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On the Origins of Invalidation of British Colonial Legislation by Colonial Courts: The Van Diemen's Land Dog Act Controversy of the 1840s – Part One

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ABSTRACT

By 1865 British Imperial governments had accepted that colonial courts had the authority to invalidate colonial statutes which contravened the relevant colony's constitution. This situation arose notwithstanding the lack of any express grant of such jurisdiction to colonial courts in Imperial or colonial legislation. This paper evaluates the first instance of a colonial court asserting that jurisdiction, during the Dog Act crisis in Van Diemen's Land (Tasmania) in the 1840s. Part one of the paper charts the background to, conduct of and judgment in the relevant litigation. The second part, which will appear in a future issue of this journal, explores the consequential attempts of the colony's Governor to remove the judges from office and to re-enact the invalidated colonial law. The suggestion made is that the Dog Act controversy provides considerable insight into how, despite the absence of any explicit statutory grant of such jurisdiction, the power of judicial review of colonial legislation by colonial courts became established as an orthodox element of British colonial constitutional law in the latter nineteenth century.

KEYWORDS Van Diemen's Land; colonial constitutional law; judicial review of legislation; independence of the judiciary; amoval

I. Introduction

Colonial Australia has provided United Kingdom constitutional lawyers with stimulating ideas to inform domestic arguments about the nature of parliamentary sovereignty, especially the possibility that Parliament might enact judicially enforceable limits on its substantive competence and/or on the ways that statutes addressing particular substantive issues might be enacted. The High Court and Privy Council judgments in *McCawley v The*

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King[1] and *Trethowan v Attorney-General of New South Wales*[2] are the best-known examples. Less frequently viewed are the fascinating disputes engaging the Supreme Courts of Queensland and South Australia in the early 1860s concerning the legality of some legislation 'enacted' there, controversies which prompted enactment of the Colonial Laws Validity Act 1865.[3]

This paper travels further in place and time to colonial Van Diemen's Land (Tasmania) in the 1840s. The article's specific focus is a case called *Symons v Morgan*[4] and satellite litigation called *Hughes v Morgan*.[5] The notional target of this litigation was the Dog Act 1846; the legal weapon chosen to attack the target was an Imperial statutory provision requiring that certain colonial Acts be expressed in a particular linguistic form; the claimed consequence of a successful attack was that the Dog Act had no legal existence; and the claimed consequence of that conclusion was that colonial courts could hold the Act invalid.

Mr Morgan's adventure merits closer attention than it has hitherto received for several reasons.[6] Firstly, the episode provides a fascinating insight into the complex interaction within the pre-democratic British colonial tradition of what we might loosely label 'law' and 'politics' in the context of acute constitutional crises. The second, more focused reason, is that *Symons v Morgan* is the first judgment in which a British colonial Supreme Court claimed and exercised a jurisdiction to invalidate colonial 'legislation'. The judges who took that innovative first step – innovative because there was no explicit statutory basis for them to do so in either

[1](1918) 26 CLR 9; [1920] AC 691.

[2](1931) 44 CLR 394; [1932] AC 526. For discussion see H.R.W. Wade, 'The Basis of Legal Sovereignty', 13 *Cambridge Law Journal* (1955), 172; Ivor Jennings, *The Law and the Constitution*, 5th ed., London, 1949, 144–177; John Goldsworthy, 'Trethowan's Case', in H.P. Lee and George Winterton, eds., *State Constitutional Landmarks*, Alexandria, 2007; Michael Gordon, 'The Conceptual Foundations of Parliamentary Sovereignty: Reconsidering Jennings and Wade', [2009] *Public Law*, 519.

[3]See for example George Shaw, 'Filched From Us: the Loss of Universal Manhood Suffrage in Queensland 1869–1863', 26 *Australian Journal of Politics and History* (1980), 372; Ian Loveland, *McCawley and Trethowan: the Chaos of Politics and the Integrity of Law: Volume 1: McCawley*, Oxford, 2021, ch. 3; John Williams, 'Justice Boothby: a Disaster That Happened', in Winterton, *Landmarks*, 21; D.B. Swinfen, *Imperial Control of Colonial Legislation 1813–1865*, Oxford, 1970, ch. 11.

[4]Van Diemen's Land did not then have official law reports. A transcript of the Supreme Court's judgment is in *The Courier (Hobart)*, 2 Feb. 1848, 3. Lower court proceedings received extensive press coverage, drawn upon below. The Supreme Court judgment is also reproduced in the *Votes and Proceedings of the Legislative Council* [of Van Diemen's Land] (hereafter *VP*) *1847–1848*, 14; and House of Commons, *Despatches relating to Cases of Mr. Justice Montagu and Chief Justice Pedder; Coms. or Warrants appointing Members of Legislative and Executive Councils and Lieutenant Governor of Van Diemen's Land*, House of Commons Papers 1847–1848, Paper Number 556, 75–81 (hereafter Commons, *Montagu*).

[5]Reported with varying thoroughness in the press reports cited below.

[6]It is an occasionally visited episode, usually mentioned briefly in wider-ranging analyses, for example Enid Campbell, 'Colonial Legislation and the Laws of England', 2 *University of Tasmania Law Review* (1965), 148, at 162–164; David Clark, 'The Struggle For Judicial Independence: the Amotion and Suspension of Supreme Court Judges in 19th Century Australia', 12 *Macquarie Law Journal* (2013), 21, at 28–29; B.A. Keon-Cohen, 'Mad Judge Montagu: a Misnomer', 2 *Monash Law Review* (1975), 50, at 67–77. For more detailed analysis see P.A. Howell, 'The Van Diemen's Land Judge Storm', 2 *University of Tasmania Law Review* (1966), 253.

Imperial or colonial legislation – on what was to become a well-trodden constitutional path deserve rather more credit for having done so than they have thus far received.

II. 'The Legislature' and Judiciary Created by the New South Wales Act 1823 and the Australian Courts Act 1828

Successive Imperial governments would not accept until the 1850s that the Australian colonies – populated as most initially were predominantly by convicts, ex-convicts ('emancipists') and their descendants – were ready for the model of governance generally deployed in Britain's American and Caribbean colonies, where an elected Assembly (albeit elected on the basis of a very narrow property, gender and race franchise) played a significant role within the government process. Until 1823, the governmental system in New South Wales lay both de jure and de facto largely in the hands of a (military) Governor appointed by the Imperial government.[7]

1. The 1823 legislation

The first shift towards an internally structured lawmaking system was introduced by the New South Wales Act 1823. Section 1 empowered the Crown to establish by charter or letters patent a 'Supreme Court' in both New South Wales and Van Diemen's Land. Each court would have a single judge (the Chief Justice) appointed by the Crown and holding office at pleasure.[8] Section 2 authorised the Crown to appoint up to two additional judges to each court.

The initial Chief Justice of New South Wales was Francis Forbes, previously Chief Justice of Newfoundland, who was recruited by the Colonial Office while transiting the two jurisdictions to take primary responsibility for drafting the 1823 Act.[9] In Van Diemen's Land the first incumbent was John Pedder, who arrived there in 1824 aged 31, having spent – after education at Charterhouse and Cambridge – just two years at the English bar.[10] Pedder

[7]What seems generally regarded as the most authoritative account of the evolution of the Australian governmental system is A.V. Melbourne, *Early Constitutional Development in Australia*, 2nd ed., St Lucia, 1963.

[8]Section 1's formal; phrasing was:

> it shall and may be lawful be lawful for His Majesty and His heirs and successors from time to time as occasion may require to remove and displace any such judge or chief justice and in his place and stead to appoint another fit and proper person … .

[9]Forbes has received much academic study. The leading work is C.H. Currey, *Sir Francis Forbes*, Sydney, 1968. See also J.M. Bennet, *Sir Francis Forbes*, Annandale NSW, 2001, especially ch. 4 on the genesis of the 1823 Act.

[10]On Pedder's life and career see J.M. Bennett, *Sir John Pedder, First Chief Justice of Tasmania*, Sydney, 2003.

took office on 14 May 1824,[11] the same day as a newly-arrived Lieutenant Governor.[12]

The Act – noting in section 24 that it was not yet 'expedient' to give the colony an elected Assembly[13] – created a nominee 'Legislative Council' of five to seven members, appointed in form by the King but in practice by the (Lieutenant) Governor.[14] Per section 24, the Legislative Council could: 'make laws and ordinances for the peace welfare and good government of the said colony', subject to a 'repugnancy clause' which required such laws not be: 'repugnant to this Act or to any charter or letters patent which may be issued in pursuance hereof or to the laws of England'. But the Act also gave the Chief Justice a significant legislative role.[15] Per section 29, the (Lieutenant) Governor could not introduce a bill into the Council unless the colony's Chief Justice had certified that its contents were not; 'repugnant to the laws of England but is consistent with such laws so far as the circumstances of the said colony will admit'.[16]

Section 27 of the Act was a fiscal hypothecation measure, which – in a nod to the Imperial Parliament's acceptance of the legitimacy of colonists' desires not to be milked as a revenue source for imperial purposes - provided (emphases added):

> and be it further enacted that the said Governor and Council shall not impose any tax or duty upon any ship or vessel trading with the said colony or the dependencies thereof or upon any goods wares and merchandize imported into or exported from the same nor any other tax or duty except only such taxes or duties as it may be necessary to levy for *local purposes* and the purposes for which every such tax or duty may be so imposed and to or towards which *the amount thereof is to be appropriated and applied shall be*

[11]Pedder's arrival occasioned some public excitement, albeit attributable to the office rather than the man: 'The deep interest excited by the opening a Court of Judicature, with competent power in criminal as well as civil causes, was evinced by the Court being crowded upon this occasion with the most respectable Inhabitants' (*Hobart Town Gazette and Van Diemen's Land Advertiser*, 14 May 1824, 2).

[12]The styling of the officers as Lieutenant Governor in Van Diemen's Land and Governor in New South Wales reflected the former colony's initial (legal and practical) status as an adjunct of the mainland colony. The then Lieutenant Governor was Sir George Arthur, a career soldier who had previously been the Superintendent (de facto Governor) of British Honduras.

[13]'Expedient' being a coded way of saying that too many of the colony's free inhabitants were emancipists or their descendants who could not – even if possessing the requisite property – be entrusted with the franchise.

[14]An 'Executive Council' – in effect an embryonic cabinet – was created for both territories in 1825 under the prerogative; (in form through the 1825 commission granted to the new Governor, Sir Ralph Darling: <https://www.foundingdocs.gov.au/item-sdid-74.html> (last accessed 01 May 2024)). The Council's members were appointed de jure by the Crown. The commission did not specify who the members would be, but there seems to have been an unspoken presumption that they would be holders of senior government offices such as the Chief Justice, the Colonial Secretary and the Colonial Treasurer (offices respectively created under the prerogative in 1821 and 1823): Melbourne, *Australia*, 104–109.

[15]The Chief Justice's role was a safeguard against the possibility that a Governor might pursue – particularly towards convicts and emancipists – more liberal policies than imperial governments would wish, as had Lachlan Macquarie, Governor between 1809 and 1821 (see Melbourne, *Australia*, 115–116).

[16]It is a nice illustration of the often slapdash way the imperial Parliament scrutinised colonial 'constitution-making' legislation that s.24's definition of repugnancy differs from the definition in s.29.

> *distinctly and particularly stated* in the body of every law or ordinance imposing every such tax or duty.

Prima facie, the 'local purposes' proviso presented a substantive constraint on the Council's lawmaking powers, while the 'distinctly and particularly stated' phrase presented a constraint of linguistic form.

That the 'constraints' were not however regarded by Van Diemen's Land's Lieutenant Governor and Legislative Council as something to be strictly complied with (or of wide application) is nicely illustrated by an 1826 statute which introduced an extensive alcohol licencing and criminal offence regime.[17] Section 39 stated that any funds raised under the Act were to be applied: 'for the public uses of the said Island of Van Diemen's Land and the support of the government thereof, and go to and be applied in aid of the Colonial Fund of said Island accordingly'; but nothing in its text met the New South Wales Act 1823s section 27 'distinctly and particularly stated' proviso. Whether the Legislative Council – and the Chief Justice per section 29 – thought section 27 inapplicable to the alcohol legislation or simply overlooked it is not clear.[18]

Like other colonial 'constitutions', the 1823 Act (in section 30) granted the Crown an express power of disallowance over colonial legislation, exercisable (with only prospective effect) up to three years after the measure's enactment. This being a purely political power, the Act did not limit the circumstances in or grounds on which disallowance could be used. No need for repugnancy to be demonstrated or even alleged arose.

The 1823 Act did not expressly indicate how its repugnancy constraints might be enforced within the colony itself. Section 2 granted the colonies' Supreme Courts a combined civil and criminal jurisdiction equivalent to that of the King's Bench, Exchequer and Common Pleas. However, there was no explicit grant of jurisdiction to the Supreme Court to invalidate or in any fashion prevent the application of statutes (or specific provisions therein) which breached the section 24 repugnancy proviso. The Act perhaps rested on an unspoken assumption that because the Legislative Council was de jure a statutory body the Supreme Court had a presumptive competence to ensure that it did not overstep the limits of its legislative authority, a presumption that could be rebutted only by imperial legislation

[17] An Act for regulating the future Sale of Ale, Beer, Wine, Spirits and other Liquors, by Retail, in the Island of Van Diemen's Land and its Dependencies, and promoting Good Order in Public-houses (7 Geo. IV no.2).

