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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 Two

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ABSTRACT
The first part of this paper examined the background to and conduct of a case called *Symons* v *Morgan* before the Supreme Court of Van Diemen's Land. *Symons* appears to be the first case in which a colonial court asserted jurisdiction to invalidate a colonial 'statute' on the basis that the legislation concerned contravened the colony's constitution. The Supreme Court claimed the jurisdiction as a matter of inference. There was no imperial or colonial legislation expressly granting such a power, nor any judicial authority – whether colonial or imperial in origin – supporting the Supreme Court's conclusion. The second part of this paper analyses the responses of the colonial government to the *Symons* judgment, and consequently the responses of the imperial government and Parliament to those colonial initiatives. The actions of the imperial government and Parliament show acceptance of the principle that colonial courts could review the validity of colonial legislation.

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

I. Introduction

The 1847 judgment of the Van Diemen's Land Supreme Court in *Symons* v *Morgan*[1] appears to be the first instance of a British colonial Supreme Court asserting a jurisdiction to invalidate a statute enacted by a colonial legislature. Part I of this two part paper concerned the legal, political and social

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[1]There were then no formal law reports in Van Diemen's Land. The judgment is fully reported in *The Courier (Hobart),* 2 February 1848 and in *Votes and Proceedings of the Legislative Council* (hereafter *VP*) *1847–1848*, 13. Available online at: https://www.parliament.tas.gov.au/resources/history/earlyrecords (accessed 3 May 2024).

context of the litigation, as well as the case itself.[2] Although the decision of the Van Diemen's Land Supreme Court in *Symons* v *Morgan* was unwelcome to the executive authorities in the colony, the case itself was a local matter. This second part of the paper explores the wider imperial aftermath of the case, an aftermath which reveals acceptance by the central imperial authorities in the British Empire of the important constitutional principle that colonial courts could review the legality of colonial legislation.

II. Background: The Dog Act and *Symons* v *Morgan*

The Van Diemen's Land statute in issue was the Dog Act 1846, a measure imposing a dog licencing system in the colony. John Morgan, a newspaper owner motivated both by political idealism and personal disgruntlement, had run a campaign opposing both the wisdom and the validity of the Act. He publicly refused to licence his own dogs, provoking the colony's then Lieutenant Governor, Sir William Denison, to initiate legal proceedings against him.[3]

Morgan's argument against the Act's validity was formulated in conjunction with one of the colony's leading barristers, Alfred Montagu. Their case rested on several interconnected propositions either expressly contained in or implicitly derived from what was then Van Diemen Land's 'constitutional' statute, the Australian Courts Act 1828.[4]

Section 21 of the 1828 Act contained a version of the provision found in every British colonial constitution statute to the effect that the colonial legislature (which per the 1828 Act was an appointive body known as the Legislative Council) could not enact legislation 'repugnant' to imperial legislation or orders in council or the more expansive concept of 'the laws of England'. Section 25 provided that in any tax-raising statute, the uses to which the tax raised would be put had to be 'distinctly and particularly stated' in the statute's text. Morgan contended that the Dog Act 1846 was a tax-raising statute, and since its text did not contain a 'distinctly and particularly stated' proviso, it was repugnant per section 21 and therefore invalid.

That much of Morgan's case was explicitly rooted in the 1828 Act. The next step in his argument, that Van Diemen's Land courts could invalidate 'repugnant' statutes, was entirely a matter of inference. Neither the 1828 Act, nor any other imperial legislation nor order in council, nor any Van Diemen's Land statute, expressly granted the Supreme Court such jurisdiction. Neither was there any judicial authority, whether from an English

[2]Ian Loveland, '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', 45 *Journal of Legal History* (2024), 155; (hereafter 'Dog Act – Part One').

[3]For the context of the case and the judicial proceedings as explained here see, generally Loveland, 'Dog Act – Part One'.

[4]9 Geo IV c.83. The Act was popularly known as 'Huskisson's Act', after the Secretary of State for the Colonies who promoted it.

court, a colonial Supreme Court or the Privy Council holding that such a jurisdiction was an implied or inherent element of any colonial constitution. Nor was there any treatment of the issue as a matter of legal principle in Blackstone's *Commentaries*.

Morgan's implied jurisdiction assertion had two elements. The first, not very clearly argued, seemingly derived from section 3 of the 1828 Act, which granted the Supreme Court a jurisdiction equivalent to that of the King's Bench, Common Pleas and Exchequer courts in England. Those courts undoubtedly possessed a presumptive common law jurisdiction to invalidate the actions of statutory bodies, albeit the presumption could be rebutted by an explicit ouster or limitation clause in the relevant statute. Since the Van Diemen's Land Legislative Council was a statutory body, and since the 1828 Act did not contain any ouster clause, Morgan contended it was proper to assume that section 3 granted the Supreme Court a statutory equivalent of the English court's common law jurisdiction over statutory bodies to invalidate the ultra vires acts of the Legislative Council. Montagu's submissions for Morgan also relied heavily (and more obviously) on the proposition that Van Diemen's Land courts stood in the same relation to the Legislative Council as United States courts stood to the Congress and State legislatures. Just as United States courts could invalidate 'legislation' enacted by Congress or State legislatures 'repugnant' to the United States Constitution, so a Van Diemen's Land court could invalidate a colonial 'Act' which was 'repugnant' per section 21.

