493, because one finds reference at the top of page 775 of the English Report two statements disproving Mr Justice Montagu's statement that the debt there alluded to was of long standing, but that it had stood over by Mr Addison's consent, and in fact the accounts are set out, and the fourth in particular:

> To his, Mr Justice Montagu's, bill transactions . . . . . his usefulness as a judge.

That is of the essence of what is said here, the, in effect, conduct bringing the bench into disrepute. If you do act in your private life in a way that excites public scandal, you derogate from your usefulness as a judge.

SIR R. BLACKBURN: I wondered if it might be a little more narrow than that, that if you had a large number of creditors

around the small town of Hobart in 1849, it is highly likely that those creditors will come along as plaintiffs, or one of them, and you would be disqualified, so your general state of pecuniary embarrassment is directly related to the fact that you are likely to be disqualified in a substantial number of cases.

MR CHARLES: We would say, your Honour, that that is certainly a possible explanation of the case, but that the way in which it is put in argument certainly suggests a wider basis, there were various pecuniary embarrassments - - -

SIR G. LUSH: The reference in the facts to bill transactions suggests the borrowing of money on bills, to me, and failure to honour the bills when they became due. That might be regarded as a good deal more reprehensible than not paying tradesmen.

MR CHARLES: Yes. In Mr Behan's work on Mr Justice Willis, it will be found that that judge, a member of the bench in Victoria, used regularly to attack counsel who appeared before him if he was aware that they used accommodation bills or bills as a means of paying their creditors, and he regularly asserted that not only was it quite wrong for any counsel appearing in his court to be involved in any way with horse racing but if he found that they used bills, they would be struck off the rolls in his court. I doubt if it could be said that using accommodation bills is improper behaviour by a judge, but being in a state of continuous and known pecuniary embarrassment is a different question.

MR CHARLES: The last words used in the relevant part of the argument of Sir Frederick Thesiger were:

> And tended to bring into distrust and disrepute the judicial office in the colony. This was another strong reason for his removal.

That is why I say while it is possible that the argument is limited in the way your Honour has just put to me, we say it is also open to a wider construction, and in any event that if bankruptcy supervened, that would be a more serious and more obvious basis for asserting misbehaviour, and we have made the point that the Privy Council sees no reason to differentiate the grounds for saying that amoval was properly brought.

SIR R. BLACKBURN: You will notice that Lord Brougham says that their Lordships do not state their reasons in those cases, so we do not get much information.

MR CHARLES: No. I think it was taken as being so clear a case that it really did not require comment, and if I may say so, with good reason.

Next, in our submission, it is difficult to over-estimate the importance of the words used in the appendix, the memorandum of the Lords of the Council, on the removal of colonial judges, because insofar as one is looking at the standards of behaviour regarded as appropriate and required for such judges, they are very clearly set out. If one starts with the main memorandum, the relevant passage begins at 10 at page 827.5:

> Some factual means ought to exist for removal . . . . . charged with grave misconduct.

Now, your Honours, we say that when one remembers that this document was produced in 1870, my friends assert that by this stage there had long since passed into the common law a received technical meaning of misbehaviour well known to everyone; so well known that all sorts of people at the constitutional convention were using it even though most of them were not lawyers, and all entirely well understood as the basis on which judges were to be removed from office. That seems to have escaped their Lordships of the council and they talk about grave misconduct; they do not talk about misbehaviour in this passage. And when one finds the matter being next discussed, the circumstances under which judges are to be removed from office, one would have expected, if this expression "misbehaviour" was to be so well known and received, that the circumstances of its operation would have been equally well known to them and the idea of tenure during good behaviour, terminating only on misbehaviour in office or conviction for serious offence. Now what one finds is really, if I may say so, as one would expect, that judges charged with gross personal immorality are to be removed from office. Now has anyone ever suggested anywhere, but of course particularly in the convention debates, that judges charged with gross personal immorality should remain in office? Of course they have not. Everyone has assumed that they would be removed from office. And what one finds here is that when a judge is charged with gross personal immorality or misconduct, with corruption, or even with irregularity in pecuniary transactions:

> - - - - on evidence sufficient to satisfy the executive role . . . . . or a protracted investigation.

This, your Honours, is a case where it is said that matters such as immorality, irregularity in pecuniary transactions, they are sufficient to justify suspension even before the matter has been properly tried out by the Privy Council. You do not in a case of a charge of that kind even allow the judge to remain on the bench in the meantime. What they go on to say - and the distinction is of some significance - in the next paragraph is:

> On the other hand when the charges against a judge consist not in any alleged . . . . . lower the dignity of his office.

That situation, your Honours, is one that will more normally be found in a case of misbehaviour in

office; a cumulative case of judicial perversity: someone who consistently shouts at people appearing before him, or gets enraged at people appearing in his court; misuses his office in various ways. That is what one will more normally find for misconduct in office. That, is said, it is more difficult to justify suspending him. It is harder for the local executive to act on its own reponsibility. In cases of this kind you will probably have to wait until the Queen in council acts.

So obviously, your Honours, what is seen by this is that it is a worse reflection on the judiciary requiring suspension rather than postponement in cases where you have got gross personal immorality, or irregularity in pecuniary transactions. And we would say the inference one draws is that what is being said here is that in the kinds of immorality or irregularity which my friends are saying the constitution precludes as a basis for removal of High Court judges are seen to be cases requiring more immediate action to remove the judge from office pending a proper trial of it.

This is quite plainly not a single view because we find Lord Chelmsford saying really precisely the same sort of thing. In the opening words of his Lordship's comments on the right hand side in page 16 of the report, and in that passage his Lordship talks about the desirability of ample opportunity being given to the judge to answer the charges; and then over the page, after talking of the behaviour of the judge being incompatible with the temperate and dignified administration of justice:

> In these cases it would be better in my opinion to inform the judge . . . . . of the Privy Council.

You do not suspend a judge who is behaving badly on the bench. You tell him what it is; you give him a chance to answer it; and then you send it back to the Privy Council:

> These observations do not apply to . . . . . immediate removal from the bench.

Precisely the same thought, if I may say so. And we would submit that the opinions of the Right Honourable Stephen Lushington and the Right Honourable Sir Edward Ryan are to the same effect.

We would submit with respect that that memorandum is entirely inconsistent with the views argued by my friends suggesting that there is a received and technical meaning of misbehaviour. And we would submit that what those arguments lead to is that what is misbehaviour requiring the removal of a judge from the bench is of a very much wider description covering personal misconduct, gross personal immorality, covering irregularity in pecuniary transactions, covering cases of immorality and corruption.

SIR R. BLACKBURN: Is not it important to be sure that in these cases they were contemplating - I mean in this memorandum they were contemplating the case of a judge who had been the subject of addresses under Act of Settlement provisions in the colonies which came to the Queen and were referred by her to the Privy Council?

MR CHARLES: Yes.

SIR R. BLACKBURN: And not only to judges who were removed under Burke's Act.

MR CHARLES: Yes, your Honour.

SIR R. BLACKBURN: I suppose that is so.

MR CHARLES: Indeed so, your Honour, yes.

SIR R. BLACKBURN: Certainly Boothby, whom they mentioned, was dealt with under the South Australian equivalent to the Act of Settlement but it went to the Queen and not to the governor of the colony.

MR CHARLES: Yes.

SIR R. BLACKBURN: If they were contemplating the removal under the colonial equivalent of the Act of Settlement then, of course, your argument is very much stronger. If they were only contemplating removal under Burke's Act, well your argument is not so strong.

MR CHARLES: Yes. In our submission it is plain that they were looking at the position generally and that is to say covering both. And as your Honour points out, explicit reference is made to Mr Justice Boothby's case and to the fact that addresses to the Crown had been relied on.

SIR R. BLACKBURN: Yes.

MR CHARLES: And indeed, as appears in the middle of page 10, all the forms of suspension or removal which are in

use lead by different roads to the same result.

SIR R. BLACKBURN: Yes.

MR CHARLES: Likewise, can I add what appears at the bottom of that page:

> Charges brought a colonial assembly against a judge . . . . . Queen in council.

SIR R. BLACKBURN: Yes, but some of those cases at least were under a provision in an act of - was it William IV, which was in very general terms, that the Queen may refer any matter referred to her to the Privy Council.

MR CHARLES: Yes. I suppose I should also draw your Honour's attention to page 829 at the beginning of page 15 of the nominated report:

> It is scarcely necessary to add that in colonies . . . . . corroborates the argument stated in the paper.

So in other words, your Honours, we submit that it is clear that what their Lordships are stating is of general operation in any of the various methods by which removal of a judge from office can be obtained.

May I next give the commission a short reference to Wade and Phillips Constitutional and Administrative Law at pages 316 to 317. It is the ninth edition of Wade and Phillips.

SIR G. LUSH: Is this the same Mr Phillips as Hood and Phillips.

SIR R. BLACKBURN: No, Hood Phillips is a different one.

MR CHARLES: No, indeed not, your Honour.

SIR G. LUSH: It is O. Hood, Phillips and Jackson. Yes?

MR CHARLES: At page 316.5, Tenure of Judges, it is said that:

> Judges of the High Court and Court of Appeal held their offices during good behaviour . . . . . although arguably any conviction is misconduct.

Then there is Lord Russell's case referred to and:

> Since the Act of Settlement only one judge has been removed from office . . . . . witnesses may be called to give evidence.

We say as to that that was has in effect happened with the commentators since Todd is that most of them have not been required to give serious attention to the question which is now of critical importance for this commission, and what has simply happened is regurgitation by one commmentator after another of the notion seen to be derived by Todd from the Victorian Law Officers.