[18] Records of early legislative proceedings are sketchy at best. See the helpful explanation at <https://guides.slv.vic.gov.au/tasgovpubs/hansard> (last accessed 01 May 2024). An online pdf copy of the (original handwritten) *Votes and Proceedings of the Legislative Council* is at <https://www.parliament.tas.gov.au/resources/history/earlyrecords> (last accessed 01 May 2024). The s.27 point was not picked up in (the very limited) press coverage of the Act; (*Colonial Times and Tasmanian Advertiser*, 15 Sept. 1826, 2). Per s.32 of the 1823 Act, councillors were forbidden from discussing any Council business with non-members.

limiting the court's jurisdiction. In 1823 however there was precious little authority – either judicial or academic – supporting that presumption in respect of colonial legislatures.[19]

An alternative inference was that any such presumption (even if applicable) was impliedly rebutted by the Chief Justice's section 29 jurisdiction: the rationale being that if statutes passed pre-enactment judicial scrutiny there could be no need for post-enactment review; and that the only remedies in such circumstances (other than persuading the Legislative Council to repeal the Act) would be to petition the King for disallowance or ask the imperial Parliament to enact overriding legislation.[20]

Section 29 triggered one significant dispute between the New South Wales Supreme Court and the Governor/Legislative Council over proposed statutes restricting freedom of the press in the colony. Francis Forbes, by then in situ as Chief Justice, invoked section 29 to prevent enactment of colonial legislation intended to impose a pre-publication system of licencing and censorship on newspapers.[21] There appear however to have been no instances during the 1823 Act's brief lifespan of either Supreme Court exercising or even asserting a jurisdiction to invalidate enacted legislation on grounds of (subsequently argued) repugnancy.

The Act provided in limited circumstances for appeals from the Supreme Courts to a 'Court of Appeals' comprised of the Governor 'assisted by' (as the Act put it) the Chief Justice of New South Wales.[22] Section 16 granted a right of appeal to the Privy Council against 'Court of Appeals' judgments, but the Act gave no indication that Supreme Court judgments which were not appealable within the colony could be challenged in the Privy Council.[23]

The statute's provisions provided only a partial picture of the Supreme Courts' jurisdiction. The charters authorised by section 1 were issued through Letters Patent on 13 October 1823.[24] The charter contained many detailed jurisdictional and procedural provisions (particularly relating to succession and the appointment of a sheriff). It also appeared, although its drafting is opaque, to authorise appeals directly from the Supreme Court to the Privy Council in matters where £2000 or more was in issue. It cast no further light however on of whether there were any circumstances in which the Supreme Court was competent to invalidate or refuse to apply colonial legislation, nor did a subsequent 1831 Charter.[25]

[19]Blackstone's *Commentaries* did not address the issue at all.
[20]Disallowance would not be available if the King had expressly approved the statute or the section 30 time limit expired.
[21]Bennet, *Forbes*, ch. 7. Pedder raised no objection to identical legislation enacted in Van Diemen's Land (Bennet, *Pedder*, 55–61).
[22]ss.13 and 15. The 'Court of Appeals' was manifestly not a 'court' in the by then traditional British sense.
[23]Some years were still to pass before the Privy Council's appellate jurisdiction from colonial courts was formalised on a statutory basis in the Judicial Committee Act 1833 (3 & 4 Will. IV c.41). See P.A. Howell, *The Judicial Committee of the Privy Council 1833–1876*, Cambridge, 1979, 23–47.
[24]<https://www.foundingdocs.gov.au/item-sdid-118.html> (last accessed 01 May 2024).
[25]Neither did the New South Wales Charter.

An Order in Council separating Van Diemen's Land from New South Wales was made in 1825.[26] The broad thrust of its brief text was that Van Diemen's Land's governmental system would initially in substance and form mirror that of New South Wales per the 1823 Act.

2. The 1828 legislation

Shortly thereafter, the Imperial Parliament enacted the Australian Courts Act 1828 ('Huskisson's Act'),[27] applicable to both New South Wales and Van Diemen's Land. The drafting was again largely the work of Francis Forbes, now in office as Chief Justice of New South Wales,[28] although some substantial input into the Act's policy and precise wording was made by James Stephen, then permanent counsel to the Colonial Office.[29]

The 1828 statute expressly repealed the 1823 Act and reproduced many of its terms verbatim. The most notable excisions were the Court of Appeals and the jury trial at quarter sessions.[30] The Legislative Councils were increased in size from five to seven members to ten to fifteen (s.21) and were again empowered to: 'make laws and ordinances for the peace welfare and good government of the said colonies'. Section 21 contained the repugnancy proviso previously in section 24 of the 1823 Act.

The 1828 Act (in section 3) repeated the grant of jurisdiction (equivalent to that of the Kings Bench, Comon Pleas and Exchequer in England) previously made in section 2 of the 1823 statute. However, the new legislation significantly altered the legislative role of the colonies' Supreme Courts. Section 22 replaced section 29 of the 1823 statute:

> And be it further enacted that every law or ordinance so to be made as aforesaid shall within seven days from the date thereof be transmitted by the Governors of the said colonies respectively to the said Supreme Courts to be there enrolled and recorded And at the expiration of fourteen days from the day of the date thereof every such law or ordinance so to be made as aforesaid shall take effect and be binding upon all His Majesty's subjects and others within the said colonies respectively until His Majesty's pleasure shall be known but if before the expiration of the said term of fourteen days the judges of the said Supreme Courts respectively or either of such judges shall transmit to such governor a representation that any such law or ordinance is repugnant to this act or to any Charter or Letters Patent or Orders in Council issued in

[26]Frederick Watson, ed., *Historical Records of Australia* [hereafter *HRA*], *Series III, vol.IV*, Sydney, 1921, 304–306. The Order did not change the 'Lieutenant Governor' nomenclature.
[27]9 Geo. IV c.83.
[28]Bennett, *Forbes*, 115–116.
[29]On Stephen's role in the Australian context see especially Alan Shaw, 'James Stephen and Colonial Policy: the Australian Experience', 20 *Journal of Imperial and Commonwealth History* (1992), 1.
[30]At second reading Huskisson condemned the Court of Appeals ('that absurd practice') as an affront to accepted notions of justice and explained that Parliament in 1823 was mistaken to accept that the colony was ready for jury trials: *Parliamentary Debates,* series II, vol. 18, cols. 1546–9, 18 April 1828 (HC).

> pursuance hereof or to the laws of England then and upon the receipt of any such representation such Governor shall suspend the operation of such law or ordinance until the same hath been brought to him together with such representation as aforesaid under the review of the said Legislative Council and if upon a review by the said Governor in Council of the said ordinance the said Governor in Council shall adhere to such ordinance a written notice of such resolution shall forthwith be transmitted by the said Governor to the judges of the said supreme court and such ordinance shall thenceforward take effect and be binding upon all His Majesty's subjects within the said colonies until His Majesty's pleasure shall be known any repugnancy or supposed repugnancy of such law or ordinance to this act or to any such Charter Letters Patent or Orders in Council as aforesaid or to the laws of England notwithstanding and such judges shall and they are hereby required in any such representation as aforesaid to state fully and at length the grounds of such their opinions which representation shall be forthwith transmitted by such Governor to His Majesty through one of His Majesty's principal Secretaries of State.

The hierarchy of colonial legal authority which section 22 created is not immediately apparent. This is in part an inevitable consequence of the (to modern eyes) structurally chaotic drafting style that the imperial Parliament then adopted.[31] If presented in a more explicitly segmented form, section 22's scheme appears to be this:

(1) If neither judge raised a repugnancy objection, the Act would come into force (subject to the King's approval and disallowance power);[32] alternatively
(2) If a judge did raise a repugnancy objection the judge was required to provide reasons for the objection; and then
(3) which reasons the Governor (Lieutenant Governor in Van Diemen's Land) was ordered to send immediately to the Imperial Government; and then
(4) the Governor should suspend the application of the Act; and then
(5) the Governor and the Legislative Council could if they wished review the Act in the light of the repugnancy certification; and then
(6) the Legislative Council could if it so wished override the judge's certification; whereupon
(7) the Act would remain in force: 'any repugnancy or supposed repugnancy of such law to this Act or to any such charter or letters patent or orders in council as aforesaid or to the laws of England notwithstanding';[33] subject to
(8) the King's power of disallowance.

The final stage of the section 22 process was a Henry VIII clause. In a formal sense, Parliament was empowering the Crown to authorise the

[31] s.22 (the Act's original form has no section numbers) contains 360 words. It has at least six discrete parts, but the text has no formal sub-divisions, nor even any punctuation until the closing full stop.
[32] In s.28 of the 1828 Act, exercisable at any point within four years of the Act passing in the colony.
[33] Emphases added.

Legislative Council to make laws otherwise beyond its competence. The 'formal' caveat arises because there is little evidence that 'Parliament' gave any considered attention to section 22 or any other part of the Act. The text passed through its parliamentary stages with barely any discussion.[34]

Forbes had shipped a draft bill to the Colonial Office on 10 October 1826,[35] although just six weeks later he sent an amended version and asked for the original to be destroyed.[36] This second version still contained section 29 in its original form. The Colonial Office seemed, to this point, most content with Forbes's work, given that Forbes noted in a further memorandum dated 12 November 1827:

> It was only the day before yesterday, that I was favored, for the first time, with a sight of the proposed new act. I perceive that it exactly follows the draft I forwarded last year from this colony; as, in some measure, an offspring of my own, I cannot but feel a parent's solicitude for its success in Parliament, and favorable reception with the public.[37]

Forbes still wanted to retain section 29, but did so reluctantly, and requested that it be modified:

> 3. As there is now a second Judge [on the Supreme Court], and in the course of events we may soon expect a third, I must earnestly pray to be relieved from that most invidious and responsible duty of certifying every proposed law, before it can be laid before the Council; and that, instead of 'the Chief Justice,' it [ie the retained s 29] be amended, and required of 'the Judges of the Supreme Court' to certify every projected law.[38]

This reluctance was likely attributable to Forbes' difficult personal and professional relations with then Governor of New South Wales, Sir Ralph Darling. These difficulties had derived in substantial part from Forbes' refusal (per section 29) to approve the Legislative Council's aforementioned press censorship bills, but that controversy was perhaps just an acute manifestation of a chronic problem.

Five days after Forbes had penned his self-congratulatory letter to the Colonial Office, Darling wrote to Huskisson complaining both about the draft bill and Forbes' contribution to it.[39] But rather than trouble Huskisson

[34] First reading is at *Parliamentary Debates*, series II, vol. 18, col. 1431, 1 April 1828 (HC). Commons second reading debate filled only 4 columns of *Hansard*: *Parliamentary Debates*, series II, vol. 18 cols. 1565-9, 18 April 1828 (HC). Committee took place on the floor of the House (*Parliamentary Debates*, series II, vol. 18 col. 1456, 20 June 1828 (HC)); the brief debate focused only on the issue of trial by jury. There is no record in *Hansard* of the bill receiving any consideration in the Lords. For greater insight into the then Imperial government's intentions see Melbourne, *Australia*, 140–162.

[35] *HRA, Series IV, volume 1*, 1922, Sydney, 642.

[36] On 4 December 1826: ibid., 644 (memorandum) and 647 et seq (text of bill).

[37] Forbes to Under Secretary Hay; ibid., 745.

[38] Ibid., 749.

[39] *HRA, Series I, volume XIII*, 652.

directly with those concerns, Darling listed them in an enclosed a memorandum sent directly to James Stephen.

Darling complained forcefully that Forbes had neither consulted him as to the terms of the draft bill sent to London a year earlier, nor offered him any assistance in formulating his concerns about the bill's contents. As to the proposed changes to section 29, Darling professed: '… I am perfectly indifferent as to the alterations he has proposed, though it is pretty evident that he has been anxious to perpetuate and extend his own powers, and to curtail those of the Governor'.[40]

Stephen seemingly read Darling's despatch as a demand that something be done about section 29. He consequently drafted a memorandum (on 4 March 1828) to Huskisson responding to these various representations.[41] Regarding section 29, he noted 'The provisions have been the occasion of much jealousy between the Governor and the Chief Justice'.[42] Having observed that such 'jealousy' was an undesirable feature of colonial governance, Stephen continued '[I]t is now proposed to omit altogether the restriction on the powers of the local legislature'.[43] Stephen does not answer the reader's obvious question, which is 'Proposed by who?'. The question was also obvious to a contemporaneous commentator in the Colonial Office, who has entered 'By whom?' as a marginal note.[44] Darling seems the most likely candidate, with Stephen reading between the lines of the Governor's various missives to find a proposal which Darling does not seem explicitly to have made.