It has simply been passed down a pile of people, in most cases after the Constitution was adopted in 1900. We say that the fact that a lot of academic commentators have simply accepted a line of thought without being required by particular cases to give clear attention to the problems involved is no justification for saying that this is now a received part of the common law.

SIR G. LUSH: You simply want to direct our attention to the fact that Wade and Phillips are commentators who do not follow that pattern.

MR CHARLES: The part they take is in effect to say, "Well, it is not really quite clear". If I may say so, exactly the same comment can be made about the passage from Anson upon - - -

SIR G. LUSH: Although Wade and Phillips referred to the possibility of dismissal not only for misconduct but for any other reason which the houses might adopt, they do not seem to attempt - when they come to a definition of misconduct they do not go very far into it, do they?

MR CHARLES: No, they do not, but what one finds is that the position is not wholly certain in their view. Of course,

they talk about the wider bases on which judges may be removed. When one goes back to the passage in Anson, what one finds, if I may simply read from the single sheet that my friend relied upon at pages 222 to 223, it is the 1907 edition of Anson, what is said is that:

> Appointments made during good behaviour create a life interest in the office . . . . . good behaviour in respect of the office held.

Again, your Honours, that is a statement inconsistent with any behaviour outside office, even criminal, being relevant:

> Misbehaviour appears to mean misconduct in the performance of official duties, refusal or deliberate neglect, or it would seem conviction for such an offence.

We would say considerable doubt is being expressed by the learned author, both the "appears to mean" and the "it would seem" - a consequence of a paucity of judicial experience in this area.

May I, in passing, note that when one looks at the Constitution itself and the circumstances under which members may be disqualified from office, one does find in section 44 disqualification being found in subsection 2 as:

> Being attainted of treason or has been convicted or is under sentence or subject to be sentenced for any offence.

So, at least so far as members are concerned, those who framed the Constitution were prepared to descend to specific reference to conviction. Obviously not very much can be made of this, but we simply point to it as an indication that in that respect at least those who framed the Constitution were prepared to descend to reference to a conviction as a means for seeking to remove a judge. They obviously do not - and having regard to that, we would say it is at least open to inference that if it had been put to those constructing the Constitution, "Do you think that in relation to conduct outside office such as immorality or peculation or matters of this kind that it will be necessary to have a conviction before there can be misbehaviour?" They would have said that that was wholly outside their intention.

On the question of what is meant by proved misbehaviour, we say that the intention of the Constitution or at least of those who framed it was clearly never demonstrated in the second debate, the Melbourne debate;

that what was intended was two things. It was to provide protection for the judge in giving the judge some form of hearing, notification of what was alleged against him, and the necessity for proof of it. Secondly, it is clear enough on the face of what was being said by those debating the matter that they also thought that use of that expression would procure finality for the decision of parliament.

That is something which we submit they may have failed to achieve because, notwithstanding what they said and intended, in our submission the High Court would say that judicial independence is to be maintained by curial review in this respect. We submit that misbehaviour has no technical meaning. We say that one can suggest tests which would be applied, for example conduct which would be regarded as sufficiently morally reprehensible whether or not criminal as to render the person unfit to exercise the office.

One can use a variety of different sentences to try to achieve this, but alternatively one would say: conduct which is inconsistent with accepted standards of judicial behaviour - a phrase that we have used in some of the allegations. Alternatively: is the conduct 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)
Transcript-in-Confidence

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 really 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

(Continued on page 350a)

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 mis-apprehension 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)

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.

(Continued on page 366)

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.

COMMONWEALTH REPORTING SERVICE
Law Courts Building, Queens Square, Sydney, NSW 2000 (02) 2308322

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, 31 JULY 1986, AT 10.10 AM

Continued from 24.7.86

Secretary to the Commission

Mr J.F. Thomson
GPO Box 5218
Sydney NSW 2001

Telephone: (02) 232 4922

MR EINFELD: Just before the formal proceedings this morning, may I announce that MR WATERSTREET appears also together with Mr Gyles, Mrs Bennett and myself in these proceedings.

SIR G. LUSH: Thank you, Mr Einfeld.

MR WEINBERG: Today was set aside as a return day for summonses that were issued pursuant to the provisions of the act. Three summonses have been issued dated 25 July 1986, one addressed to Mr Gerry Gleeson, the secretary of the Premier's Department, the second to Mr Paolo Totaro, chairman of the Ethnic Affairs Commission, and a third one to Mr John Ducker, chairman of the Public Service Board. I understand Mr Gleeson and Mr Totaro are present in compliance with the summons and that a Ms Kathy Williams is present from the Public Service Board pursuant to the summons that was issued to Mr Ducker.

If it is acceptable to the commission, what we propose to do is simply to ask each of these three persons to come forward and produce the documents that they do bring with them pursuant to the terms of the summons.

SIR G. LUSH: Mr Weinberg, have you given thought to the question of identifying documents that are handed over? Are they being handed over as single documents or as files?

MR WEINBERG: They are files, Mr President. In one case I think there is quite a large bundle of files. In the second case there is a very small file. I do not know what the third case will lead to but we could have them separately identified by each of the persons producing them.

SIR G. LUSH: I do not want to go through every sheet of paper on the files. Do you know whether the files are indexed in some way to show what they contain?

MR WEINBERG: I do not, Mr President. We have to ask the persons producing them to identify them in substance.

SIR G. LUSH: We will see but I would like to be in the position in which the materials handed over can be quite accurately identified so that the completeness of their return or any deficiencies in their return can be readily established.

MR WEINBERG: Is the commission desirable that any of the persons who have been called be sworn and asked to give evidence on oath?

SIR G. LUSH: Not at this stage, Mr Weinberg.

MR WEINBERG: I might commence by calling Mr Gerry Gleeson, the secretary of the Premier's Department.

GERRY GLEESON, called:

MR WEINBERG: Mr Gleeson, you received a summons asking you to produce all papers, files and documents relevant to the appointment of Wadim Jegarow to any position with the Ethnic Affairs Commission and all papers, files and documents relating to the creation of position of full-time deputy chairman of the Ethnic Affairs Commission. Do you produce all such documents?

MR GLEESON: I produce all such documents.

MR WEINBERG: Would you be able to describe to the commissioners what is contained within the files that you produce?

MR GLEESON: Yes, there are five files and they deal with all aspects of the appointment of Mr Jegarow. One file is a file which I had constructed following The Age tapes and which canvasses all aspects of Mr Jegarow's services in the Premier's Department and at the Ethnic Affairs Commission. It includes a report from myself to the premier in relation to that matter following those allegations.

MR WEINBERG: Are there any other files to your knowledge in your possession or in the possession of your department which relate to these matters?

MR GLEESON: No.

MR WEINBERG: Would you hand over that file, please?

MR GLEESON: Yes, I should like to add that in those documents there are some very sensitive comments concerning certain individuals other than Mr Jegarow and because when the government comes to appoint, to make appointments to a commission such as the Ethnic Affairs Commission, it is my responsibility to report in a very frank way to the premier. I should just like the commimssion to be aware of the confidentiality of those remarks.

MR WEINBERG: Thank you, Mr Gleeson.

SIR G. LUSH: Mr Gleeson, there is a section in the act under which this commission sits, section 14, which says:

Except in accordance with the direction of the commission the contents of the document produced to the commission shall not be published.

It is an offence to publish any of the contents otherwise than by permission and those are the rules which govern us and those who appear before us and we expect them to be followed.

MR GLEESON: Thank you, sir.

MR WEINBERG: Could Mr Gleeson be excused?

MR EINFELD: Just before he does, could I ask a question please arising out of the summons?

SIR G. LUSH: Yes, Mr Einfeld.

MR EINFELD: The second paragraph of the summons requires material relating to the creation of the position of full-time deputy chairman. Do any of the documents you produce relate to such a matter or is there such a concept that is capable of being embraced in the documents?

MR GLEESON: Yes.

SIR G. LUSH: Thank you, Mr Gleeson. We will excuse you from further attendance.

THE WITNESS WITHDREW

MR WEINBERG: I call Mr Paolo Totaro to produce documents.

PAOLO TOTARO, called:

MR WEINBERG: Mr Totaro, you received a summons dated 25 July 1986 in exactly the same terms as those which I read out a moment ago?

MR TOTARO: Yes.

MR WEINBERG: Do you produce to the commission the documents which are set out in the schedule in accordance with the terms of the summons?

(Continued on page 370a)

MR TOTARO: Yes.

MR WEINBERG: Would you tell the commission what the nature of the files that you produce is?

MR TOTARO: They are personal files relating to the employment of Mr Wadim Jegarow, first by the Department of Forestry, then by the Premier's Department and by the Ethnic Affairs Commission. There are several documents which are cross-overs from one department to the other and which may be relevant to the commission so I have not, except from the files, all the documents which are relevant. There are several documents which are not relevant to the commission and if the commission wants we can do so.

SIR G. LUSH: I am only guessing at the significance of the question, Mr Weinberg, because obviously we have not seen them but is not this best left by taking the files in and when counsel come to inspect them, the question of relevance can be determined?

MR WEINBERG: I think that would be the best solution, Mr President. We do not know ourselves what the documents are.

SIR G. LUSH: The breaking up of files has all sorts of difficulties. I think we should take the files as they stand at this stage at least.

(Continued on page 371)

MR WEINBERG: If the commission pleases. Would you hand those documents, please, to the commission staff. Could Mr Totaro be excused?

MR EINFELD: No objection, and no questions.

SIR G. LUSH: Thank you, Mr Totaro. You will be excused from further attendance.

THE WITNESS WITHDREW

MR WEINBERG: Miss Kathy Williams.

KATHY WILLIAMS, called:

MR WEINBERG: Miss Williams, do you appear as a member of the legal section of the New South Wales Public Service Board?

MISS WILLIAMS: Yes, I do.

MR WEINBERG: And you were requested by the chairman of the Public Service Board to produce documents in compliance with the summons that was issued on 25 July 1986?

MISS WILLIAMS: Yes.

MR WEINBERG: Could you describe to the commission generally what the nature of the files and documents that you produce is?

MISS WILLIAMS: Yes. One is a file entitled "Premier's Department, Representations by W. Jegarow regards fees being paid to position of Deputy Chairman, Ethnic Affairs Commission." Another one is entitled "Premier's Department, Establishment of a position, consultant, ethnic communities."

MR WEINBERG: To the best of your knowledge, are those all documents and files that are relevant to the matters set out in the schedule to the summons that was issued?

MISS WILLIAMS: Yes, they are.

MR WEINBERG: Would you hand those over, please? Could Miss Williams be excused?

MR EINFELD: No objection.

SIR G. LUSH: Thank you, Miss Williams. You will also be excused. The documents produced will be held in the custody of the commission. Counsel who wish to see them can make arrangements to do so. If there is any question raised as to whether documents should be seen or not, the commission will deal with it as it arises.

THE WITNESS WITHDREW

MR CHARLES: If the commission pleases, the next matter is a letter received from the judge's solicitor, Mr Masselos. It is dated 29 July, and it sets out some documentary material which is required to assist in the preparation of the first allegation.

Before I proceed to that letter, may I raise this? We note on the right-hand side of the bar table that the judge is not present today. We are not in possession of any firm information as to why this is so, but it is the subject of suggestion in the newspapers that the judge is extremely sick.

May I say from this end of the bar table that if any formal indication were given to the commission that the judge was unwell, unable to be present and unable to give instructions or that the taking of any of those steps would cause him any sort of upset along those lines, we would immediately submit to the commission that it should adjourn and proceed for the time being no further with any formal hearing.

Now, I say this by way of an invitation to my friends to make such comment on that as they see fit, but I would like to make it perfectly clear that as far as counsel assisting the commission are concerned, the receipt of any satisfactory evidence along the lines I have suggested would immediately lead to us making a submission of that nature. We would do that partly out of concern for the judge's health, and partly because it seems to us that the demands of natural justice involve that the judge is entitled to be present, and the act contemplates that he is entitled to be present and assumes a continuing ability to do so. For all of those reasons, we would immediately submit that there should be an adjournment and that the commission should proceed no further until the judge was ready and able to attend the commission's hearings.

SIR G. LUSH: Mr Einfeld, you have heard what Mr Charles has had to say. An article in the Financial Review has

been brought to the attention of the commission. It may be that as the matter stands at the moment, the commission has no material on which it can take any action.

MR EINFELD: We are mindful and conscious of the views which have been expressed by my learned friend, and I have done the best I can this week to remain in contact with him in almost an hourly way, or certainly several times a day, over the last few days, mindful of our obligations to the commission and to society, as well as to our client.

I have not seen the article in the Financial Review, but the commission may be assured that there is no possibility that any such article could ever come into existence without being also part of a 6 o'clock telephone call in the morning from various members of the media wishing to obtain comments.

The commission may be assured that this article, as with all other articles, has been met with no comment of any significance at all, and certainly not those that have been reported. We have taken the trouble, indeed, to ensure that whenever the media have rung, at least me, I have always been accompanied by someone who could, if necessary, support the lack of positive response that we have given, lack of meaningful response in any way whatsoever other than the minimum of courtesy. So far as the substance of the matter is concerned, nothing at all can be read into the absence of the judge today, any more than can be read into his absence last week during the legal argument that took place. It was never intended that he be here today merely for the return of subpoenas.

So far as the future is concerned, the position is that I am in no better position to inform the commission in relation to the article in the Financial Review than I was to inform the media who were seeking a comment about it. That is to say, I do not know, as I stand here today, whether the statement made in that article is correct or not.

But I do not wish to humbug the commission. Our position is that we are continually seeking to obtain updated instructions. As our instructions are at the moment, there is no reason to believe that the judge will not be able to attend substantive hearings of the commission on matters of evidence at any rate in the foreseeable future. As I have informed my learned friend this morning, and several times yesterday and the day before, I will certainly inform him as soon as there is anything different to that position that comes to our knowledge and attention. It is not as if we are not actively seeking these instructions on

a continuing basis. We are not sitting there waiting for the telephone to ring, as it were, and we will certainly advise him, and through him the commission, if there are any changes.

Our present instructions are, however, quite clear and unequivocal, that is, that the judge seeks the earliest opportunity to clear his name of all these allegations and to continue with the activities of the commission with all possible speed. If those instructions at any time change, we will certainly notify my learned friend and the commission.

MR CHARLES: I should raise certain matters of publicity about the affairs of this commission that have come to our attention in the course of this last week. On Tuesday of this week there was a report which appeared in The Australian which is in these terms: after reference to the fact that lawyers for the judge had yesterday withdrawn his High Court challenge to the validity of the parliamentary commission established to inquire into his behaviour, The Australian report of Tuesday continues:

> His barrister Mr Marcus Einfeld said the decision to withdraw the challenge was not connected with Mr Justice Murphy's health.

My friend is reported as saying - at the end of that article:

> Mr Einfeld said yesterday that it was not necessary for the judge to continue the High Court hearing. The case is not necessary because of the developments in the inquiry including the inconsequential nature of the allegations which have been made against him.

The fact that statements of this kind are contained in inverted commas does not lead to the inevitable conclusion that my friend said these things, but if anyone made those comments they should not have been made. The fact was that as of Tuesday part only of the allegations had been received by the judge, a fact which was known to those acting for the judge and, in any event, to make any comments publicly about the nature of allegations made would, in our submission, be the clearest case of prejudging matters before this commission one could find.

In The Sydney Morning Herald of the same date, that is, Tuesday the 29th, the reporter, Verge Blunden, is quoted as having said:

> According to Mr Marcus Einfeld, QC, one of Mr Justice Murphy's counsel, the withdrawal of the challenge had nothing to do with the judge's health.

> He said the real reason that the action was no longer necessary was because there was "nothing in" any of the allegations raised in the commission's inquiry.

In a separate related article in The Sydney Morning Herald that day, Mr Einfeld is quoted as having said that the judge had told him his doctor described his condition as fighting fit, and that he felt he could go six rounds with Jeff Fenech.

In the papers of this morning, The Financial Review in the article to which my friend has made reference after referring to the judge's condition, the assertion being made, as my friend said, that the judge has inoperable cancer, the last column in the article contains the statement:

> Meanwhile the inquiry is understood to be continuing although it is now believed that it has discovered little of substance to add to what little evidence is already available for opponents of Mr Justice Murphy to claim that he should be removed.

The last paragraph contains the statement:

> This week Justice Murphy's lawyers halted a constitutional challenge to the inquiry on the basis that little of substance had emerged during the inquiry to give them cause for concern.

The Age of this morning contains an article which says in it that Mr Einfeld also said he had not been aware that two weeks ago the commission had appointed two special investigators from the ACT Corporate Affairs Commission which is part of the federal Attorney-General's Department, to assist its inquiries. Again I do not say that my friend has said these things to the paper, I simply say that any attempt by anyone to give the impression to members of the press that this is something that had been done without warning to those acting for the judge would be entirely wrong and quite unfair. It was perfectly well known to those acting for the judge some considerable time ago that if after the hearing in the High Court no step was taken to appoint investigators that attempts would be made to seek the appointment of investigators, and that had been a matter of discussion between myself and Mr Gyles on a number of occasions.

I simply say, your Honours, that there appears to be a campaign being undertaken by someone to denigrate this commission and to use it as part of some other

grander scheme, and it should not be taking place. We would submit that it is a clear contempt of the commission's operations and quite wrong. As I say, I simply raise those matters.

MR EINFELD: I think things need to be put in a little context. I do not know of any denigration of the commission, I do not know what the grander scheme is. Indeed, if there was anything sinister in it, one would have thought those who were named by Verge Blunden as potential appointees to the High Court would have the grander scheme and not those of us who were omitted. I know of no such scheme and I know of no denigration of the commission.

I have a list, as it happens, of the people who have telephoned my chambers and my home. I also have a note of the things which have been said to almost all of them, and dealing with the last matter first, so far as The Age is concerned, it is true that they asked yesterday in a series of written questions which I asked to have submitted if they wished to have anything at all, whether we knew that investigators had been appointed, and I answered that question no. I did not make any other comment to any of the other questions, which included when did I find out, was I annoyed about it, was anybody concerned about it. Nothing else, no other question was answered at all, but the answer no was given to that question.

I see nothing at all denigratory in that and no possible contempt of the commission. I have certainly never said that the allegations were inconsequential, quite apart from the fact that my opinion of whether the allegations are consequential or inconsequential is entirely irrelevant. It may be accepted that I as an experienced senior counsel, and especially one experienced in matters which have attracted public attention, never make any comment about the substance of any case in which I am participating.

I have a note in particular of the remarks which I did make, which were wrongly reported in The Sydney Morning Herald in another article which my learned friend referred to, and that was simply this: there was a statement made on a programme on Channel 9 on Sunday morning called Sunday by a man named Laurie Oakes, who made two assertions. One was that there was going to be a statement made by Mr Justice Murphy that night about his condition, and the second was that there was a campaign to quash the commission, or words of that kind. I said that both of those things were wrong, there was to be no statement, and the first people who would be informed about any developments would be the commission

and not the media. The second was that there was no campaign in relation to the commission. The commission was the law of the land, and whilst it remained the law of the land it would be obeyed and complied with.