Stephen was not impressed with the idea of dropping section 29 – 'I am on the whole disposed to deprecate this'[45] – his concerns being firstly that such an omission would represent a departure from previous practice (which he considered per se undesirable); and secondly, more importantly, because it might be (mis-)read in New South Wales (he again made no reference to Van Diemen's Land) as releasing the colonial legislature from the repugnancy principle. He was nonetheless willing to countenance that some means should be found of employing a less overt restriction than the section 29 jurisdiction.[46]

Forbes' various refusals to certify bills Darling had proposed were described by Stephen as: 'invariably right in point of law'.[47] But being

[40]Ibid., 657 (original emphasis).
[41]The National Archives: Public Record Office (PRO) CO 201/195, 336 et seq. The memorandum runs from 336 to 369 in the CO records. It has its own page numbering running from 1 to 66. Citations here give the CO page number initially with the memorandum page number following in [ ].
[42]PRO CO 201/195, 353 [36]. Stephen gave no indication that such problems had arisen in Van Diemen's Land.
[43]Ibid., 354 [38] (original emphasis).
[44]The addendum is not signed or initialled. The underlining in the text is in pencil, so the emphasis is presumably that of the commentator rather than of Stephen.
[45]PRO CO 201/195, 354.
[46]PRO CO201/195, 354–355.
[47]PRO CO 201/195, 356.

right in law was not necessarily the same as being politic in governance, for sometimes Forbes had: 'asserted his power in a manner not the most conciliatory, and the Governor has resented it with a proportionate warmth of feeling'.[48] Stephen suggested that the need for section 29 would diminish as the number of members of the Legislative Council increased, his reasoning being that a larger number of voices in the lawmaking process would reduce the likelihood of a Governor pressing ahead with inappropriate bills.

But another issue also presented itself: 'There is however an inherent difficulty in this subject which I think cannot be avoided'.[49] This arose because Forbes believed that: 'independently of any positive enactment, it is the duty of the judges to refuse to give effect to any law passed by the local legislature which they, the Judges, may deem "repugnant to the law of England"',[50] because such an Act would be 'an illegal usurpation of authority'.[51] Stephen continued – 'Assuming this opinion to be accurate (and I think it at least plausible)'[52] – that any such clash arising in open court between the judges and the Legislative Council would be most undesirable, and so:

> It has occurred to me that the better course might perhaps be to provide that immediately after the enactment of a law in the Council, but before its actual promulgation, a copy of it should be sent to the Supreme Court.[53]

The memorandum then sketched out the process subsequently enacted as section 22; (save for a subsequently discarded suggestion that any two or more members of the Council should be empowered to prevent a 'repugnant' bill being continued with).

Stephen suggested this mechanism would be an elegant and effective solution to a potentially serious constitutional problem:

> By some such method as this … security might be taken against the various dangers of arbitrary Acts being passed – of a single Judge being placed in a situation of [illegible] formidable power – of public dispute between the judicial and legislative bodies – and disputes whether a law actually promulgated is binding or not.[54]

The bill had its first reading just a week later. Its newly minted section 22 had obviously not been the subject of consultation with either the New South Wales or Van Diemen's Land Governors or judges.

Section 27 of the 1823 Act was reproduced in truncated form in section 25 of the 1828 Act:

[48]Ibid.
[49]Ibid., 357.
[50]Ibid.
[51]Ibid.
[52]Ibid. Stephen did not elaborate on his basis for thinking Forbes' view might be 'accurate' or 'plausible'.
[53]Ibid., 357 [44].
[54]PRO CO 201/195, 358 [46].

> The said Governor and Council shall not impose any tax or duty except only such as it may be necessary to levy for *local purposes* and the purposes for which every such tax or duty may be so imposed and to or towards which the amount thereof is to be appropriated and applied shall be *distinctly and particularly stated* in the body of every law or ordinance imposing every such tax or duty.[55]

This provision did not feature as problematic in either Forbes or Stephen's drafts of the bill. But it was this section, alongside section 22 which – twenty years later – would lie at the legal heart of the Dog Act controversy.

Van Diemen's Land was very much the junior partner to New South Wales in the consultation process leading to the 1828 Act. Lieutenant Governor Arthur had sent a despatch to Huskisson's successor as Colonial Secretary, Sir George Murray, on 5 July 1828 (by when the Act had been passed) in which he expressed concerns about the contents of Forbes' draft bill.[56] He predicted that the removal of trial by jury and of the Court of Appeal would not be well-received among the free settlers in the colony. But the despatch also included a 60 page report on the bill authored by the colony's then Attorney-General, Thomas McClelland, within which McClelland had been much concerned with what he saw as ambiguities both as to the meaning of the phrase 'laws of England' and with respect to the Supreme Court's jurisdiction to assess the validity of colonial legislation on the basis of its 'repugnancy'.[57] Arthur endorsed and underlined this concern in his 5 July despatch, suggesting he very much opposed the principle that a colonial court should be empowered to invalidate colonial legislation:

> I think the Attorney-General's observations exceedingly just. The importance of certainty in this particular is too obvious to remark; *for if the possibility of the application of any law must await the event of a judicial decision* … we would arrive at very slow degree at the desired end, if indeed at all, since the decision of a Judge is liable to reversal by his successor.[58]

Arthur's concerns obviously did not reach Murray prior to the bill's enactment.

The Act arrived in Van Diemen's Land early in 1829, along with Murray's lengthy explanation (dated 31 July 1828)[59] of its purpose and meaning. On

[55]Emphasis added.
[56]Arthur to Murray, 5 July 1828, PRO CO 280/17, 111.
[57]28 May 1827, PRO CO 280/17, 81. A typescript version is at Chapman, *HRA*, Series III, Volume VII, 416–434.
[58]Arthur to Murray, 5 July 1828, PRO CO 280/17, 113 (underline emphasis in original; italicised emphasis added). Pedder was asked by the Colonial Office and by Arthur to produce his own analysis of the draft bill, but had failed to do so, to Arthur's evident frustration: 'I have found it absolutely impossible to prevail upon the Chief Justice to send it [the report] in, and I really can press the matter no further without coming to an open rupture' (ibid., 115).
[59]The original is at PRO CO 408/5, 103. (Arthur's despatch to Murray of 14 February 1829 confirming receipt of the 31 July despatch is at PRO CO 280/19, 294). A typescript copy is in *HRA, Series III, volume VII*, 450.

the repugnancy question in general, and of the replacement of section 29 by section 22, Murray's despatch simply recycled Stephen's March analysis. Murray explained that section 22 had replaced section 29 Act because section 29 had provoked an undesirable tension – the press Acts controversy in New South Wales being the prime example – between the Governor and the Chief Justice. In the then Secretary of State's opinion, the purpose of section 22 was to alert the Legislative Council to a possible repugnancy problem but also to enable the Council to override the judge's opinion in circumstances of: 'the most urgent necessity'.

Murray's despatch indicates that he assumed – surely correctly – that completing the section 22 process would rebut Forbes' ('accurate/plausible') presumption that colonial courts (the reference to 'the Judge' suggests Murray was thinking only of the Supreme Court) could in post-enactment litigation 'deny the validity' of colonial legislation. The despatch was however as lacking as the text of the Act itself and Stephen's March memorandum as to whether the Supreme Court had jurisdiction to invalidate a colonial Act (or parts thereof) which the judges had not identified per section 22 as 'repugnant' and so which had not been enacted after the section 22 process had been conducted. That question might – very obviously – arise because the colonial Act in issue was prima facie inconsistent with a subsequently enacted Imperial statute; or – perhaps less obviously – because one of the original judges (or their successors) subsequently concluded in the context of litigation that a section 22 objection should have been issued but, erroneously, was not.

Liuetenant Governor Arthur's acknowledgment of 14 February 1829 that he had received Murray's despatch suggested that his earlier concerns had not been allayed in the intervening months:

> My best exertions you may be assured will be zealously applied to carry into effect the intentions of Parliament, which I shall hope, under any circumstances of doubtful interpretation, rightly to apprehend from the ample observations which you have been pleased to convey to me upon it.[60]

Shortly thereafter Arthur turned a little of his attention to the increasingly vexing problem of dogs.

III. The Significance of Dogs in the Early Colonisation of Van Diemen's Land

Van Diemen's Land was environmentally quite distinct from the Australian mainland. For the European invaders in the early years of colonisation, the mainland's interior presented an unremittingly hostile environment within which even subsistence living – unless one assimilated with the indigenous

[60]PRO CO 280/19, 294.

population – was unattainable. Early British settlers scrabbled together a precarious existence on the continent's coastal fringes. And even as – by 1820 – the colonists created a self-sustaining pastoral and arable economy that crept slowly inland, survival demanded constant contact with established settlements.[61]

The mainland itself was a gaol. Many early settlers were transported convicts serving their sentences as forced labour for the colony's free settlers. The likely consequence of an attempted escape into the interior was death through starvation. Relatedly, convicts who had served their sentences could not easily remove themselves from organised colonial society – and its nascent labour market – by moving into the interior and developing a means, whether individually or as a small collective, to subsist independently. For many emancipists, the de jure regaining of freedom co-existed with a continuing de facto state of captivity.

But Van Diemen's Land was different. The island offered colonists a more benevolent climate, more fertile interior lands and much more populous wildlife, especially kangaroos and emus. It also had the evolutionary idiosyncracy of having no indigenous dogs, unlike the mainland where wild dingoes were an established feature of the eco-system. The island's kangaroos and emus had not had to evolve to escape the attentions of fleet-footed natural predators; the so-called 'Tasmanian Tiger', soon hunted to extinction by the colonists, was not a swiftly moving animal.[62] The difficulties of catching emu and kangaroo on the mainland are nicely put by Watkin Tench, a member of the 'First Fleet' of the British invasion:

> Some of them are immensely large, but they are so wild, as to make shooting them a matter of great difficulty. Though incapable of flying, they run with such swiftness, that our fleetest greyhounds are left far behind in every attempt to catch them.[63]

But for British invaders of Van Diemen's Land, the island's much less swift kangaroos and emus offered a potential source of plentiful amounts of high quality food. Early nineteenth century firearms technology was not sufficiently advanced to provide an effective means of killing even the less speedy Van Diemen's Lands' kangaroos and emus, but it rapidly became apparent to the colonists that kangaroos and emus could easily be caught by hunting dogs. Such dogs, often Irish wolfhounds cross-bred with greyhounds, were very large, very strong and very fast. Among the more

[61] See generally Grace Karskens, *The Colony*, Crows Nest NSW, 2010, ch.3; Inga Clendinnen, *Dancing with Strangers*, Edinburgh, 2005.
[62] James Boyce, 'Return to Eden: Van Diemen's Land and the Early British settlement of Australia', 14 *Environment and History* (2008), 289.
[63] Watkin Tench, *A Narrative of the Expedition to Botany Bay*, Milton Keynes, 2008, 54 (first published in 1789).

'respectable' elements of colonial society, these dogs played the important roles of watchdogs for sheep flocks and a source of personal security, especially for residents in more remote areas.[64] Among the less 'respectable' inhabitants they provided – in combination with the island's environmentally benign interior – a means for convicts to escape from their confinement, and perhaps more significantly for emancipists and newly arrived free settlers to fashion at least a subsistence existence which did not require much engagement with organised colonial society and its labour market.

By 1830, the proportion of settlers who were convicts or recently freed emancipists and their children was notably higher in Van Diemen's Land than in New South Wales. This trend reversed briefly in the 1830s, when many free settlers came to the colony, but escalated again after 1840 when transportation to New South Wales was discontinued and almost all convicts were sent to Van Diemen's Land.[65] In 1840, the colony's European population was barely 70,000, of whom some 30,000 were (predominantly male) convicts.[66] The shift in destination was accompanied by a shift in penal policy. To that point, most convicts had been 'assigned' as no-cost labour to free settlers. That policy was discontinued in the early 1840s and replaced by a so-called 'probation system', which required convicts to pass through a series of 'moral rehabilitation' steps. The earlier stages of the probation system entailed increasingly rigid forms of prisoner segregation (from other convicts and free settlers), progressing from physical incarceration in gaols, to work in labour gangs, and eventually on to 'ticket of leave' status which entitled convicts to enter the local labour market.[67] The prospect of renewed incarceration loomed for recidivist prisoners. The economic impact of the probation system was doubly problematic for free settlers and the Legislative Council. It entailed both a reduction in supply of cheap labour and the increased expenses of providing the system's physical and regulatory infrastructure. Those expenses were proportionately much higher than in New South Wales, but the Imperial government (initially) thought it appropriate that the cost be borne largely by the colony itself.

[64] James Boyce, 'Canine Revolution: the Social and Environmental Impact of the Introduction of the Dog to Tasmania', 11 *Environmental History* (2006), 102. For illuminating accounts of the political, social and environmental factors shaping the colony's initial growth, see Peter Bolger, *Hobart Town*, Canberra, 1973 and Boyce, *Van Diemen's Land*, Part I.

[65] For a helpful insight into the ebbs and flows of free and convict 'immigration' to the colony in this era (and the reasons underlying them) see Boyce, *Van Diemen's Land*, 224–248.

[66] James Barnard, *Observations on the Statistics of Van Diemen's Land for 1849*, Hobart, 1852, 1–2. See also Richard Tuffin and Martin Gibbs, '"Uninformed and Impractical"? The Convict Probation System and Its Impact Upon the Landscape of 1840s Van Diemen's Land', 17 *History Australia* (2020), 87, table.

[67] Kathleen Fitzpatrick, 'Mr Gladstone and the Governor; the Recall of Sir John Eardley-Wilmot from Van Diemen's Land 1846', 1 *Australian Historical Studies,* (1940), 31, at 39–41; Tuffin and Gibbs, 'Probation'.

IV. The Dog Acts 1830–1844

A Dog Act first appeared on Van Diemen's Land's legislative landscape in 1830.[68] The Act immediately generated polarised opinions within polite – and not so polite – society. An editorial in *The Tasmanian* greeted the Act as:

> A most excellent one, and which will put down one of the greatest public nuisances which can exist in any country – the being infested, literally over-run, with myriads of dogs of every possible denomination, nine-tenths of them starved, a consideration of itself, on the score of humanity, strongly bearing in favor of the Act.[69]

An opposing view was put – more succinctly – by the author of an early guidebook for British readers on Van Diemen's Land colonial life: 'The most universally obnoxious enactment that has passed the Legislative Council'.[70] This violent – if only rhetorically – division of opinion had distinct but inter-related roots.