They are the only matters we have ever commented on, and certainly never on the substance of the matter, and my learned friend may rest assured, and I ask the commission to rest assured that even if we had a view it would not be one we would be likely to share with the front pages of the newspapers, particularly newspapers who have hardly ever generated any particular friendship to our client.

So far as Mr Blunden's remarks are concerned, I did not see The Australian comment until this morning, I did see the article of Verge Blunden. Verge Blunden is an old friend of mine.

SIR G. LUSH: Is this the article about the High Court proceedings?

MR EINFELD: That is the one that was read out just a moment ago, or referred to.

SIR G. LUSH: The Australian was the report on the abandonment.

MR EINFELD: Yes, the comment in the right hand column of 29 July - I did say that the judge had told me that his doctor had described him as fighting fit and that he could go six rounds with Jeff Fenech. I also told him that I had avised him that that would be an unwise step for him to take, and I recommended he not take it unless he had a contract that would enable him to get as much money as Jeff Fenech would get out of it for six rounds.

So far as the article on the left hand side is concerned, namely, that I had said there was nothing in any of the allegations, the same comments apply as apply in relation to The Australian. I said nothing of the kind. It is not a view that I would have been likely to express, I do not use those sorts of words or expressions, and I certainly am well aware that if I wanted to make a comment such as that there is no better place to make it than here. I have learned over many years that cases cannot and are not to be conducted on the front pages of newspapers. So that was certainly not said, and I have spoken to Mr Blunden about that article since, I have taken him to task for choosing Mr Charles as one of the likely appointees to the High Court and not choosing me, but I have also told him that that was a mischievous thing. It obviously came

from another article, probably The Australian or one of the other articles, and it certainly did not come from me, nor did I say, by the way - the way in which it is expressed in this article, "despite Mr Einfeld's comments that he believed nothing new had emerged in the commission of inquiry" - I did not say that either, and when you look at the article you find that he does not actually say that I did say it, that is just put in a skilful journalistic way. That was not said.

So far as The Financial Review is concerned, I have not spoken to the reporter or anyone from The Financial Review, as my notes in my chambers will show. I said this morning I had not seen the article before, I have no responsibility whatsoever for any part of it. I do not, did not and had not read the article until it was produced a moment ago, I still have not read it in full, and no part of it has been contributed by anybody from our side, nor, as I repeat, is there any scheme nor any denigration of the commission.

It is fair to observe, however, that the media has been relentless in its pursuit of stories of one kind or another about this matter since last Sunday, since last Saturday night, in fact. The first knowledge I had of it was as I was going out from my home with my wife on Saturday night when I was stopped by a telephone conversation which related to me what Oakes was going to say on Sunday morning. I said then that there was no truth so far as I knew in the story about the statement or about the attempt to quash or squash or do something or other to the commission.

I then took the trouble to telephone the judge at his home on Saturday night just to check that there was not going to be any statement of which I had been unaware because I had not been in Sydney last week. He confirmed that there was to be no such statement, and I have maintained that position ever since, and I pressed upon him that it was unwise that there should be any public statement that was made at all before the commission was advised in advance, and that is the position up to the present moment. That was an initiative which I took and which I continue to maintain and with which I have acquainted Mr Gyles, and he also agrees.

So that the position is that although they continue to be relentless, including at least five phone calls I had this morning before I left home from six till about eight, and several since I have been in chambers, although they are relentless and although some of them are people whom I know,

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journalists whom I know, some of them I am even friendly with whom I do not particularly want to be rude to, but at the same time I do not want to participate in any discussion about the matter.

The commission may be assured that we are maintaining, consistent with courtesy, the maximum possible reluctance to make any comment at all, and reportings of so called comments are mischievous, they tend to be repetitive of each other, and they also tend to be productive of rumours which are coming to us just as they are, no doubt, coming to many others from various sources. Indeed, my learned friend himself informed me of something yesterday which I did not previously know and which I still do not know to be true, though I do not suggest for a moment that it may not be true or even that his information is not correct, but information is coming to us from many sources. It is extremely difficult to maintain a position in which one is so distant from the media that nothing will be reported even if one says "no comment" or "no" or "I do not want to speak about it", or something of the kind.

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We are attempting to resolve this matter by the minute with updated instructions and positive moves that will put an end to the matter one way or another and, as I said before, as soon as we are in a position. I have tried, by the way, this week to show good faith to the commission by keeping my learned friends in personal touch with whatever I know. I shall continue to do that as a matter of courtesy to the commission and fraternal camaraderie to them. We will seek to do that and I will not be speaking to them or to the commission through newspapers in the future any more than we have in the past. Thank you.

SIR G. LUSH: Thank you, Mr Einfeld.

MR CHARLES: Your Honours, the only other matter that I have for this morning is in relation to the letter from Mr Masselos to Mr Thomson concerning documents. I do not know if the commission has seen this letter. It is one of some 16 pages.

SIR G. LUSH: We have copies of it before us, anyway.

MR CHARLES: It contains a wide variety of requests for documents to be sought to enable the judge to meet allegation number 1 which is of course the first allegation on which evidence will be called, if it is to be called.

SIR G. LUSH: Perhaps if you just take a seat for the moment, Mr Charles. I simply wish to record that the commission has heard what has been said concerning a number of newspaper articles. It wishes to make no comment of its own on the existing position. It accepts what has been said.

MR EINFELD: If the commission pleases.

MR CHARLES: Your Honours, subject to any information that the commission may receive about the judge's health which might work to the contrary we propose to proceed with allegation number 1 on Tuesday morning next. We will call first Mr Thomas who is the main witness in relation to this allegation and I understand from my friend that it is unlikely that he will be able to cross-examine at the end of evidence-in-chief in which case we will be asking the commission to adjourn to enable my friends to prepare their cross-examination.

Now, in relation to that we have received this letter from Mr Masselos which is dated 29 July. We have not yet asked the commission to take any action in relation to it. It seems to us that a very large

percentage of the documents referred to in this letter have no apparent relevance to the allegation and we would submit that my friends are not entitled simply to ask us without any explanation whatever or to ask the commission to summons the production of documents in this way.

We would submit that the appropriate course is for my friends to be called upon to indicate at least some prima facie basis on which the documents should be produced to the commission. It may be that now is not the best time for my friends to make submissions along those lines and we would be perfectly happy to leave it to them when they make those submissions, but we do put it to the commission that especially in regard to the fact that the documents sought are extremely lengthy and it would be a very long process having them produced, the proper course is for some basis to be given the commission why this step should be taken.

MR EINFELD: I can argue most of that now and the argument does not have to be very lengthy.

SIR G. LUSH: We have not copies of the letter in front of us at the present time.

MR EINFELD: I see. Perhaps it would be helpful. The commission will not have to study the whole thing but you can get a general impression of the material.

SIR G. LUSH: Mr Einfeld, is this really appropriate? I see that the letter runs to 16 pages. I saw the letter on arrival but I have not studied it and I have only the idea of the significance of its contents that any other stranger might get on reading it. But is it satisfactory to attempt a verbal explanation of the requests contained in it?

MR EINFELD: Is it satisfactory - I am sorry, I did not hear - is it satisfactory?

SIR G. LUSH: Is it satisfactory to attempt a verbal explanation of the reasons for these requests? They have the appearance of being very detailed and complex.

MR EINFELD: Well, I do not know about complex. They are detailed in the sense that to identify the appropriate material it is necessary and we thought it only fair that the commission have identified as particularly as possible individual documents one by one rather than some generic statement of documents that might come within a certain category.

All of these documents, as I have pointed out to my learned friend personally, are documents which will be wherever the materials, exhibits, documents, transcripts and so on of the social security conspiracy case are held. I am not myself possessed of knowledge as to precisely where they are held at the moment but no doubt we can give some assistance to the commission as to where they might be so as to avoid unnecessary delay or inconvenience.

We are certainly capable of giving an answer or a statement as to the relevance of the material that is covered by this letter, that is, covered by this letter up to and including the item numbered 4 - I am sorry - up to but not including the item numbered 4 on page 11, that is all the documents on page 1 to 11 come within a certain category of relevance.

The items numbered 4 and 5 on pages 11 and 12 come within a different category. The items on page 13 are similar but different category to the first series, and the persons listed on pages 14 to 16 are persons who are of relevance to the documents which are set out in pages 1 to 11.

Now, the position concerning therefore the documents at pages 1 to 11 and the persons who are named or responsible for them as set out on pages 14 to 16 arise in this way. Thomas was a detective chief inspector of the Commonwealth Police as it was then known in 1977 and 1978. In that capacity he became the chief informant and head of investigation into what became known as the social security conspiracy case, usually called by the newspapers the Greek conspiracy case because of the fact that the major bulk of the defendants in the case were of Greek ethnic origin.

That case commenced in terms of litigation by the arrests of something just under 200 people on 31 March and 1 April 1978. They were all charged with conspiracy to defraud the Commonwealth under the appropriate section of the Commonwealth Crimes Act, section 86, and the particulars of the allegation eventually turned out to be that it was alleged that these people engaged in a scheme to defraud the Commonwealth Department of Social Security of very substantial sums of money by affecting that they were medically entitled to social security benefits of one kind or another when in fact they were not suffering from the conditions which were used as the base for their claims or were not otherwise entitled for economic or other reasons.

The case took some 4½ years and was eventually completed in June 1982 when the defence was really

at the beginning of their address but had addressed already for several days and had pointed out - - -

SIR G. LUSH: What was happening, were these commital proceedings or trial before a jury?

MR EINFELD: Committal proceedings before a magistrate and from day one to the end were committal proceedings before a magistrate and conducted in what was then known as the Central Court of Petty Sessions in Sydney.