The Act's preamble announced that:

> there are great numbers of Dogs roaming at large over the Island which cause destructive ravages among the Sheep and infest the streets and public ways to the annoyance of His Majesty's subjects and it is expedient to put some check upon their further increase.[71]

The solution adopted was to introduce a generally applicable licencing system. Per section 1, any person 'keeping'[72] a dog was required to buy an annual licence from the local police magistrate; (10s. for each dog and 20s. for each bitch). Section 3 made keeping a dog without a licence an offence triable summarily before the local police magistrate. Conviction attracted a fine of between £2 and £25. Section 4 empowered a constable to seize any unlicenced dogs, dogs a magistrate could order killed if the owner did not buy the requisite licence within 24 hours. Section 5 created a criminal offence (attracting a fine of between 1s. and £20) of allowing any dog – licenced or not – to be 'at large without being under the immediate custody, protection or control of some competent person'. Section 5 also authorised a constable 'or other person whatsoever' to kill any such dog not wearing a metal collar which identified its owner.

This measure was seemingly passed with section 25 of Huskisson's Act in the Lieutenant Governor and Legislative Councillors' minds. Section 8 provided that

[68] An Act for Establishing Regulations to Restrain the Increase of Dogs, 10 Geo. IV no. 11. The Act is not available on Austlii or the Tasmanian government's websites, but its full text is in the *Launceston Advertiser*, 22 March 1830, 4.
[69] *The Tasmanian*, 26 Feb. 1830, 2.
[70] Henry Melville, *Van Diemen's Land*, London, 1833, 196.
[71] Van Diemen's Land's governmental infrastructure did not then extend to employment of parliamentary draftsmen, and the task of finding the statutory formulae to express legislative policy generally fell to one or both of the colony's law officers.
[72] That term was not further defined in the Act.

all revenues accruing to the government under the Act would be used: 'for defraying the expense of making and repairing Roads and Bridges in this Island … '. The Act was referred to the Chief Justice under section 22, and he raised no objection to it. There is no indication in the Colonial Office records that the then Lieutenant Governor felt any need to justify the Act to the Colonial Office, nor that any thought was given by the Secretary of State to disallowing it.[73]

The fiscal question which most occupied the minds of Colonial Office ministers and officials in 1830 was whether the 1828 Act had impliedly abolished the Lieutenant Governor's limited powers under the prerogative to levy certain duties. The issue is hardly esoteric; it raised a basic point of constitutional law. Stephen's memorandum to the Secretary of State on the point nicely encapsulates the more general issue of the lack of rigour which attended the Act's drafting:

> I cannot however affect to deny that there is some obscurity in the language of the enactment on which I have been commenting, and it becomes me to say this the more distinctly because the Act was drawn with my own pen, and I am justly responsible for errors of this nature.[74]

Stephen's view was that the power had been abolished with prospective but not retrospective effect, but he regretted that this had not been stated expressly in the Act.

Lieutenant Governor Arthur's primary concern at the time seems to have been disabusing the Colonial Office of its suggestion that Arthur should reduce the size of his personal office. The plea below was formally made in a letter to Van Diemen's Land's then Colonial Secretary, but would seem in substance aimed at the Colonial Office, to which it was promptly copied:

> I am quite conscious that the Secretary of State has no idea of the labour which I personally endure, and have done so without intermission during the whole period since my arrival in the colony, and the physical impossibility of any man's devoting more hours to business.[75]

Arthur asserted that: '[A]t least two thirds of the whole business has reference either directly or indirectly to the Convict Establishment in its various manifestations';[76] while much of the rest concerned supervision of land grants. The Dog Act, it seemed, was a very minor political matter within government circles.

Despite its small European population and relatively primitive state of technological development, Van Diemen's Land then hosted a very lively local press, within which the Dog Act's merits were fiercely debated. Mr Melville's

[73]PRO CO 280/26, 280/28 and 280/29 cover the relevant period.
[74]30 August 1830, PRO CO 280/261 92 at 97.
[75]Arthur to John Burnett, 3 October 1830 (received in the Colonial Office on 31 May 1831) PRO CO 280/28, 65–66.
[76]Ibid., 67 (original emphasis).

above-quoted 'obnoxious enactment' objection is echoed in much newspaper coverage. In part, that objection derived from abstract constitutional principle; specifically an antipathy towards 'taxation without representation'. This clarion call which had underlain the American revolution barely fifty years earlier had been a recurrent trope amongst the more radically inclined colonists in New South Wales and Van Diemen's Land.[77] These ideological concerns about the Act were exacerbated by the nature of the colony's constabulary. Two intersectional elements raised particular problems.

The first – common to all the Australian colonies – was that wages for the bottom levels of the service were very low, in substantial part because of an expectation that constables would supplement their incomes by claiming 'bounties' paid to them (qua what were styled 'informers') for effective prosecution of some crimes. The initial root of this (for some colonists) perceived problem lay in section 6 of a Van Diemen's Land statute – An Act to Regulate Summary Proceedings Before Justices of the Peace 1828 (hereafter Summary Proceedings Act 1828):

> [E]very penalty awarded … … .shall in all cases (except where otherwise provided by any such Act) go and be distributed one moiety thereof to the use of His Majesty and the other moiety to the use of the informer or party prosecuting who shall also be in all cases entitled to his or her costs and charges over and above such penalty to be ascertained and assessed as aforesaid.

Section 6 therefore gave constables given a direct, personal financial motive for rigorous enforcement of criminal laws. For convictions under the Dog Act, that bounty could be as much as £12 10s per case. Even by 1850, prevailing wage rates for constables were as little as 2s. 6d. per day.[78] That some constables might succumb to a temptation for over-zealous enforcement was particularly significant in Van Diemen's land, where even as late as 1830 many – perhaps most – constables were emancipists and even serving prisoners, convicted in Britain and Ireland of crimes of dishonesty.[79] The colony's constabulary was not widely regarded as a beacon of competence and integrity. Furthermore, since the Summary Proceedings Act provided that any individual could initiate prosecutions (unless the statute creating the particular offence provided to the contrary) the Dog Act had obvious potential to be a vehicle through which personal grudges might be pursued.

The Act implicitly recognised that its provisions could be abused, whether by constables or private citizens. Intrusions onto a person's land or the destruction of a person's dog raised the obvious possibility of actions in trespass being raised against the intruder/destroyer. The Act made no attempt to

[77] See Loveland, *McCawley*, 18–42.
[78] Noted in W.A. Townsley, *The Struggle for Self-government in Tasmania 1842–1856,* Tasmania, 1951.
[79] Many constables were actually still de jure convicts. See generally James Boyce, *Van Diemen's Land,* Melbourne, 2008, 173–174; Stefan Petrow, 'Policing in a Penal Colony: Governor Arthur's Police System in Van Diemen's Land, 1826–1836', 18 *Law and History Review* (2000), 351.

indemnify any person against such liability. It did however contain a deterrent against such actions being brought, by providing in section 7 that any unsuccessful plaintiff would be liable for treble costs to the defendant.

Press concerns about the Act's enforcement extended beyond the constabulary to include the Police Magistrates' courts where prosecutions would be conducted. The Act did not modify the generally applicable provisions of the Summary Proceedings Act 1828. Dog Act prosecutions would be heard before a single 'police magistrate', a salaried governmental official whose independence of thought and action from the Lieutenant Governor could not be taken for granted.[80]

Section 1 of the Summary Jurisdiction Act 1828 required convicted defendants to pay any fine and associated costs within one week. If they failed to do so, section 3 authorised the court to levy distress on the defendant's goods and chattels and/or imprison the defendant until the fine and costs were paid. Section 3 also permitted a convicted defendant who paid any fine and costs in full within a week of conviction to appeal to the Court of Quarter Sessions.[81] That court might sit with as many as six members, these being a mix of salaried government 'official' magistrates and unpaid 'lay' members drawn (albeit by government appointment) from the upper strata of the colony's population. Section 3 also provided that the Quarter Sessions appeal would be the last stop on the litigation road:

> the Justices at such Sessions so assembled shall hear and thereupon finally determine the matter of every such appeal in a summary way and their judgment thereon shall be final and conclusive to all intents and purposes nor shall any writ of certiorari afterwards be allowed.

Section 9 provided that the Act would expire on 31 December 1833. During its brief lifespan, the legislation prompted a steady stream of public and press disquiet.[82] But this did not deter the Legislative Council from continuing to address the dog 'problem'. After a brief hiatus, a second Dog Act, which was to remain in force for two years, was enacted in September 1834.[83]

The stated purpose and the scheme of the 1834 Act resembled those of the 1830 legislation. The new Act added a proviso that unregistered dogs could

[80]The power of appointment (and dismissal) lay with Lieutenant Governor derived from the prerogative through the Governor's Commission rather than imperial or colonial statute.

[81]The creation of quarter sessions courts in New South Wales and Van Diemen's Land was permitted by s.19 of the 1823 Act (subsequently s.17 of Huskisson's Act). The acts did not specify the composition of such courts, but inferentially left that matter to the discretion of the Governor. That discretion was initially exercised through a proclamation issued in April 1825; (reproduced in *The Hobart Town Gazette and Van Diemen's Land Advertiser*, 29 April 1825, 1). The proclamation imported the procedural regime then applied in the Middlesex Quarter Sessions in England.

[82]See the leader in the *Hobart Town Courier*, 27 February 1830, 2; a letter in *The Tasmanian*, 5 March 1830, 8; and an editorial comment in the *Launceston Advertiser,* 29 March 1830, 1. For a nice vindication of the fear that the Act could be abused by corrupt constables to pursue personal feuds see the *Colonial Times*, 31 December 1830, 3.

[83]An Act to Restrain the Increase of Dogs, 5 Geo. IV no.8.

be seized and/or destroyed by any person, with such seizure or destruction garnering the person concerned a 'reward' of between 5s and £2.[84] The various provisions of the Summary Proceedings Act 1828 were also applied in the new Act,

There was however one distinct difference between the two Acts. Section 12 of the later statute provided both registration fees and fines should be used to cover the expenses of administering the Act and that any surplus might be used for 'such local purposes as the … Lieutenant Governor shall from time to time direct'. Unlike the 1830 Act, the 1834 Act did not contain any text which addressed the 'distinctly and particularly stated' proviso in section 25 of Huskisson's Act. Notwithstanding this omission, Chief Justice Pedder and his newly appointed (in 1833) colleague, Algernon Montagu,[85] did not raise any repugnancy objection to the Act under section 22. Nor was the Act the subject of any discussion between the colonial and Imperial governments.[86] Per section 16, the Act would expire on 31 October 1836. At that time the Legislative Council saw no need to renew it.

After eight years of Dog Act free existence, the colonists found themselves subjected to a different form of Dog Act in 1844.[87] This new measure did not contain any licencing provisions. It provided that the keeper or owner of any dog 'at large' on the island which was not 'under the immediate custody protection or control of some competent person' was liable to a fine of up to £5, and also permitted a constable or any other person to seize the dog concerned, which dog could then by destroyed on the order of a magistrate unless claimed by its owner within twenty-four hours. Prosecutions would be heard summarily before a single magistrate. There was nothing in the Act to indicate to what use the proceeds of any fines levied were to be put, other than that explicit provision was made for one half of any fines (but no costs) to be paid to the informant. The Lieutenant Governor and Legislative Council had evidently not thought section 25 of Huskisson's Act applicable here – the lack of a licencing scheme might suggest this was not a taxation statute – and neither Supreme Court judge raised any repugnancy concerns.

The then Lieutenant Governor was Sir John Eardley Eardley-Wilmott,[88] a wealthy, well-connected barrister of (for the time) mildly liberal political

[84] ss.8–9.

[85] Algernon Montagu was a grandson of a former Earl of Sandwich, who had exploited his personal connections to secure appointment in 1826 as the colony's Attorney-General when only twenty-six and with only two years experience at the English bar. On Montagu's career and personality generally see Keon-Cohen, 'Montagu'.

[86] The relevant Colonial Offices files are PRO CO 408/8, 408/9, and 408/10.

[87] An Act to authorise the Seizure and Destruction of unclaimed Dogs running at large in this Island (7 Vic. no.14), 11 Jan. 1844.

[88] Michael Roe, 'Eardley-Wilmot, Sir John Eardley (1783–1847)', *Australian Dictionary of Biography* <https://adb.anu.edu.au/biography/eardleywilmot-sir-john-eardley-2015> (last accessed 01 May 2024).

inclination who had sat initially as a Whig and then as a self-styled 'independent country gentleman' in the Commons for ten years before becoming Lieutenant Governor in 1843. Eardley-Wilmott had also achieved some eminence as a legal academic, with a particular interest in criminal law and penal policy. His tenure as Lieutenant Governor was not an especially happy one; he frequently found himself in the unenviable position of being roundly – and simultaneously – criticised both by the colonial press and by the Imperial government. His primary failings seem to have been congenital laziness and an unwillingness to pay attention to the details of the governmental process,[89] but he also suffered the misfortune of holding office during a general economic downturn, exacerbated in Van Diemen's Land by the Imperial government's adoption of the probation system.

The 1844 Act did not present Eardley-Wilmott with any serious difficulties. Like its 1834 predecessor, the Act passed wholly unremarked in Imperial/colonial correspondence.[90] The measure – perhaps because it was not, owing to its lack of a licencing requirement, widely seen as a taxing statute – attracted little press comment.[91] Indeed, the strongest criticism of the Act, in an editorial in the *Cornwall Chronicle* – traditionally a newspaper supportive of the government – complained that the Act was too feeble to deal with an increasingly irritating nuisance.[92] Shortly thereafter, it seems, those complaints triggered a legislative reaction.

V. The Dog Act 1846

The Act to Restrain the Increase of Dogs 1846 was a brief measure, with seven sections and a schedule. The bill passed the Council on 13 July and was assented to by the Lieutenant Governor on 28 July.

The Act's preamble began by stating the statute's purported policy objectives:

> WHEREAS Dogs have increased in this Island to such an extent as to be injurious to Sheep-owners and a nuisance to the Public and there is no sufficient check by law to this evil and it is advisable in order to restrain the increase of Dogs and to make their destruction lawful in certain cases that a remedy be provided.

and continued by announcing that the remedy was a licencing system applicable to keepers of any dogs aged over six months.

[89] Roe, 'Eardley-Wilmott'. Fitzpatrick, 'Gladstone' offers a more positive portrait.

[90] There is no indication in the relevant Colonial Office files (PRO CO 408/23 and 408/24) that the Act was considered problematic in any sense.

[91] A trove search of Tasmanian newspapers produces only seven hits ('Dog Act' – date range 1 January 1844 to 1 January 1846).

[92] *Cornwall Chronicle*, 11 May 1844, 2; 'Our ears are still nightly saluted with the yelping of whole myriads of curs, whilst, in the day-time, it is scarcely possible to walk the streets for them'. See also *The Cornwall Chronicle*, 19 June 1844, 2.

Section 2[93] priced the licence – issued by the local Police Magistrate – at 5s. for male and 10s. for female dogs. Section 4 authorised any person to kill any dog which was (outside of identified townships) not under the 'control of a competent person'. Per section 6, the occupier of land was presumed to be the keeper of any dog found there until he or she proved the contrary.

Section 7 identified where any revenues raised under the Act were to go: 'all monies which shall be received by authority of this Act not herein before specifically appropriated shall go and be applied in aid of the ordinary Revenue of this Colony'. Section 7 was a very peculiar provision. The 'not herein before specifically appropriated' proviso might be a nod to section 25 of Huskisson's Act. If so, it was a rather half-hearted nod, given that the subsequent 'ordinary revenue' reference is not obviously consistent with section 25's 'distinctly and particularly stated' requirement. Perhaps more oddly – and this goes clearly to the (lack of) rigour with which the Lieutenant Governor, the Legislative Council and the judges approached their respective legislative roles – there simply were no 'specifically appropriated' revenue destinations 'herein before' (or indeed 'herein after') identified in the Act. The Dog Act had been referred to the Supreme Court per section 22, but neither judge had raised any objection to it, nor apparently spotted section 7's obvious error.

1. The second string to the Dog Act bow – an act to restrain the practice of Kangaroo Hunting

The suggestion recently aired in environmental historian circles that the 1846 Dog Act was prompted by governmental concerns that hunting dogs were enabling significant numbers of colonists to disengage from the labour market is not immediately apparent from text of the Dog Act itself.[94] That policy objective becomes more evident when the Dog Act is considered alongside a second 1846 statute, also passed in the Legislative Council on 13 July. The preamble to An Act to Restrain the Practice of Kangaroo Hunting[95] (hereafter referred to as the Kangaroo Act) expressed this concern:

> WHEREAS in many parts of this Island men having no permanent place of residence and no visible occupation whereby to gain an honest livelihood associate together leading a wandering life and hunting Kangaroo to the great damage and disturbance of the flocks and herds of Flockmasters and others and many idle and lawless persons under the pretence of hunting

[93] 10 Vict. no.5. The drafting style of this statute was that the preamble was an un-numbered s.1; the numbered sections began with s.2.
[94] See the discussions in Boyce, 'Eden' and Boyce, 'Canine'.
[95] 10 Vict. no. 6.

> Kangaroo live in remote and unfrequented places and shelter and conceal Sheep and Cattle Stealers and other felons and partake in such crimes and the plunder of such felons and it is necessary that provision be made for remedy thereof.

Hunting kangaroos on land of which the hunter was not in lawful possession (or was hunting with the permission of such a person) was made a criminal offence[96] unless the hunter had a hunting licence. Per section 3, licences could be granted annually by the Police Magistrate or Court of Quarter Sessions at a cost of £1. Like the Dog Act, the Act did not offer criteria on which a decision to grant (or refuse) a licence might be based. And like the Dog Act, the text of the Kangaroo Act did not seem to meet the section 25 requirements. As with the Dog Act, neither Pedder nor Montagu objected to its enactment.[97]

2. The broader political context – and crisis

The two 1846 Acts passed without discussion in communications between Eardley Wilmott and the Colonial Office.[98] Much of the Lieutenant Governor's attention at this time was taken up with a collapse in discipline and an imminent threat of inmate mutiny in the colony's prison establishment,[99] and – of lesser significance – by prolonged bickering with the Bishop of Tasmania over whether the Bishop or the Lieutenant Governor exercised ultimate fiscal authority over the colony's clergy.[100]

But the 1846 Acts also emerged in the context of a broader political crisis in Van Diemen's Land.[101] Imperial legislation passed in 1842 had granted New South Wales a 'mixed Council' of thirty-six members; twelve appointed by the Queen (de jure but de facto by the Governor) and twenty-four elected.[102] The New South Wales electorate was drawn from a very narrow franchise, but that tentative step towards responsible and democratic governance was not seen by the Imperial government as appropriate for Van Diemen's Land. This was source of great discontent among the more 'radically' inclined members of the colonial community,

[96]Per s.5; s.6 set the maximum penalty at a £10 fine or twelve months imprisonment.

[97]Little had happened since the first Dog Act's passage to assuage concerns that enforcement of a Dog Act (and now a Kangaroo Act) might be tainted by corruption as a result of the composition of the colony's constabulary. The island's police force remained heavily reliant on convict constables. The *Hobart Town Gazette*, 7 April 1843, at 362–363 records that on 3 April 1843 fifteen new constables were appointed. Only one of the fifteen was a free man.

[98]There is nothing in the relevant Colonial Office files to suggest that either the colonial or Imperial government anticipated that the Acts would provoke any significant legal or political controversy: PRO CO 280/194-198; PRO CO 408/25-28.

[99]The sequence of events is recounted in a memorandum from Eardley Wilmot to Gladstone, 6 July 1846, PRO CO 280/194, 404.

[100]Eardley Wilmot to Gladstone, 30 June 1846, PRO CO 280/194, 366.

[101]The episode is examined in detail in Townsley, *Struggle*, ch.4.

[102]New South Wales Constitution Act 1842, 5 & 6 Vict c. 76. The Act repealed section 22 of the 1828 Act in respect of New South Wales.

because it obviously meant that while taxation statutes in New South Wales were predicated on at least some electoral representation, revenue raising laws in Van Diemen's Land remained entirely a matter for governmental appointees.

The 1828 Act fixed the size of Van Diemen's Land's Legislative Council at between ten and fifteen members. As matters of political practice rather than legal necessity, membership was kept at the top end of that range and by the late 1830s the fifteen were divided between seven so-called 'official' members (ie those holding governmental office, including the Lieutenant Governor and the Chief Justice) and eight 'non-official' members. By 1845, those non-official members were displaying considerable independence of thought and action on matters of fiscal and economic policy, to the point that in November 1845 six of them – quickly dubbed the 'Patriotic Six' in more radical newspapers – resigned their office.

The primary difficulty – both chronic and acute – which Eardley-Wilmot faced was budgetary. A general economic downtown in the early 1840s[103] had catastrophically detrimental effects for what had previously been the colony's primary sources of revenue – customs duties on imports and the sale of Crown lands. The collapse in income coincided with vastly escalating costs of supporting and policing the (compared to New South Wales disproportionately large) convict population, costs which the Imperial government was not willing to meet.[104] Eardley-Wilmot sought to plug the financial gap by raising taxation (which exposed him to domestic criticism and prompted the resignation of the Patriotic Six) and by borrowing significant sums (which earned him the opprobrium of the Imperial government).

Eardley-Wilmot moved promptly to make six new appointees and called the Council into session in March 1846. The colony's budget was in substantial deficit, and Eardley-Wilmot's primary concern was to enact a legislative program to ameliorate those difficulties. In purely economic terms, the Dog and Kangaroo Acts were not the most significant measures enacted in 1846. A wider and deeper impact was made by An Act to Abolish Certain Differential Duties of Customs. This statute increased the import duties on all goods imported from New South Wales to 15 per cent.[105] Given that Van Diemen's Land still heavily relied on New South Wales for both the

[103]See generally Boyce, *Van Diemen's Land*, 227–230.

[104]More police were needed to catch escaped convicts, more courtrooms and judges were needed to try convicts who committed crimes, and more goal spaces were needed to imprison those convicts once caught and convicted.

[105]8 Vic. no.18 (An Act to Increase the Duties Chargeable on Certain Goods). The Act amended an 1834 statute (4 Will IV no.15), which – in apparent compliance with section 25 – specified in s.4 that all revenues it raised would be used to pay the salary of the Lieutenant Governor and the judges. It seems unlikely that revenues from the amended Act would be used only for those purposes, and quite unlikely that was the only use made of the 1834 Act revenues.

necessities and luxuries of colonial life, the Act had adverse economic implications for many colonists.[106]

Although these statutes offered some prospect of addressing the colony's budgetary crisis, and Eardley-Wilmot reported to the Legislative Council in March that revenue from customs duties was increasing rapidly,[107] he was recalled by the Imperial government in October 1846. The recall perhaps had more to do with the views of the then Secretary of State, William Gladstone, on questions of sexual ethics than of governmental competence and financial solvency. Gladstone was much influenced by accusations – subsequently accepted to be baseless – that Eardley-Wilmot entertained a chain of mistresses at Government House;[108] and by reports – certainly accurate – that homosexuality was rife among the colony's convict population.[109] Eardley-Wilmot's eventual replacement was William Denison, a military officer and engineer with no previous experience of civilian governance.

On his arrival, Denison received a 90 page despatch from Gladstone's successor, Henry Grey, which began by informing Denison that: 'You will enter on that Government when the great interests thus confided to your care have become the subject of no common solicitude'.[110] For Grey, those 'great interests' arose predominantly from the question of convict policy. Like Gladstone, Grey seemed much exercised by the 'horrible and disgusting' prevalence of homosexual relations within the convict population.[111] Grey's longer term solution for this problem was to send more women convicts to the colony.[112] In the interim, Grey seemed to think carpentry was the most effective response: he instructed Denison that 'the men in their present dormitories should be separated by partitions made of strong bars of wood reaching from floor to ceiling'.[113] A second despatch from Grey of the same date[114] addressed 'some other topics' that awaited Denison's attention. These included the composition of the Legislative Council, the prospects of the colony being granted a representative assembly, and the ongoing dispute

[106]The 1846 Act (by implication) incorporated s.4 of the 1834 statute.
[107]Address to the Legislative Council: *VP* 1846, 1, at 3.
[108]Pedder was among several eminent colonists who wrote expressly to Eardley Wilmot saying they considered such charges were ill-founded: PRO CO 280/196, 597.
[109]See Fitzpatrick, 'Gladstone'. The relevant despatches are readily found at House of Commons Papers, *Correspondence Between the Secretary of State and Sir E. Wilmot, Relating to Recall of Latter From Governor of Van Diemen's Land*, London, 1847; see especially 'Gladstone to Eardley-Wilmott', 30 April 1846, ibid., 5. The originals are PRO CO 280/196. See also Eardley Wilmot's reply to Gladstone of 5 October 1846, PRO CO 280/196, 558 (a typescript version is at 596). In his biography of Gladstone, Roy Jenkins is scathingly critical of what he characterises as Gladstone's 'clumsy' and 'sermonising' dismissal of Eardley-Wilmott: Roy Jenkins, *Gladstone,* London, 1995, 86.
[110]30 September 1846, PRO CO 280/198, 296.
[111]Ibid., 303.
[112]The problem was longstanding; see the 'Free passage for women' (so long as they were 'of good character') posters reproduced at <https://blog.nationalarchives.gov.uk/colonial-correspondence-tasmania-settlers/> (last accessed 01 May 2024).
[113]PRO CO 280/198, 335.
[114]Ibid., 343.

with the Bishop of Tasmania. Dogs (and kangaroos) had not yet captured Earl Grey's attention.

Denison enjoyed the immediate fiscal benefit of an upswing in customs revenues and of the Imperial government intimating that it would soon (the date was unspecified) meet two thirds of the costs of maintaining the probation system. He also promptly revealed an inclination to play fast and loose with legal niceties, by dismissing the Legislative Councillors who had replaced the 'Patriotic Six' and reinstating the Six (now mollified by the Imperial government's apparent change of heart on financing the convict system).[115] A despatch from the Imperial government sent in September 1846 had raised no objection to the Six's reappointment,[116] but did not expressly dismiss the replacement Councillors. Nonetheless, the *Hobart Town Gazette* of 23 March 1847 (at 293) contained two contiguous announcements. The first stated – quite incorrectly – that the Queen had dismissed the replacement Councillors. The second announced the reappointment of the Six. Denison's legally cavalier approach to this issue did not provoke censure from the Imperial government: (Denison was however prudent enough to adjourn the Council when the Chief Justice raised concerns about the lawfulness of the(re-) appointment process until he received the Secretary of State's approval).[117] That mollification was not replicated among press and public opinion more broadly: and there can be little doubt that the difficulties which Denison was about to encounter with the Dog Act were an acute manifestation of a much more pervasive governmental malaise which had moved beyond questions of mere economics and settled in the more abstractly contentious realm of constitutional principle.