SIR C.LUSH: Do you mean proceedings before the magistrate for 4½ years or it was after 4½ years that you reached the stage of counsel's address?

MR EINFELD: Yes, both those things are correct. Not every day, of course, of 4½ years were occupied. There were 35,000 pages of transcript at the time when the case concluded and some 15,000 exhibits of which the commission will be pleased to know we have selected but a very small helping indeed. I was about to say that the defence at the time of the ending of the case - my recollection is as a matter of fact that there were 365 hearing days, that is one year precisely of hearing days on either the day on which the case collapsed or the day before or the day after. It is very close to that period of time. The Crown at that stage of the defence address withdrew the charges against all the then remaining defendants having withdrawn at various stages in the intervening period the case against all the other defendants who had been charged at the same time.

Now, the position was this, Thomas was, as I say, the head of the investigation and the chief informant. I say chief informant meaning that he was himself the informant who brought about the proceedings in the vast majority of the cases. On occasions a somewhat junior officer to him was the formal informant for various practical reasons at the time but it was never denied that Thomas was the person who was responsible for all the relevant decisions associated with the charging and prosecution of these persons at the time when they were arrested. The withdrawal by the Crown of the case after such a long period of time came about on their statement because the magistrate had indicated in response to requests by the defence during its address which it had reached at that stage that a person whom Thomas had regarded as his informant in relation to this supposed conspiracy was a person of no credit. The magistrate also decided that he was proposing to report Thomas to the attorney-general for perjury and perverting the course of justice on the basis of certain evidence which he had given at an earlier stage of the case in relation to his connection with that informant and his association with it.

That matter extended to several major aspects of which it will suffice for present purposes to mention one. During the course of this informant's evidence and Thomas' evidence to the committal proceeding, it emerged that prior to but undisclosed to anyone, the commencement of the arrest of the people at the hearing, Thomas had engaged in detailed

negotiations with the informant concerning the payment of a reward to him in the event that he was prepared to inform as to this supposed conspiracy whereas the discussions which took place pursuant to his relationship with this informant on this reward had in government circles at various relevant times been in relation to a relatively modest sum, a few thousand dollars, I do not remember the precise amount. It emerged that Thomas had participated personally on behalf of and in the interests of this informant to lift the amount of the reward to be paid by the Australian government to $200,000 without ever disclosing either his role in that substantial increase to anyone including the prosecution and the government and his employers and his superiors and certainly, of course, not to the court in any way whatsoever.

Answers were given on oath which it will be demonstrated to the commission or submitted to the commission were clearly false, that he misled the court, that this informant had been a person whom he had only met after the arrest of the people and not before it. Evidence will be brought to the commission that Thomas manufactured a record of interview with this informant in order to meet what had been demonstrated to him by counsel for the Crown as being a major gap in the evidence of the prosecution on which these people had been arrested and long after they had been arrested, that he himself, that his own participation in the negotiations for the reward give rise to a substantial inference that he himself expected to benefit from the payment of the reward. That short outline will give to the commission some indication of the nature of the cross-examination to which Thomas will be subjected in these proceedings.

As a means of establishing that he is a man upon whom not the slightest weight can be placed as to anything he says and that indeed even further, that he has participated in similar types of activity as is alleged here, that is participating in conversations the content of which he later alters or manufactures to suit his own purposes quite differently to the fact as it will be established. It will be shown or evidence will be brought to the commission to show that in the course of his activities during the social security conspiracy case, Thomas deliberately and knowingly misled the Australian government, the attorney-general, the Minister for Social Security and the Cabinet as a whole, not to mention his superiors in relation to the whole question of his relationship with this informant and the matter of the reward and deliberately and knowingly gave false evidence to the court during the course of his own testimony.

SIR G.LUSH: Mr Einfeld, be it so, the question with which we are concerned is what is the relevance of all this material to our proceedings in which Thomas will be giving evidence on a subject identified in the particulars of allegation and in respect of which he plainly will be very vigorously cross-examined as to credit.

MR EINFELD: When you say the plaintiff, you mean the witness?

SIR G.LUSH: Thomas. Did I say the plaintiff?

MR EINFELD: I think I know what you mean, sir.

SIR G.LUSH: What needs to be explained is how when the attack is made on his credit the material in this subpoena can be used or in the letter asking for subpoenas or the witnesses can be called to give evidence. I would be very surprised if this commission which is to confine itself to evidence admissible in a court of law is going to try issues arising out of the Greek conspiracy case as a kind of sideline.

MR EINFELD: I would be most horrified to think that it would, sir.

SIR G.LUSH: Your horror has not yet emerged.

MR EINFELD: My horror is real and stark. We certainly would seek no such findings. However, the commission will appreciate that if it is to make a finding that Thomas' evidence in relation to the luncheon in question is to be believed or at least prima facie accepted as capable of belief, it will need to know and inform itself of the character and substance of the man who is giving the evidence in the context, of course, that the assertions he makes and the conclusions that the allegation seeks to draw from his evidence could conceivably be accepted.

SIR G.LUSH: I understand that but under what principle are you going to call evidence to show that Thomas told lies on another occasion?

MR EINFELD: I do not need to have a principle because this commission is not governed by the rules of evidence. I am saying as a matter of justice and as a matter of the commission being able to make a positive determination that the evidence that Thomas is to give is believable, it will need to know what is the nature of the man, a former senior officer of the police force and a member of the bar at the present time, who comes before it for the purpose of giving

evidence which it would be asked to be believed. Now the commission will, in our submission, hesitate long before not permitting a person against whom it is alleged, judge or not, that he took part in a conversation which had a sinister, even criminal overtone as deposed to uncorroborated by one individual about whom it can be established, we will be submitting in due course, is clearly a person upon whom not the slightest reliability and reliance can be placed.

I point out by the way that the vast majority of these documents are either Thomas' own documents or they clearly emanate from him and can be established to emanate from him.

SIR G.LUSH: I do not think you are really grasping the nettle. Documents I can readily seek are things that may be put to Thomas in cross-examination if the course of the cross-examination makes it in the cross-examiner's mind appropriate to put them. If they are in any way his documents, they can be used if the situation arises to refute what he is saying but initially I was speaking about these witnesses who are supposed to come and tell us about the matters in the Greek conspiracy case. You can cross-examine him to your heart's content about whether he lied in the Greek conspiracy case but outside evidence on a credit issue is normally not admissible.

MR EINFELD: I was addressing myself to the documents, not to the people and I thought that we were talking about that because my learned friend invited us to make an explanation in relation to the documents, not to the people.

SIR G.LUSH: If the documents are wanted for confrontation purposes, that is one thing.

MR EINFELD: That is what they are wanted for, confrontation purposes. So far as the people are concerned, the people are either the authors in most cases or the recipients of the other documents or the information in the documents. They may not necessarily be called, depending on how the cross-examination goes and how many admissions and other statements are made.

SIR G.LUSH: Are they authors of documents critical of Thomas?

MR EINFELD: No, not at all. I do not know of any of those people who are authors of documents critical of Thomas. They are people who received from Thomas in large measure, I do not speak about every single one of them, but the majority of them were people who received information from Thomas in one way or another and converted them into action on their part

in some cases the contents of some of the documents based upon information which he gave which information can be established to be false and whose evidence will therefore establish to the commission, if the commission wants to go that far and that is down the track somewhat, the extent of the sinister result of Thomas' perjuries and other crimes in the course of the proceedings.

Now, for example, there are some of the people who are mentioned who are the authors of the documents. As far as we are aware, the contents of the documents that are authored by some other people were not known to these other people other than by information obtained from Mr Thomas. If Thomas is not prepared to admit that he was, although not the author of the documents, entirely responsible for their contents, it will be necessary to call those persons to establish that he was responsible for those contents.

SIR G. LUSH: That seems to be for the purpose of refuting something he said in reply to a question as to credit, and that is one of the things it is difficult to do.

MR EINFELD: Well, Mr Chairman, the position is simply this. We are not bound in this case by the rules of evidence - - -

SIR G. LUSH: Do you mean that you can only suffer an adverse conclusion on admissible evidence but that you can prosecute your side of the case with inadmissible evidence?

MR EINFELD: No, I do not say that at all. We are not seeking anything other than what is laid down in the statute. The commission's finding cannot be made other than on admissible evidence, but at the same time it does not need to restrict itself, and we would submit it will not restrict itself, by a simple but in this case misleading word like credit.

This is not ordinarily a matter relating to credit in the way lawyers normally talk about credit. It is not just a question of attempting to establish that somebody on one or two occasions has made an incorrect statement or an inconsistent statement or something of the kind. It is desired here to establish as quickly but as decisively as possible that Thomas is a person upon whom the commission can place no possible reliance or weight, and it will be sought to establish that by establishing that he is not merely a person who has made an odd inconsistent statement or so, but that he has deliberately been engaged in a major fraud. We will seek to establish the type of fraud it was as well as its consequences, in order to establish to the commission's satisfaction our primary submission that he is not a person upon whom any weight may be placed.

Now, the question of the people is quite a lot different to the question of the documents. Not all those people may be required, because it may very well be that there will be adequate admissions made in relation to the contents of documents by him in cross-examination, or it may appear to the commission that it may say, we do not need to hear any more in relation

to that matter, in which case that will deal with the matter more promptly than any other conceivable way.

But the fact is that this is not a question of credit in the simple sense of the word; it is attempting to establish the impossibility of placing reliance upon his credit. I may add, by the way, that the commission will be assisted by the knowledge that the magistrate who heard all this evidence and was well familiar with it came to certain conclusions himself about Thomas's answers and evidence in relation to this matter. Whether the commission wishes to place reliance upon what the magistrate thought is a matter for it, but certainly so far as we are concerned, we cannot assume that the commission will adopt the magistrate's view. We must assume that we have to establish that what led to the magistrate's view should also lead to the commission's view, quite separately arrived at and without any relation at all to what the magistrate has said.