VI. The Dog Act 1846 – the legal challenge

The leading light in the campaign against the Act was John Morgan,[118] owner and editor of a Hobart newspaper, the *Britannia and Trades Advocate* (hereafter *Britannia*), a position reached after a long and varied career. After a brief sojourn as a royal marine, Morgan exploited a friend's political connections to get himself appointed in 1828 as a minor official in the Western Australia colony, a position attracting a £200 year salary and a grant of 3000 acres of

[115]Dismissal seems likely to have been a power reserved to the imperial Crown under the 1828 Act, and Denison had not received express authorisation from the Imperial government to remove the new councillors. Grey nonetheless approved all the re-appointments by warrant in July 1847 (PRO CO 380/105, 503).

[116]Grey to Denison 30 September 1846, PRO CO 280/196, 343.

[117]Townsley, *Struggle*, 90–92; Bennet, *Pedder*, 88-90. Denison's explanation (though not Pedder's opinion) can be found in in the *Launceston Examiner*, 7 August 1847, 6.

[118]On Morgan's life see Peter Bolger, 'Lieutenant John Morgan: The Dog Tax Martyr', 55 *Journal of the Royal Australian Historical Society* (1965), 272.

land.[119] In 1833, leaving substantial unpaid debts behind him, Morgan inveigled his way into several government offices in Van Diemen's Land. These included appointment as a police magistrate, commissioner of the Court of Requests and deputy chairman of the Quarter Sessions;[120] the latter two being legal positions for which Morgan had no evident qualification. Morgan was as careless of his personal finances in Van Diemen's Land as in Western Australia, and when his penchant for serial indebtedness became widely known, Morgan unwillingly resigned his posts and began to dabble in journalism. By 1845 he had founded several short-lived newspapers, before in January 1846 he settled into that role at *Britannia*.

Britannia soon became a vehicle for Morgan's personal political agenda, the primary element of which was vituperative disapproval of the colony's government. Bolger's biographical sketch roots Morgan's politics both in a philosophical attachment to Whiggish notions of liberty (and especially their adaptation by American and French political radicals) and a more personal perception – likely not well-founded – that he had consistently been badly treated by governmental authorities both in Australia and Britain in respect of his career. The Dog Act provided Morgan with a precise target to attack.

Morgan coupled editorial broadsides in *Britannia* as to the Act's (in)validity with some more practical steps.[121] He was a prominent member of a committee of disgruntled colonists, which in addition to generating public opposition to the Act, provided £12 to commission opinions (at £3 per head) from four of the colony's barristers, Messers M'Dowell, Brewer, Smith, and (Alfred) Montagu.[122] The first three counsel focused their attention on micro-level critiques of the Act's scope and enforceability. The fourth – Montagu – enthusiastically endorsed the point that Morgan had already raised – that the Act was invalid because of its failure to comply with section 25 of Huskisson's Act. Of the four barristers, Alfred Montagu evidently impressed Mr Morgan the most, for it was he who was instructed to argue on Morgan's behalf; (although one cannot exclude the possibility that Morgan thought Montagu's fraternal relationship to the second, recently appointed, Supreme Court judge might also benefit Morgan's cause).[123]

[119]Since Western Australia was then largely uncultivatable desert, a 3000 acre land grant was not – in the short term -– an especially valuable proposition.
[120]*Hobart Town Courier*, 28 November 1834, 2.
[121]He intimated on 2 September that the Act contravened section 25 (*Britannia*, 2 September 1847, 2) and stated that view firmly on 16 September (*Britannia,* 16 September 1847, 2).
[122]*Britannia* 16 September 1847, 1, where the opinions are reproduced verbatim.
[123]Alfred Montagu emigrated to Van Diemen's Land at his brother Algernon's urging in 1843 and quickly established a successful practice. Morgan's brief offered him an obvious cause celebre to fashion a reputation as the go-to counsel for anti-government litigation.

Client and counsel devised a twin track strategy laid out dramatically in a lengthy newspaper advert:[124]

> THE DOG TAX!
>
> **FELLOW COLONISTS**, - I consider constitutional my duty, during the contest between, unconstitutional authority and those who act upon the principle of
>
> No Taxation without Representation,
>
> to inform you of every step taken to enforce the ever memorable
>
> DOG TAX.

Morgan announced that he owned several dogs, that he would not licence them, and that the government should go ahead and prosecute him. His planned response to the expected official prosecution (*Symons v Morgan*) was that he would advance a defence based on the Act's invalidity, that he would be convicted and fined, that he would refuse to pay, that he would then be subject to distraint and that he would then sue the distraining constables and the trial magistrate for trespass before the Supreme Court. Morgan also arranged for a friend to 'inform' against him in a second prosecution (*Hughes v Morgan*), whereupon, expecting again to be convicted despite making the invalidity argument, he would appeal the conviction to the Quarter Sessions. The expected costs of the cases would – Morgan hoped – be met by public subscription to which concerned citizens were invited to contribute 2s 6d per head.

To this point, licence fees under the Dog Act had not yielded any significant government income. The estimates for 1847 record only £366 of Dog Act licence revenue; Kangaroo Act licences had produced only £55.[125] For Morgan, it seemed, this was a matter of principle not of pounds.

1. Trials

The anticipated official prosecution soon eventuated. The first hearing in *Symons v Morgan* took place before a Police Magistrate in Hobart on Thursday 16 September. As (somewhat) ironic fate would have it, the presiding magistrate (sitting alone), AE Wilmot, was a son of the Lieutenant Governor who had introduced the 1846 Act.[126] Mr Symons was the Chief District Constable in Hobart. He was described in *The Courier* as a 'nominal' party, the assumption being that this was de facto Denison's prosecution. But neither

[124] *Colonial Times (Hobart)*, 21 September 1847, 2 (original emphases).
[125] *VP 1847–1848*, item 10, 'Abstract of the Revenue and Expenditure for 1847'. The Abstract identifies 'Fines and Fees from Police Magistrate' as £2163, without sub-divisions as to source.
[126] Appointing his son to that post, and simultaneously as a coroner and Deputy Commissioner of the Court of Requests, was one of Eardley-Wilmott's last acts as Lieutenant Governor; *Hobart Town Gazette*, 14 July 1846, 728–729.

the nominal nor real prosecutor instructed counsel, which left Montagu with the floor to himself. A substantial audience, apparently composed almost entirely of Morgan's supporters, crowded the courtroom to hear Montagu admit all the relevant elements of the 'offence' and then target his submissions primarily at the question of the offence's very existence.[127]

> This Act is one imposing a direct tax in aid of the general revenue. We were very differently situated here to what the magistrates were at home. There they could not question the legality of an Act of Parliament, as [Parliament] had full power to pass any act they thought proper. But in this colony your Worship is no more bound to administer an illegal act of Council than I am bound to submit to it. The Huskisson Act was the Magna Charta of this island — an Act most carefully framed to prevent any excess of power and improvidence in the conduct of governors at this end of the world. The Huskisson Act prohibits his Excellency and Council from taxing at their mere will and pleasure, by prescribing the specific mode in which they shall do it, in order to compel them to shew the people here and the authorities at home what they are about.[128]

Montagu then recited section 25, observing that; 'Nothing could be more carefully worded to guard against improvidence'.[129] The Dog Act clearly failed to meet that standard, as it provided only that funds raised under the Act would be 'applied in aid of the ordinary revenue of this colony'.[130]

Montagu also drew the court's attention to a newly emergent factor; a draft bill before the Legislative Council which would repeal the Dog Act and replace it with a new statute which contained 'distinctly and particularly stated' provisions as to how any revenues generated would be used.[131] This Montagu asserted, optimistically, was tantamount to a concession by the Lieutenant Governor that the 1846 Act was invalid: 'The very Act of amending the Act shows its illegality'.[132] The suggestion was also made that what Montagu called 'the loose manner' in which section 7 was drafted had left 'such a hole in this 7th clause as to render the whole Act void'.[133]

Press reports do not record Montagu offering the court any authority, statutory, judicial or academic, to support the proposition that it could hold the Act invalid. The obvious argument – but there is no contemporaneous evidence that Montagu made it in terms – would be that the Supreme Court's jurisdiction per section 3 of the 1828 Act was equivalent

[127]There are reports in *The Courier (Hobart)*, 18 Sept. 1847, 3; *Colonial Times*, 21 Sept. 1847, 3; *Britannia,* 23 Sept. 1847, 4. This account draws on all those sources. Montagu also made several submissions directed at the Act's effect if it was valid. All seemed rather implausible, for example that the Act did not actually create any offence at all.
[128]*Britannia*, 23 Sept. 1847, 4.
[129]Ibid.
[130]Ibid.
[131]'[I]n aid of the lighting, paving and cleaning the city of Hobart Town'; ibid..
[132]Ibid.
[133]Ibid.

to that of the Queen's Bench, Common Pleas and Exchequer courts in England. Those courts undoubtedly possessed an inherent, presumptive common law jurisdiction to invalidate the ultra vires actions of statutory bodies. Section 3 gave the Supreme Court a statutory equivalent of that common law jurisdiction with respect to statutory bodies within the colony. And since the Legislative Council was such a body, the power to invalidate its ultra vires actions fell within the Supreme Court's section 3 jurisdiction. Montagu was perhaps more concerned with grandiloquent principle and rhetorical theatrics than calm doctrinal analysis. *The Courier's* account of the trial suggests that he ended submissions with a dramatic flourish designed to suggest that the point was beyond argument:[134]

> This, said the learned gentleman, (holding up the Act) is a piece of waste paper – a nullity – but such a piece as it is, it is at end, and thank God for it.
>
> The learned gentleman concluded his address amidst the applause of the crowd who filled the office.

Police Magistrate Wilmot was apparently neither swayed nor impressed by Montagu's theatrics. He found Morgan guilty and fined him £1.

Hughes v Morgan came on the next day, again before Wilmot. Morgan's brief account records:

> I made no defence to the charge of having kept another dog for which I had not taken out a license, farther than the plea of Not Guilty, and by stating very briefly my objections, which were of course founded on those pleaded the day before by Mr. Montagu. 'As this was my second offence' (his Worship said), he fined me thirty shillings, and five shillings costs. Against this second conviction I gave notice of appeal.[135]

Morgan then modified his plan of attack in *Symons*. Rather than await distress and an action in trespass, he applied to the Supreme Court for certiorari to quash his conviction on the basis that the Act was invalid. Before that however, *Hughes* came on for appeal.

2. Quarter sessions

The appeal (to a bench of six magistrates, three salaried government officials and three 'lay' Justices of the Peace appointed by the Lieutenant Governor) was – after several adjournments[136] – heard on October 29. The case was the fourth of the day. Mr Hughes – unsurprisingly – took no part, leaving the

[134]*The Courier (Hobart)*, 18 Sept. 1847, 3.
[135]*Colonial Times (Hobart)*, 21 Sept. 1847, 2.
[136]The court busied itself on 4 October imposing sentences of seven years imprisonment on James Walker (for stealing a key), on Ellen Ellison (for stealing a ham) and on Henry Simpson (for stealing a pig): *The Courier (Hobart)*, 9 Oct. 1847, 4.

field clear for Montagu to elaborate his previous submissions.[137] The initial obstacle came from Joseph Hone, who chaired the bench.[138] Hone indicated that he considered that the court had no jurisdiction to hear submissions on the Act's alleged invalidity.[139] After hearing Montagu's protestation, the bench briefly retired, returning to say it would hear those submissions the next morning.

Montagu's arguments, which seem to have been refined and elaborated in the month since the first hearings in *Symons* and in *Hughes*, present a curious mix of principle and authority. His first objective was to disabuse Mr Hone of his views about the court's jurisdiction:

> I am here to show you that you can enter on that point, and that it is self-evident. The only argument on the subject against the right of the bench to hear it is the assimilating an Act of Council with an Act of Parliament … The confounding the two together forms the only plausible argument against my point. The bench must bear in mind the wide distinction between an Act of Council and an Act of Parliament. [140]

Thereafter Montagu stressed the absence of any legal limits on the imperial Parliament's power: '[i]s there anything written, or any law which defines their duties and puts a limit to their powers, or which could control them'?[141] In contrast the Legislative Council was a creature of the Huskisson Act, and so a body of limited competence. This would seem to be a not especially clearly formulated line of argument rooted in the jurisdictional point deriving from section 3 of the 1828 Act.

But then Montagu paused that line of argument and sailed into more unlikely waters in submissions notably more reliant on 'authority' than those presented at trial in *Symons* and *Hughe*s. Montagu appeared to argue that English judges did indeed in some circumstances have the power to invalidate imperial statutes. These contentions began with an unattributed reference to *Dr Bonham's Case* – 'It has been laid down that where an Act of Parliament was contrary to reason the common law shall control it and declare it void'.[142] Montagu did not explain why a pre-revolutionary case was relevant authority, choosing instead to cite Holt CJ's (post-revolution) comment in *City of London v Wood* that Coke's statement in *Bonham's*

[137]A lengthy account of submissions is in the *Hobart Town Advertiser*, 5 November 1847, 1. See also *The Courier*, 10 November 1847, 2. There are significant differences between the two accounts.

[138]Hone an English émigré barrister, held various governmental appointments – including as Chairman of the Quarter Sessions – after arriving in the colony in 1824. He was not widely considered a lawyer of distinction, being described by one contemporary as: 'universally looked upon as only a few degrees removed from an idiot': Peter Crisp, 'Hone, Joseph (1784–1861)', *Australian Dictionary of Biography* <https://adb.anu.edu.au/biography/hone-joseph-2195> (last accessed 01 May 2024).

[139]As in *Symons*, Montagu also raised points concerning the Act's meaning if valid, but these were not pursued at length.

[140]*Hobart Town Advertiser*, 5 Nov. 1847, 1.

[141]Ibid.

[142]Ibid: *The Courier (Hobart)*, 10 Nov. 1847, 2.

Case: '[i]s far from any extravagancy, for it is a very reasonable and true saying, that if an Act of Parliament should ordain the same person should be party and judge, it would be a void Act of Parliament'.[143]

Montagu then moved on to *Howard* v *Gossett*.[144] One cannot exclude the possibility that Montagu's submission was misreported, but that report indicates that *Howard* was presented as a case in which Lord Denman and Coleridge J assessed the validity of a statute. That assertion is plainly incorrect. The issue in *Howard* was whether the Speaker had authority deriving either from statute or parliamentary privilege to issue a warrant providing Gossett (the Commons Sergeant at Arms) with a defence to a trespass and false imprisonment action. The case had no relevance to the issue in *Symons*. It seems unlikely that Montagu did not realise this; *Howard* was perhaps invoked more as a play to sympathetic (but legally uninformed) public and press opinion than as an authority that would persuade the court.

Press reports suggests that Montagu also frequently referred to Fortunatas Dwarris' work, *A General Treatise on Statutes*.[145] Montagu relied primarily on a passage where, invoking Blackstone, Dwarris wrote that: 'The general and received doctrine certainly is that an Act of Parliament, of which the terms are explicit, and the meaning plain, cannot be questioned or its authority controlled, in any court of justice'.[146] Dwarris then immediately contrasted this British orthodoxy with the situation in the United States where it had become a 'settled principle' that: 'it belongs to the judicial branch, as a matter of right and of duty, to declare any Act of the legislature made in violation of the Constitution, or any provision of it, null and void'. The obvious inference is that Montagu was seeking to persuade the court that the relationship between the courts and the legislature in Van Diemen's Land was akin to that prevailing in the United States rather than in Britain.[147]

[143]The quote comes from (1701) 12 Mod Rep 669, at 687.

[144]*Howard* v *Gossett* (1842) Car & M. 380; see also *Howard* v *Gossett* (1845) 10 QB 359 and *Gossett* v *Howard* (1845) 10 QB 411.

[145]Fortunatas Dwarris, *A General Treatise on Statutes; Their Rules of Construction, and the Proper Boundaries of Legislation and Judicial Interpretation*, London, 1830. Dwarris prefaced his book (at (v)) by claiming it was a groundbreaking work: 'A regular Treatise on the general construction of statutes has long been a desideratum within the profession. Nothing solid or systematic upon the subject has before been attempted'. Dwarris was a barrister, independently wealthy through inheritance of a slave plantation in Jamaica. He is best known (or notorious) for his work for the British government investigating the legal systems of the Caribbean slave colonies and his opposition to abolition of slavery. See generally W.P. Courtney, rev. Jonathan Harris, 'Dwarris, Sir Fortunatas William Lilley (1786–1860)', <https://doi.org/10.1093/ref:odnb/8337> (last accessed 01 May 2024). The references made by Montagu are at *The Courier (Hobart)*, 10 Nov. 1847, 2: *Hobart Town Advertiser*, 5 Nov. 1847, 2.

[146]Dwarris, *General Treatise*, 646–647.

[147]Dwarris's *General Treatise* contains a brief section (at 997–1003) addressing the colonies, but this comprises almost entirely an account of the disallowance power. A passage at 999 contains a (mis-) quotation (and mis-citation) from 7 & 8 Wil. III c.8 (a 1695 Act) that: 'all law, bye-laws, usages and customs which shall be in practice in any of the plantations [colonies], repugnant to any law made or to be made in this Kingdom, shall be utterly void and of no effect'. The statute is mis-cited as c.22. The misquotation is the omission of 'the said' before 'plantations', which limits the scope of the Act to the American colonies. Montagu seemingly did not take the court to this passage.

This becomes evident when Montagu later returned to the 'non-assimilation' concept with which he began:

> It is by construing the Huskisson Act that the gross error committed in confounding an Act of Parliament and an Act of Council is at once evident. The Act itself shows how palpable the difference is, for it, in terms, gives to the judicial authorities a right to question to question the legality of the proceedings of the Council. It precludes the Council from passing some laws, and from making any but for particular occasions, and under proper restrictions. It cautiously excludes anything like irresponsibility, and is, in fact, a mere parliamentary trust, to be performed according to the express terms in which it is created. It constitutes a tribunal with a limited jurisdiction, and, like any other such jurisdiction, any excess of it is illegal.[148]

The suggestion that Huskisson's Act gave any colonial courts, still less the Quarter Sessions, such a jurisdiction 'in terms' is plainly wrong.[149] But Montagu then submitted that the jurisdiction arose inferentially from both other provisions of the Act and its general scheme. The Act contained various (what Montagu termed) 'restrictions' which differentiated the Legislative Council from the imperial Parliament. Montagu referred to section 21[150] and the judges' certification powers under section 22 before moving to section 25: 'Now comes a restriction in the passing of the Acts and on that I take my stand. It overpowers every other clause'.

After reading section 25, Montagu presented the court with some questions:

> Would it not be in defiance of our constitution if the Council were to impose a tax without inserting into the body of the Act the purpose for which it was raised? If it was in defiance of the constitution is not the passage from Dwarris to be our guide?.

And then some answers: 'I say if that was to be the case it would be an infringement of our constitution. If you authorise this Dog Act you authorise the upsetting of the law of England'.

As before the Police Magistrate in *Symons*, Montagu ended with a dramatic finale:

> If the magistrates declined to enter into the consideration under discussion, they would be acquiescing in the assumption by the Lieutenant-Governor and Council of irresponsibility; they would repudiate the Huskisson Act, and assent to the Government doing that which it [the Act] says they shall not do. They would, in fact, accede the right to the Lieutenant Governor and his Council to alter and render nugatory the laws of England.[151]

[148] *The Courier (Hobart)*, 10 Nov. 1847, 2: *Hobart Town Advertiser*, 5 Nov. 1847, 2.
[149] Montagu asserted that every court in the colony had such power.
[150] Which provided, inter alia, that at least two-thirds of the Council's members had to be present for it to conduct any business and also that a notice of 'the general objects' of any proposed law had to be published in at least one of the colony's newspapers no less than eight days before enactment.
[151] *The Courier (Hobart)*, 10 Nov. 1847, 2: *Hobart Town Advertiser*, 5 Nov. 1847, 2.

Denison had not formally intervened in the proceedings, so the bench retired immediately on Montagu finishing his submissions. The magistrates returned thirty minutes later, announcing – without giving reasons – that they were divided three to three, which meant that the conviction stood.[152] A month later, the certiorari application in *Symons* was before the Supreme Court.

3. The supreme court

Quite when – and for how long – the certioriari application was heard is something of a mystery. The *Colonial Times* reports a two day hearing on 26 and 27 November 1847.[153] *Britannia* records a five hour hearing beginning and ending on 23 November.[154] Denison did engage with these proceedings. The government's case was argued by the then Attorney-General, Thomas Horne.[155] Montagu again acted for Morgan. The stage was further set by the 'coincidence' that Denison announced he had just received confirmation that the Queen had expressly approved the Dog Act per section 30 of Huskisson's Act.[156]

Montagu did not pursue the narrow grounds relating to the Act's meaning if valid which he had argued below. His focus was purely on the issue of validity. His submissions were by now well-rehearsed and he did not add to them in the initial part of the hearing.

Horne's argument could easily be misrepresented. He appeared to concede the principle that the Legislative Council's status as a creature of statute presumptively empowered the Supreme Court (it is not clear that he extended the concession to lower courts) to invalidate legislative provisions which breached the requirements of the 1828 Act. He asserted however that the Act's scheme was such as to have *implicitly* rebutted that presumption. He focused in particular on section 22.

The submission was cast in terms that were widely – verbatim – reported:

[152]Even the integrity of the score was not universally accepted: 'Mr. Barnard, who was on the Bench, wished to explain the reasons which induced him to vote against the appellant, and was proceeding to state that he had been misled by the learned Chairman, when he was called to order, as it was quite obvious that he could not be heard at that meeting, which was convened for a specific purpose. After a brief discussion, the subject dropped, but not before Mr. Barnard had signified his concurrence in the arguments adduced by the learned counsel, Mr. Montagu' (*Colonial Times*, 2 Nov. 1847, 3).

[153]30 Nov. 1847, 2.

[154]25 Nov. 1847, 2. The account of submissions here draws on both those sources and also: the *Courier*, 1 December 1847, 3; the *Colonial Times*, 26 Nov. 1847, 3.

[155]Horne had emigrated from London in 1830. His colonial reputation owed more to his penchant for accumulating substantial debts than his legal expertise, and he was widely regarded, despite his initial engagement in colonial political life as a critic of government policies as very much an Eardley-Wilmott and Denison loyalist (Mary Nicholls, 'Horne, Thomas (1800–1870)', *Australian Dictionary of National Biography* <https://adb.anu.edu.au/biography/horne-thomas-3798> (last accessed 01 May 2024)). Eardley-Wilmot had appointed Horne Solicitor-General in 1841 and Attorney-General in 1844 (PRO CO 380/104, 553). For a very unflattering portrait of Horne on his latter appointment see the *Launceston Advertiser*, 14 September 1844, 2.

[156]Some suggestion was made that Denison had sat on the relevant despatch and released it then as a crude means to pressure the Court: *Colonial Times,* 26 November 1847, 3.

> If a law is passed in the Legislative Council of the most oppressive character, and even if it be repugnant to the laws of England, and the Judges do not certify that it is so within the time prescribed, they cannot do so at any way afterwards; it is the law until it is disapproved by the Queen, and all her subjects must obey it, there is no remedy, and the Supreme Court has no powers.[157]

Pedder expressed some surprise at this proposition, but Horne stuck firmly to his guns.

What neither Pedder nor Montagu (J) did however was press Horne on the point that the situation he posited was the one that clearly would arise per section 22 if a repugnancy certificate was issued but was then overridden by the Council. That the same consequence should be taken to arise in the absence of a certificate and override would seem quite implausible.

The historical record on Horne's side, although he seemed not to dwell on it, was that no New South Wales court had ever held a colonial statute invalid. Campbell's survey records several instances in the 1830s where one judge had considered a colonial statute invalid on general section 21 repugnancy grounds, but there had never been majority support of that position, and it does not seem that a section 25 invalidity argument was ever made.[158] Conversely, there was no New South Wales authority supporting the main plank of Horne's argument; that certification under section 22 precluded subsequent judicial review of legislation.[159]

Horne also spent some considerable time identifying the likely governmental consequences – both specific and general – of the Act being invalidated. The government would be deprived of any future revenues derived from the Dog Act. Moreover, other taxation statutes with the same section 25 deficiency would also be invalid, further compromising the government's fiscal position. Still more worryingly, if Montagu's 'restrictions' submission was correct, colonial statues would be vulnerable to invalidation on myriad grounds and chaos would ensue. Such problems were so obvious, Horne contended, that it could not sensibly be thought that the imperial Parliament would have allowed them to arise. Horne seemed to present this 'chaos' point in the alternative. Firstly, it negated any inference that a power of judicial invalidation existed at all. Secondly, if such a power did exist, it should not be exercised when such unwelcome consequences would ensue.[160]

At the end of initial submissions, the Court adjourned and invited counsel to return the next day to address the questions of whether section 25 had a mandatory or merely directory character and how that proviso interacted

[157] *Britannia*, 25 Nov. 1847, 2.
[158] Campbell, 'Colonial Legislation'.
[159] The s.22 procedure was removed in New South Wales from 1842 by the New South Wales Constitution Act 1842 (5 & 6 Vict. c. 76).
[160] *Britannia*, 25 November 1847, 2.

with sections 21-22.[161] Montagu made very short submissions, asserting that section 25's text was clearly cast in mandatory terms – ie twice using the word 'shall' rather than 'may'; (' … shall not impose any tax or duty … . shall be distinctly and particularly stated … '). Montagu again invoked Dwarris as an authority, and also reportedly referred the Court to '*Dawson v Hill* 1 Eason 64'.[162] Horne submitted, in effect reformulating his earlier submissions, that section 25 could not be mandatory in nature as that would 'frustrate' the purpose of section 22. Section 22, Horne maintained, had to be read as overriding both the specific terms of section 25 and section 21's general repugnancy caveats.[163]

A. Pedder's judgment

Judgment was given orally on 29 November. The *Colonial Times* reported a practical difficulty: 'From the low tone in which the Chief Justice spoke, and the continued rattling of carriages, it was utterly impossible for anyone present to follow the thread of the arguments'.[164] A written judgment was not provided until some weeks later.[165]

After briefly recounting the facts and summarising Montagu's and Horne's submissions, Pedder moved promptly on to the large constitutional question: did the Court have the jurisdiction to hear the claim and give the remedy that Morgan sought? He began by observing that Blackstone's 'subversive of all government' principle was simply inapplicable in the colonial context:

> Upon the general question of the competency of the Court to pronounce upon the validity of an Act of Council. I said that if it was meant to be contended that the Court could only so deal with the question as the Courts in Westminster Hall could with regard to the validity of an Act of Parliament, I utterly denied the position.