SIR G. LUSH: What you have to consider, Mr Einfeld, is that you will be at liberty to attack Thomas's credit by all the means permitted by the laws relating to evidence - - -

MR EINFELD: Well, the laws relating to evidence here.

SIR G. LUSH: You will not be permitted to take this commission into side issues of fact not directly related to the issues that we have to decide merely on a credit matter. You will have to justify taking us into extraneous issues under some principle of law.

MR EINFELD: Well, I will have to do so - subject, of course, to the rulings of the commission, I will have to do so in the context of the rules relating to evidence that are applicable to this commission, not the rules that are applicable in a trial or in some other - - -

HON A. WELLS: I do not want to deter you from developing this, but really subsection (2) of section 6 does not say except upon evidence that would be admissible in proceedings in a court against the judge. It says admissible, at large. In due course you will have to confront the implications of that, and that, prima facie at all events, suggests that the evidence is generally to be admissible for all relevant purposes.

MR EINFELD: Well, we would seek to put submissions in relation to that - - -

HON A. WELLS: I am sure you would, but I simply point out - - -

MR EINFELD: It is very kind of you, very gracious of you - - -

HON A. WELLS: I am not attempting to be kind, Mr Einfeld. I am

merely clearing my own mind. You see, subsection (2) says admissible.

MR EINFELD: It is always helpful if a bench telegraphs its preliminary views to counsel so that we can develop submissions, but the commission can accept that we will in due course and at the appropriate time make a submission on the meaning of section 6(2), a submission which will include the fact that the only findings which the commission is asked to make are findings in relation to the judge, and therefore that the whole of section 6(2) is predicated on the concept of evidence that would be admissible in proceedings in a court to sustain those findings. So that it is not evidence at large as such, but the commission is the master of its own proceedings.

All we say is that it will be our aim in the proceedings, so far as Thomas is concerned, and so far as other witnesses, by the way, relevant to other allegations as well, is to establish that he and they are men of no credibility or quality so far as reliability of their evidence and of their word is concerned, and we will seek to establish in relation to Thomas by confronting him with his own documents and his own evidence, and to the extent to which a document on its face appears to be a document which is not his document unless he admits that he is responsible for its contents, we will seek to establish that his denial that he is responsible for its contents is also false.

SIR R. BLACKBURN: But how can you do that within the framework of section 6(2)?

MR EINFELD: We would submit that section 6(2) is irrelevant so far as we are concerned, because section 6(2) refers to section 8(1)(a). Section 8(1)(a) says the commission shall report its findings of fact, and section 6(2) says it shall make no finding, and I interpolate of fact in this connection, except upon evidence that would be admissible in proceedings in a court, having in mind the contents of section 5 which provides that the framework of the inquiry is whether conduct by the judge comes within certain categories, a certain description. So among the things we will argue is that section 6(2) is not and should not be interpreted as preventing us from cross-examining Thomas and other witnesses for the purpose of establishing that they are people of no reliability whatever.

SIR R. BLACKBURN: But you want to go further than that. You want not merely to cross-examine them; you want to adduce evidence in contradiction of what they say.

MR EINFELD: We may want to, sir.

SIR R. BLACKBURN: You say you can do that within the words of section 6(2)?

MR EINFELD: We say that section 6(2) has nothing to do with that at all. We say that section 6(2) says that the commission shall not make a finding except upon evidence, a finding of fact in relation to the question as to whether Mr Justice Murphy has committed any proved misbehaviour within section 72.

SIR R. BLACKBURN: Yes, but upon evidence, and the evidence - - -

MR EINFELD: That does not exclude evidence, Sir Richard. That does not exclude evidence. What it says is that the commission may not make findings of fact except upon admissible evidence.

SIR R. BLACKBURN: Yes, I know.

MR EINFELD: Now, the question of what it is admissible to and on what it is admissible is a matter for another debate on another day, but it cannot be conceived of as admissible in relation to Thomas, because he is not the subject of this inquiry as such, there are no findings of fact relevant to report to parliament so far as Thomas is concerned. There is a finding of fact to report to parliament in relation to whether Mr Justice Murphy is guilty of misbehaviour as defined, and section 6(2) has no applicability, in our submission, to test whether Thomas may be cross-examined or refuted on the issue of his reliability as a witness of truth by reference to section 6(2), in our submission.

SIR R. BLACKBURN: But suppose, just imagine, a purely imaginary state of affairs, that on that allegation we come to the conclusion that we are unable to decide by any test except the credibility of Thomas, so that the credibility of Thomas is absolutely crucial. Now, some of the evidence on which we might come to a finding against your client would be the evidence going to Thomas's credit which you want to adduce outside the ordinary rules of evidence.

MR EINFELD: Which I might want to adduce outside the ordinary rules of evidence.

SIR R. BLACKBURN: I know, and that would be making a finding of fact on evidence which would not be admissible in a court of law.

MR EINFELD: No, with respect not. Can I put the alternative one by way of answering it. The alternative is that the commission would not hear evidence which could be brought which could establish that Thomas had told a lie in this commission and to make a finding of fact that Mr Justice Murphy can be found and perhaps should be found guilty of misbehaviour in a matter on the basis of evidence which he can prove to be false. That is impossible, in our submission. It is inconceivable that the commission could make a finding of

fact that Mr Justice Murphy could be held to be guilty of proved misbehaviour without hearing evidence which could establish the falsity of the evidence which is the basis of that finding.

SIR G. LUSH: People are convicted of crimes every day on that basis.

MR EINFELD: But we are not dealing with crimes - I do not know that. I mean, you say that. You are much more experienced in these things than I am, but I certainly would not accept, without thinking about it very carefully, that people are convicted every day on that basis. I do not know that people are convicted on the basis of evidence which can be established to be false, which proof of falsity is rendered to be or ruled to be inadmissible and therefore the person is convicted on a false basis.

SIR G. LUSH: No-one is suggesting that you cannot adduce evidence to show the falsity of an allegation. Of course you can. This is a question of evidence which goes to no issue except the credibility of Thomas, and surely you are asking us to put no weight on the credibility of Thomas because if we did put weight on it, we might make a finding of fact against your client.

SIR R. BLACKBURN: The admissibility of evidence going to Thomas's credibility must be the ordinary rule about admissibility of evidence going to credit.

MR EINFELD: I did not get up today to launch an argument into what part of the cross-examination of Thomas is going to be relevant or not, we will deal with that as each matter comes along because there may be different principles that apply in one case to another, certainly a generic rule cannot be established that will be helpful at this stage of the commission's deliberations. All that I got up to speak to this morning is the produceability of the documents which we have requested and to explain what use we seek to make of them. My answer to that is as I have given it, that we seek to attack - they are largely his documents or documents for which he is responsible. We seek to attack much wider than his credit, we seek to attack, to examine his character and his capacity of giving truthful evidence and the quality of evidence which he is able to give.

SIR R. BLACKBURN: That is all his credit.

MR EINFELD: It may be.

HON A. WELLS: What else could it be?

MR EINFELD: In the context of an inquiry as opposed to a trial I would venture to suggest that it goes to the issue as to whether Mr Justice Murphy can be found to have committed an act of constitutional misbehaviour based upon this allegation. That is what it is relevant to, it is relevant to the issue as to whether Mr Justice Murphy has committed an offence against the constitution.

SIR G. LUSH: Let us not get bogged down in semantics.

MR EINFELD: I would be grateful if we did that.

SIR G. LUSH: The question which we have to decide, the issue which we will have to decide is whether we can believe Thomas. Now that is a matter of credit. We do not have to form a determination of his character though his character may be revealed by some of the things that are put to his credit, but we are not concerned with it as such.

MR EINFELD: That is as it may be, I could not agree more.

SIR G. LUSH: Mr Einfeld, the commission will adjourn for 15 minutes now.

SIR G. LUSH: Mr Einfeld, we are doubtful of the utility of pursuing the present discussion to its conclusion in general terms. It is clear that you must have some classes of documents here but for the rest, issues about admissibility and perhaps other problems including I think the sheer bulk in relation to transcripts, may make the requirement of production difficult.

What the commission is disposed to do, and you will remember we have not heard Mr Charles about this as yet, is to indicate that you may have sub poenas duces for all documents of which Thomas is the author and all documents which purport to contain statements by him.

For other documents we propose that there should be a brief submission in writing showing why each of them is relevant to some matter which the commission ought to consider and, so far as the witnesses listed in the letter are concerned, we would propose that the same procedure be followed and we should have a brief statement in writing as to the evidence to be given and to its relevance.

The last-mentioned, I may say, what we contemplate is the sort of thing that was the practice applying for service of some subpoenas. I think it was at one time, perhaps still is, a requirement under the Service and Execution of Process Act that subpoenas should be served out of the jurisdiction by leave and the basis on which the leave was given was a brief affidavit saying, we expect the witness to say this and it is relevant to that, and we also propose - I am not suggesting affidavits in this commission and I have already said written submissions - we also suggest as no doubt a lot of these requests will be automatically granted that they be directed through counsel assisting the commission.

MR EINFELD: We are indebted to the commission for being gracious enough to grant us those documents which come into the category of Thomas's own documents, but I hasten to add that there are documents of which it is clear and can be established that Thomas was responsible for their contents even though on their face they may not appear to be his documents, an exercise which has already previously been carried out and established and could be established if the transcript was available.

SIR G. LUSH: This is the sort of thing that you can put up to us.

MR EINFELD: I was just going to add that the transcript is really quite essential, not by way of 35,000 pages of it, but that is why we were hoping to get the discs of the computerized transcript because there were two lots of computerized transcript created with headings and we would immediately be able to identify if we could have access to one or other of those discs which parts of the transcript were needed. The transcript would be an essential part not only to conduct the cross-examination but to describe the relevance of the documents to which we have to address written material.

I certainly see the point, thank you, Mr President, of being able to say in effect what I have just said about certain documents, but it will be necessary also for the avoidance of the trial of issues that have already long since been determined, to have access to considerable portions of transcript so as to be able to identify both matters for cross-examination and the relevance of particular documents that come forward. So, if a priority can be given to obtaining the computerized transcript rather than the actual written transcript that would undoubtedly save quite a lot of time in what will in any case be a fairly time-consuming undertaking.

Referring to the matter, thank you very much, of the individuals, we will certainly submit in writing what we see to be the relevance of the witnesses. From that it will become clear that not all of these witnesses and indeed none of them at the outset may turn out to be necessary. Certainly they will not be required in the course of the actual cross-examination itself.

SIR G. LUSH: But what you are asking us to do by the letter is to distribute a number of subpoenas throughout the community in all sorts of places and every one will have to identify a date for attendance and the general effect will be to make us look absurd.

MR EINFELD: We were not suggesting they all be issued next week. All we were doing is giving notice that certain persons will or may be required at some time. We are quite conscious of the fact that the commission hardly would be likely to scatter around subpoenas so there are 50 people waiting in the waiting room to be called when they are not going to be called for a considerable time. So we certainly had no such intention; I am sure the author of the letter had no such intention, at any rate. All we would certainly be prepared to and would have no difficulty, other than the question of time in identifying - - -

SIR G. LUSH: They can be dealt with then as we progress.

MR EINFELD: Yes. I was going to say it might be better to postpone that discussion until another time. I should point out that some of the documents sought are not of course documents relating to the so-called Social Security conspiracy committal. Some of them are evidence and statements made by Thomas to other places and authorities, including the commission, and so on. So they will in almost all cases, certainly a volume of cases will be his own personal statements and so on. So, yes, we will be pleased to receive whatever documents the commission is gracious enough to grant us and then we shall deal with the others as they arise.

SIR G. LUSH: Let us be quite clear about the procedure of getting these things, Mr Einfeld. The commission will be issuing subpoenas at your request. That is the only way we can get them except for the circumstance that the act gives us power to have recourse to one or two sources, but for this purpose it is a subpoena duces that will have to go and those subpoenas will be at your request.

MR EINFELD: Yes, oh yes, certainly. I should also mention we do have the intention - I am not quite sure whether the necessary resources will be placed at our disposal - we have the intention at this stage at any rate of taking statements from the majority of witnesses whom we would wish to call or have called, and we will submit the statements as they come to hand and as is appropriate. We do not have in mind that people will be called to the witness box - that the relevance of their evidence will suddenly become manifest after they have been waiting outside for a half day or something of that kind. To the extent to which our resources permit it that will apply without doubt to the major witnesses whom we would wish to have called.

The other matter I was going to mention was that there has been prepared a letter requesting particulars of this Thomas allegation and some other allegations, which is on the way. I had hoped it would have been here by yesterday but it will be here shortly.

SIR G. LUSH: Initially, that is not a matter for us. That will go to counsel - - -

MR EINFELD: - - - assisting, yes, and that itself may make it possible to truncate at least some of the people who would need to be called.

SIR G. LUSH: I do not think it is necessary and really I do not think it is appropriate that these matters of preparation, either on your side or by counsel assisting, should be canvassed in front of us.

MR EINFELD: Certainly, I am not canvassing it but just mentioning it as a matter of courtesy. There is nothing else to be done in relation to that. The only other matter I wanted to mention was that the commission will appreciate that we are acting here under continuing instructions. We propose to continue to seek and obtain instructions in the future as we have done in the past, and if our instructions in any way change in relation to any of these procedures, we shall certainly notify the commission immediately.

SIR G. LUSH: Well, we are indebted to you for that statement, Mr Einfeld, because you can imagine the commission has been concerned about the state of facts asserted in this morning's press.

MR EINFELD: Of course.

SIR G. LUSH: We cannot act on rumour and we cannot act on newspaper reports. If you should be instructed as to matters which lead you to think it is appropriate to make an application to the commission, you must feel at liberty to do so and we would probably be able to sit on a couple of hours notice although we would expect that an application, for instance, for adjournment would be supported by medical evidence.

MR EINFELD: I understand that and I did have a discussion with my learned friend about it yesterday. We will certainly seek to do that because it may be certain that neither Mr Gyles nor I will be making medical statements from the bar table. I do not profess to be knowledgeable in the field in any relevant way.

SIR G. LUSH: I am sure even if you were, you would not make statements about it.

MR EINFELD: As I hastened to tell every newspaper person, who will not accept, by the way, that what they would not be able to get from a patient's doctor they expect to get from a patient's lawyer. I find that to be an almost comical proposition, but they do not; but as far as these matters are concerned we will take upon notice with gratitude the commission's willingness to sit at short notice. With or without medical support I shall keep my learned friend informed as I am informed, as I have done this week and will continue to do, so that he may convey to the commission developments as they take place. If an adjournment of any length is desired we shall certainly seek to produce some supporting medical evidence.

SIR G. LUSH: Thank you.

MR EINFELD: I should have pointed out my learned friend was quite right in saying this morning, for reasons that will be obvious we will not be in a position to cross-examine Mr Thomas next week. It did not seem to him, as it does not seem to us, appropriate that cross-examination, as it were, be in parts. That seems to be an undesirable way to proceed, so we did suggest it would be appropriate that if sittings are to proceed next week and if Thomas is to be called to give some evidence it would be appropriate for them to take on notice that other evidence in the Thomas allegation or in other allegations including Mr Davies or other people who are proposed to be called might be held on the ready to be able to give their evidence because it is unlikely we will be in a position to cross-examine without this documentation; thank you.

SIR G. LUSH: Thank you, Mr Einfeld.

MR WEINBERG: If the commission pleases, in relation to the last matter raised by Mr Einfeld it is proposed to call Mr Thomas on Tuesday. We understand my friend will make application for time to be granted to them to enable cross-examination of Mr Thomas to proceed. The present intention of counsel assisting is, after having called Mr Thomas to give evidence in chief, to proceed to allegation number 16 and to proceed with the hearing of evidence in relation to allegation 16. That is one of the allegations of perjury. We have taken the view that we must proceed with evidence and with other allegations bearing in mind that the statute does require this commission to report by 30 September, bearing in mind our friends have not given any clear indication of precisely how long they would require to prepare cross-examination of Thomas but the informal communications we have had are that it would be a very substantial period of time indeed. So those are the present intentions of counsel assisting. We will move from Thomas to allegation 16; if the commission pleases.

MR EINFELD: Could I just say in relation to that, allegation 16 was given to me yesterday morning. Other allegations have been in our hands for a good deal longer. It seems positively bizarre without further explanation that it would be proposed, when there is other evidence in the Thomas matter that is available and other matters earlier particularized to us, not to proceed with those in favour of one which we have hardly had the opportunity of reading, let alone contemplating in terms of evidence.

We are supplying as quickly as we can both letters requesting particulars and lists of documents or people whom we need. We have not even remotely given consideration to allegation number 16 in that connection because we were going through them roughly in the order of their number and certainly in the order of the receipt we had of them, and this one was way down the scale.

It strikes me as being a rather odd way, to take one of the last ones particularized rather than one of the earlier ones or take all the evidence that is available in one. I will not allow myself the luxury of such expressions as emanated from my learned friend's leader this morning, such as grander schemes, and suggest for a moment there is any particular tactical question that would make this choice, but we for our part will not be ready to deal with allegation number 16 because we have only just got it. We have not had a chance to request particulars, have not had a chance to consider the documents and investigations we want to have made and statements taken.

SIR G. LUSH: In a word, you have not had a chance to consider whether you will be ready on Tuesday.

MR EINFELD: Oh, we will be ready on Tuesday, as I have made clear to my learned friend all week. We are ready - - -

SIR G. LUSH: To deal with number 16, Mr Einfeld.

MR EINFELD: I am sorry - we got it yesterday, sir.

SIR G. LUSH: I know but you have not yet considered whether you can be ready to deal with it on Tuesday.

MR EINFELD: We have not asked for particulars. We have not listed documents we need and the people whom we need in relation to it and have not had an opportunity to send our investigators out to interview people and it could hardly be expected we would have done so, having received it yesterday morning. By the time my learned friend left my chambers - - -

SIR G. LUSH: When you have had time to give it thought we will consider the question of whether it should be postponed beyond Tuesday but - - -

MR EINFELD: We would wish - - -

SIR G. LUSH: You may not wish us to get the impression that every suggestion for going ahead is met with some objection, Mr Einfeld.

MR EINFELD: Such an impression would be grossly misrepresentative of the fact, which the commission may not know, that two weeks ago we gave counsel assisting the commission a list of the order which we would request the matters to be taken in, not one part of which has been complied with, nor has an explanation been given, even courteously and in a brotherly way, of why it cannot be pursued in that way. We are and have been ready to deal with a number of allegations. It is hardly useful to take as an example of our lack of co-operation one that was given to us last rather than one that was given to us first.

SIR G. LUSH: We do not propose to go into that this morning. The prima facie choice of sequence rests with counsel presenting the matters to the commission. If you feel their choice puts you in an awkward position you are of course at liberty to make submissions for the postponement of the particular matter in due course, but you must realise that the commission cannot keep on putting off everything.