English courts certainly had no jurisdiction to invalidate (Imperial) statutory provisions, but that principle did not apply in Van Diemen's Land:

> The Legislative Council of this Colony was an inferior Legislature, having no existence by the Common Law, but created by the Act of Parliament for a temporary purpose, and having the power of making laws under certain limitations and restrictions the principal of which was, that the laws to be made by it were not to be repugnant to the laws of England or to that Statute.[166]

Pedder found little authority to support his conclusion. He invoked two sources, which he referred to as 'opinions'. The first came from a book

[161] *Hobart Town Advertiser*, 30 Nov. 1847, 2.
[162] This was a mis-citation. See further fn.177 below.
[163] *Colonial Times,* 30 Nov. 1847, 3.
[164] *Colonial Times*, 30 Nov. 1847, 2.
[165] Quotations are from reports in the *Courier*, 2 Feb. 1848, 3 and *VP* 1847–1848, 13. The report is written by Pedder in the form of recounting his oral judgment.
[166] *Courier*, 2 Feb. 1848, 3.

entitled *Chalmer's Opinions*: 'in which it is laid down that the Legislative Assembly of a Colony cannot at its own will and pleasure enact whatever it thinks fit for example, that it cannot alter the Common Law of England'.[167] The citation appears to be taken from an (undated) lengthy opinion of an Attorney-General of Barbados, a Mr William Rawlin, in which he urges the disallowance of a colonial statute because of its evident inconsistency with common law principle.[168] Rawlin does not at any point suggest a Barbadian court could invalidate or refuse to apply such an Act. The second opinion is a 1730 comment from the then imperial Law Officers (subsequently Lords Hardwicke and Talbot) on a hypothetical question as to the substantive competence of Connecticut's legislature:

> It is a necessary qualification to all such laws that they be reasonable in themselves and not contrary to the laws of England, and if any laws have been made repugnant to the laws of England, they are absolutely null and void.[169]

The opinion is devoid of either reasoning or authority, and while it is unambiguous on the null status of such a law it contains no explicit acceptance that such nullity could be pronounced upon and enforced by colonial courts.[170]

These sources nonetheless sufficed for Pedder to conclude that: ' … it was not only competent to the Court, but it was our duty to decide upon it, unless the Court was prevented from so doing by something contained in the Act of Parliament'.[171]

The 'unless' caveat was the most closely argued aspect of the judgment. There is a temptation to seize upon a phrase in Pedder's analysis – ' … if

[167]George Chalmers, *Opinions of Eminent Lawyers on Various Points of English Jurisprudence, Chiefly Concerning Colonies, Fisheries, and Commerce*, 2 vols., London, 1814. In his preface Chalmers (for many years chief clerk to the Privy Council) explains he began his project because Blackstone's *Commentaries:* 'were barren on such legal topics, as relate to our colonies, fisheries, and commerce' (at i). There are few 'judgments' in the book; its contents are primarily the opinions of law officers.

[168]The Rawlin opinion is at Chalmers, *Opinions*, vol. 2, 27–39, with the quoted passage at 31. My thanks to Ian Williams for his assistance on this point.

[169]Chalmers, *Opinions*, vol. 1, 341.

[170]It is ostensibly curious that Pedder did not allude to – nor apparently did Montagu invoke – the Privy Council's 1727 'judgment' in *Winthrop* v *Lechmere* (W.L. Grant and James Munro, eds., *Acts of the Privy Council of England, Colonial series, vol.3, AD 1720–1745*, London, 1910, 139–151). As Campbell notes: 'Appeals to the Privy Council involving repugnancy questions appear to have been few and far between … *Winthrop v Lechmere* is the only case heard on appeal in which a colonial statute was declared void' (Campbell, 'Colonial Legislation', 151) and the Hardwicke/Talbot opinion was a subsequent part of that long controversy. *Winthrop* v *Lechmere* does not feature in Chalmers, *Opinions*. In *Winthrop*, the Privy Council 'declared Null and Void' a Connecticut statute that the Privy Council considered 'contrary to the Laws of England … and is not warranted by the Charter of that Colony'. The judgment does not say anything in express terms as to whether a colonial court could have invalidated the statute.

[171]Pedder's engagement with Chalmers was not rigorous. The book's most obviously relevant section is volume 1, 'Part V. Of the Want of Sovereignty in the Governor, the Council, and the Representative Body, when met in Assembly'. The section contains 14 'opinions', most authored by imperial law officers. Almost all are opinions as to whether the Monarch should disallow a colonial bill. There is no opinion even hinting that a colonial court has jurisdiction to invalidate colonial legislation.

such had been the intention of the [Imperial] Legislature'[172] to suggest that he held that any such ouster of jurisdiction would have to be articulated expressly in an imperial statute. That would though be at best oversimplifiy – at worst misrepresent – his position. Pedder's reasoning endorses Horne's proposition that such an ouster could in principle be found as a matter of implication within a statute's overall scheme and the inter-relationship of its component parts. But that inference could not property be drawn for this Act.

Pedder agreed with Horne that certification and override under section 22 would preclude post-enactment validity review in colonial courts. However, 'it did not therefore follow that, in a case in which neither of the Judges had certified a repugnancy, the Act would, notwithstanding any such repugnancy, be binding'.[173] This was Pedder conceded: 'a difficult question', but 'after careful reflection' he could not accept Horne's submission.[174] His reasoning rested largely on the presence in the first clause of section 22 the phrase: 'every law or Ordinance to be made *as aforesaid*'.[175] 'As aforesaid' had to refer back to section 21's general repugnancy proviso, which necessarily meant that the Council's 'notwithstanding' power in section 22 was a consequential authority which came into being only as a result of certification and override: it could not be seen as a freestanding alternative to the Council's general – but limited – legislative powers. Pedder supplemented this textual analysis with a contextual consideration. Certification could not properly be regarded as a failsafe protection against repugnancy. The judges might through 'inadvertence' or 'neglect of duty' fail to certify a law. In such circumstances it should not be assumed that Parliament had intended that: 'the subject should be bound by a law which the Council had not the power to make'.[176]

Pedder's dismissal of Horne's suggestion that section 25 did not have a mandatory character was more brusque. He observed that: '[I]t had never been doubted that negative words in a statute are imperative', and section 25 was clearly cast in negative terms: 'The Governor and Council *shall not* impose any tax or duty'.[177]

Having addressed this issue, Pedder then considered the more prosaic question of whether the Dog Act did impose a 'tax'. Pedder accepted that

[172]*Courier*, 2 Feb. 1848, 3.
[173]*Courier*, 2 Feb. 1848, 3.
[174]Ibid.
[175]Emphasis added.
[176]*Courier*, 2 Feb. 1848, 3.
[177]Emphasis added. Pedder additionally noted authority for the proposition that even positive words could have a mandatory character. Press reports that Montagu relied on '*Dawson v Hill*, 1 Eason 63' on this point are erroneous. In Pedder's judgment, that case is identified as '*Davidson v Gill* 1 East 64', although the correct citation is: *Davison v Gill*, 1 East 64. *Davison* concerned magistrates' power to limit established public rights of way. The Act required that any order imposing such limitation 'shall' be expressed in a particular form. The court concluded that an order not in the specified form would be invalid.

the motivation underlying the Dog Act may have been abating a social nuisance rather than raising revenue. He also accepted that fines and penalties were not taxes for section 25 purposes. A licence fee, however, was a qualitatively different proposition: 'I said that the money so payable on compulsion was as clearly a tax as that payable on carriages, armorial hearings, and others I mentioned'.[178] This empirical observation was reinforced by the Act's text: 'the Act of Council itself treats the licence money as Revenue, for it directs that it shall go and be applied in aid of the Ordinary Revenue of the Colony'.[179]

Pedder concluded with essentially a statement of political theory. Section 25 served an important political purpose: 'that the Colonists and the Home Government might be distinctly informed for what particular local purpose each tax was imposed; and to ensure the application of the proceeds of the tax to that particular purpose, and none other'. The Dog Act simply did not meet this test:

> no one looking at the Act of Council can say on what specific subjects the produce of the licence money is to be expended. It is left to the Government to appropriate and apply it to any purpose it may think proper.[180]

B. Montagu's judgment

Montagu endorsed Pedder's reasoning and conclusion, but also added a more wide-ranging analysis adopting the 'restrictions' argument his brother had made. In Montagu's view, all these restrictions – not just section 25 – provided a judicially enforceable basis for challenging the validity of the colony's legislation:

> All these restrictions clearly show that it was the intention of the framers of the Statute to protect the subject by every possible safeguard against the operation of Laws repugnant to the Constitution. All these restrictions must be strictly followed to make a valid Act of Council. To that position the Attorney-General assents. But the effect of his argument would be to take away from the subject the right to dispute any law if not in accordance to those limitations.[181]

Montagu also indicated that section 22 could not be regarded as implicitly overriding this principle. Section 22 was not an adequate mechanism for judicial scrutiny:

> Several [bills] might come at once, and in the prescribed period before enrolment there would not be much more than time to read them over … . Is it wonderful, then, that the repugnancy should escape the attention of one or

[178] *Courier*, 2 Feb. 1848, 3.
[179] Ibid.
[180] Ibid.
[181] Ibid.

> two men? Eight or nine Acts might be sent to the Judges for revision at one time, and it might be that the judges during the prescribed period of seven days were sitting on this Bench. Or even if they were not, and had carefully perused the Act, they might not see the objection.[182]

Montagu's final comment echoed his brother's concluding 'wastepaper' submissions in the first hearing before the Hobart Police Magistrate:

> We are called upon to declare what the law is, and if such a duty was not in the Court, the subject would be left without any remedy. In that case the Huskisson Act would be mere waste paper. The subject would be deceived into an opinion that he had rights, and then find out that he could not act upon them. I am therefore of opinion that the Act of Council is invalid, that the Dog Act is no Act at all, and that the conviction must be quashed.[183]

4. Press reaction

The judgment generated much approbatory – almost adulatory – coverage in the colony's press. Morgan of course used *Britannia* as a triumphalist stage to applaud the Court and condemn Denison.[184] More surprising perhaps was the critical tone of a leader in the *Cornwall Chronicle*,[185] a journal often supportive of the government. The *Chronicle* congratulated Morgan for not succumbing to the resigned apathy of many colonists who had paid a tax they thought illegal rather than incur the expense and inconvenience of challenging it; congratulated the judges for proving: 'that they are above lending themselves in their judicial capacities to the unconstitutional acts of the Government nominees'; and castigated the Legislative Council for passing the Act and Denison for 'extorting' licence fees under the threat of prosecution.

A lengthy leader in the *Launceston Examiner*[186] linked the specific issue of the Dog Act with broader political concerns and invoked the American revolution as a pertinent parallel to what was happening in Van Diemen's Land to engage in some distinctly hyperbolic denunciation:

> Is it possible that a more vacillating, weak and oppressive government could exist than the one which is now submitted to in this island? Opposed to the interests of the people, inestimable in its exactions, irritating in its demands, deprived of moral force, driven from the courts of justice, destitute of the means to amend a single faulty enactment, its sway is only protected by the slender covering of prescription.

Denison was likely unperturbed by such melodramatic language. But the *Examiner* concluded with an observation and exhortation which had

[182]Ibid.
[183]Ibid.
[184]For example, *Britannia*, 2 Dec. 1847, 2 and 16 Dec. 1847, 2.
[185]*Cornwall Chronicle*, 15 Dec. 1847, 2.
[186]*Launceston Examiner*, 11 Dec. 1847, 3.

much more prosaic implications. Colonists who had bought a dog licence were urged to begin legal proceedings to reclaim the money paid.[187] *Symons* was read by some commentators as casting doubt on the validity of many other tax-raising statutes and so opening the door for myriad other restitutionary actions.[188] Denison regarded this possibility as having catastrophic implications for the colony's ongoing governance. Something would, in very short order, have to be done.

VII. Concluding Remarks

The judgments in the Supreme Court asserted that in Van Diemen's Land the colonial courts could review the legality of legislation. At this stage, however, the principle remained a local one, and rooted in local judicial rather than local legislative authority. *Symons* would have presented the Privy Council with a clear opportunity to offer an authoritative, generally applicable answer to this question. But in the event, that opportunity never arose.

The second part of this paper will explore the attempts made by Lieutenant Governor Denison to solve the Dog Act controversy both by removing Pedder CJ and Montagu J from office and by promoting legislation which would authorise the Legislative Council to pass statutes inconsistent with Imperial legislation. These attempts, and the reaction to them, demonstrated the wider acceptance of the position taken in the Supreme Court within the Empire, securing the possibility of judicial review of legislation by colonial courts.

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[187]Morgan promptly offered to co-ordinate such claims in adverts in several papers, ibid.
[188]The *Examiner* (n. 186 above) suggested the 1846 import duty Act was invalid. As noted above (n. 105–106 and accompanying text), that seems unlikely.

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