MR EINFELD: We would want the commission to move ahead, on our instructions, with maximum speed and efficiency. That is why we submitted a list of the allegations on which we would be ready to proceed, so that it could be taken into consideration in the arrangements. We suggest fairness at least demands that our request be

given consideration and respect would seem to demand we at least be given an explanation as to why a prima facie matter such as the calling of other witnesses relevant to the allegation which is proposed to be led first should not be called before branching off on some other allegation.

MR WEINBERG: Briefly responding to that - we are unaware of any such list that was said to be provided to counsel assisting. I have seen no such list. It may be that there were oral communications between Mr Gyles and Mr Charles about preferences which counsel for the judge had as to the order in which matters should be taken. I do know Mr Charles communicated to Mr Gyles that a number of allegations that counsel for the judge would have preferred to be taken first could not be taken first and why, for example, the Thomas allegation had to proceed. I am unable to take the matter further.

MR EINFELD: Mr Gyles has never communicated with me despite requests. We still have not heard why witnesses in the first matter cannot be heard.

MR WEINBERG: Mr Davies is away.

MR EINFELD: Oh, that is a good reason.

SIR G. LUSH: The proposal of the commission is that it will sit on Tuesday, Wednesday and Thursday of next week and from Tuesday to Friday, both days inclusive of the week following. We understand that next Monday is a public holiday in New South Wales and the capital territory.

MR EINFELD: It is a rather cute and contentious question but I accept the rule of the bench that it is a public holiday.

SIR G. LUSH: Even there you have the last word. The commission will adjourn now until 10 o'clock on Tuesday morning but we repeat the indication that was given within the last half hour, that during today and up to lunchtime at any rate tomorrow the commission will be available to sit if it is required to do so.

MR EINFELD: Thank you.

AT 12.18 PM THE MATTER WAS ADJOURNED
UNTIL TUESDAY, 5 AUGUST 1986

COMMONWEALTH REPORTING SERVICE
Law Courts Building, Queens Square, Sydney, NSW 2000 (02) 2308322

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 TUESDAY, 5 AUGUST 1986, AT 10.30 AM

Continued from 31.7.86

Secretary to the Commission

MR J.F. Thomson
GPO Box 5218
Sydney NSW 2001

Telephone: (02) 232 4922

SIR G. LUSH: The first thing the commission wishes to do this morning is to announce a conclusion in relation to the interpretation problem which has been argued. The commission has reached a decision on the interpretation of section 72 of the Constitution. Reasons have been written and will be published as soon as possible. The commission makes the following brief statement which is not intended to stand as a summary of the reasons:

> It is the opinion of the commission that misbehaviour within the meaning of section 72 of the Constitution does not in any case necessarily include (a) misconduct in the actual execution of judicial functions; or (b) conviction for an infamous offence; or (c) criminal conduct. The commission's opinion is that misbehaviour should be described as any conduct which is morally wrong and of such nature and seriousness as to impair public confidence in the judge's fitness to exercise judicial functions and this includes the abuse of his or her office.
>
> In the opinion of the commission it is for the parliament to determine by such means as it sees fit whether the misbehaviour is proved within the meaning of the section. This determination involves the identification with reasonable particularity of matters which are to be the subject of proof. The parliament may not arbitrarily dispense with proof or address for the judge's removal without adverting to the question of proof.

I repeat that the full reasons will be made available as soon as possible.

Mr Gyles, have you an application to make this morning?

MR GYLES: Yes, I do, if the commission pleases. The application I would make is that the proceedings of the commission be adjourned for a period. It is based upon the medical condition of Mr Justice Murphy. I have a statutory declaration by my instructing solicitor which annexes to it a copy medical certificate. May I tender that? There are spare copies, too. Once the commission has had a chance of having a look at the certificate I can add some relevant matters.

The first point to be made is that the commission will have observed the events of last Friday and the statements which were made. It is my instructions

that there was no intention to suggest that Mr Justice Murphy would boycott these proceedings, as the press put it, or that he would not continue to be represented at the proceedings of this commission. He took the stance that he did purely because of medical advice. I am instructed that the judge will be continuing to sit on the High Court this week but that his medical condition does not permit him to travel and he will not be travelling with the High Court to Melbourne and Adelaide. Indeed, his present intention is to take sick leave at the end of this week. I am instructed he has also resigned from other public positions requiring travel. In those circumstances it is our submission that the matter should go over to enable parliament to consider what should happen next in view of the medical position. It is in our submission plainly unnecessary and inconvenient that - - -

SIR G. LUSH: I think we would be shutting our eyes to reality if we did not recognize that the matter will come before parliament soon after the 19th of this month - that is a fortnight from today.

MR GYLES: Yes. The only other thing I would wish to say at the moment is that I just wish to re-affirm the position that the judge does n ot and has never sought the opportunity of clearing his name. He is here because of the statutory will of parliament. He did not seek it but he has no intention of thwarting it save through ordinary constitutional means.

SIR G. LUSH: Thank you, Mr Gyles. Have you any submission to make, Mr Charles?

MR CHARLES: Yes, if the commission pleases. We would invite the commission to accept the evidence that my friend has put forward with the statutory declaration, in part, your Honours, because it is produced by statutory declaration, and in part because I am able to inform the commission that it is a document which has already been accepted by the presiding officers of parliament as a basis for action by them. The presiding members already have a copy of this medical certificate themselves. We would submit that in those circumstances it is plainly appropriate for the commission to accept evidence of this kind in this way.

It indicates, your Honours, a very grave condition on the part of the judge which makes it inherently unlikely that the commission will ever proceed to a conclusion because the life expectancy of the order of three to nine months would make it at least highly probable that the judge would be quite unable to be called upon to give evidence to answer any prima facie

case that might have been found to be made out. Now it, in our submission, is desirable that these matters form the basis of some form of special report to the presiding members and we would respectfully submit that in the circumstances the inquiry should adjourn, say, to Friday, 22 August, to enable parliament to decide after it is reconvened what the future of this inquiry ought to be in those circumstances.

In the meantime, your Honours, the inquiry can proceed with the collection of evidence and we would be in a position obviously to call it immediately in the next week if by any chance parliament did decide that the inquiry should nonetheless proceed. But we would respectfully submit that the appropriate course is to adjourn to that date, Friday, 22 August. If anything did happen in the meantime which made an earlier sitting necessary then no doubt that could be arranged with notice to my friends. But in our submission that is the course we would submit to the commission.

SIR G. LUSH: Whether the parliament will decide to terminate the commission's activities or not is a matter for parliament; and so also, assuming they decide to terminate, is the method to be adopted. One possible method would simply be the repeal of the commission's act and personally I would wish to keep open the freedom of the commission to hold one final sitting before it ceased to exist. I have no clear idea why I feel it is desirable that we should preserve that freedom but there may in fact be quite a lot of things that need to be finallly disposed of in one way or another. It may even be desirable to sit and perhaps sit in public for no other reason than to announce that the commission is closed in just the same way as we announced in public that it was opened. However, the basic decision on continuation or termination rests with parliament. Thank you, Mr Charles.

MR CHARLES: If the commission pleases.

SIR G. LUSH: We propose, Mr Charles, subject to anything counsel may say, to adjourn to a date to be fixed by 24 hours notice given to the judge's solicitors. Do you see any defect in that proposal? I was going to ask Mr Gyles the same question but you may give me a joint answer if you wish to.

MR GYLES: Any problem is purely that of personal arrangements which will follow. I take it the basic decision is to adjourn until - - -

SIR G. LUSH: Not before the 19th.

MR GYLES. Not before the 19th, yes; and then thereafter - - -

SIR G. LUSH: I can express that, I suppose, more precisely. We can adjourn until the 19th or such later date as is fixed by 24 hours notice.

MR GYLES: Yes, no problem at all.

SIR G. LUSH: The direction will be that the further hearings of the commission will be adjourned to 19 August or such later date as may be the subject of 24 hours notice to the judge's solicitors. Is there anything further the commission should deal with this morning, Mr Charles?

MR CHARLES: I do not think there is anything further that we would wish to raise, Mr President.

SIR G. LUSH: Mr Gyles?

MR GYLES: No, thank you.

SIR G. LUSH: The hearing stands adjourned until 19 August or such later date as may be the subject of 24 hours notice to the judge's solicitors.

AT 10.45 AM THE MATTER WAS ADJOURNED ACCORDINGLY

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PARLIAMENTARY COMMISSION OF INQUIRY

SIR GEORGE LUSH, Presiding Member
SIR RICHARD BLACKBURN, Commissioner
THE HONOURABLE ANDREW WELLS, Commissioner

TRANSCRIPT OF PROCEEDINGS

AT SYDNEY ON TUESDAY, 19 AUGUST 1986, AT 12.10 PM

Continued from 5.8.86

Secretary to the Commisison

Mr J.F. Thomson
GPO Box 5218
Sydney NSW 2001

Telephone: (02) 232 4922

SIR G. LUSH: On 5 August the commission announced in brief terms its decision on the interpretation of section 72 of the constitution. It also announced that its reasons would be published later. I now publish my reasons.

SIR R. BLACKBURN: I now publish my reasons.

HON A. WELLS: I publish my reasons.

SIR G. LUSH: This may be the last sitting of the commission. The legislation which is in the course of preparation is to go before parliament and parliament will probably within the week decide the commission's future. If the final result is that this is the last sitting of the commission it is appropriate that we should acknowledge the fact that we have received great help both from inside and outside this suite of rooms and for that we are grateful. I shall adjourn the hearing sine die at the present stage. However, there may be no resumption. The commission is adjourned sine die.

AT 12.15 PM THE MATTER WAS ADJOURNED INDEFINITELY