Denison's argument before the Supreme Court, made by the then Attorney-General Thomas Horne, was that a proper reading of the 1828 Act would equate the relationship of Van Diemen's Land's courts and Legislative Council with that of the higher courts and Parliament in Britain. The means to enforce the section 21 repugnancy proviso were therefore political not legal in nature, through the Crown's general power of disallowance (in section 30 of the 1828 Act) or enactment of new imperial legislation. That presumption could be rebutted by an explicit grant of jurisdiction in an imperial statute for a colonial court to invalidate colonial legislation, but it could not be rebutted by implication.

The legal (and political) position was complicated by section 22 of the 1828 Act, which required the Supreme Court judges to consider each and every Act passed by the Legislative Council and assess if the Act was repugnant per section 2. If the judges certified the Act as repugnant the Legislative Council could override that certification and the Act would be valid until such time as the Crown disallowed it. Morgan's contention was that section 22 excluded post-enactment judicial review only of Acts in respect of which the judges' repugnancy certification had been overridden by the Legislative Council, but the exclusion did not bite on Acts which had never been so certified (as was the case with the Dog Act). Horne's argument

for Denison was that section 22 should be regarded as the only route through which the Supreme Court judges could address the repugnancy issue.

Chief Justice Pedder, by then in office for over twenty years, resolved all issues in Morgan's favour. His judgment was narrowly cast, being limited to the conclusion that a court could invalidate the Dog Act 1846 because its text did not comply with section 25 and that section 22 had no relevance to the Dog Act. The second judge on the then two man Court, Algernon Montagu, had agreed with Pedder CJ that the Dog Act was a tax-raising statute, and on the section 25 and section 22 points, but had gone (much) further in also indicating obiter that other provisions in the 1828 Act also 'restricted' (as he put it) the way in which the Legislative Council could make valid law, and that the colony's courts were competent to invalidate any 'law' enacted by the Council which did not comply with any of these 'restrictions'.

For Lieutenant Governor Denison, in post only a few months when *Symons* was decided, the case's implications were alarming. The Dog Act 1846 was enacted at the behest of Denison's predecessor, so the judgment did not present Denison with any personal embarrassment. Its fiscal implications were however distinctly unwelcome. Although the Dog Act per se was not a significant source of revenue, the section 25 analysis that underlay Pedder and Montagu's judgments might prove applicable to other revenue-raising legislation. Morgan had already indicated that colonists who had paid the Dog Act licence were lining up to bring restitutionary claims in the lower courts. Such claims regarding other tax-raising Acts threatened much more serious fiscal consequences. And if Pedder embraced Montagu's 'restrictions' analysis in subsequent litigation, the – to Denison – very disquieting prospect arose of the courts becoming a vehicle for the effective expression of the widespread political disgruntlement felt by many of the colony's inhabitants during the 1840s. Something – in very short order – would have to be done.

Denison eventually pursued a dual strategy in response to the judgment. Remedial – and retrospective – imperial legislation was the obvious long-term solution to the difficulty. That remedy was not in Denison's gift. And even if the imperial government could be persuaded of the desirability of promoting such a bill – and the imperial Parliament of approving it – at least a year and more likely nearer two would pass before such legislation could be enacted in London and transported back to Van Diemen's Land. Denison's concerns were more immediate.

III. Aftermaths: On the Independence of the Colonial Judiciary?

Denison's first preferred solution was to try change 'the law' by changing the composition of the Supreme Court. When that tactic foundered, Denison's second course was to change 'the law' by promoting new colonial legislation. Denison's various responses to *Symons* were condensed into a period of

barely two months running through the (Van Diemen's Land) summer of 1847–1848. He subsequently offered lengthy explanations of his actions to the imperial government in despatches dated 17 January 1848[5] and 18 February 1848.[6] The account that follows rests on an assumption – made with some reservation – that Denison's explanation accurately records his reasons for acting as he did.[7]

On 30 November 1847, Denison and the Executive Council[8] instructed the colony's Law Officers to produce a 'report' addressing the submissions Horne had made in *Symons*, the basis of the Supreme Court's judgment, and its likely practical consequences.[9] Horne's report was completed on 16 December 1847,[10] Solicitor-General Fleming's on 14 December.[11] As a first step in making a decision as to whether the judgment might successfully be appealed to the Privy Council that would be an entirely appropriate thing for Denison to do. That did not however seem to be what Denison had in mind. Denison chose not to release the reports to the Executive Council until over two weeks later, on 3 January 1848.[12]

Horne's 'report' consisted primarily of a recitation of the case's factual background and a summary of submissions. He devoted barely two hundred words to the judgment itself. Most of these bluntly misrepresented the decision. As portrayed by Horne, the ratio of *Symons* was found in Montagu's 'restrictions analysis', to the effect that the Supreme Court could and would invalidate colonial Acts which failed to comply with any of the restrictions Montagu identified.[13] Since Pedder had limited himself to a section 25 analysis, Horne's assertion is obviously incorrect. It is so obviously incorrect that it is difficult to attribute the opinion to incompetence; a mendacious readiness to provide Denison with pseudo-legal ammunition to fire at the Supreme Court seems the more likely motivation. There is no true legal analysis in the advice at all: it makes no reference to judicial or academic authority. Its reasoning, in the final few paragraphs, claims *Symons* to be

[5]The National Archives: Public Record Office (PRO) CO 280/223, 405 et seq; 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, 5 et seq; (hereafter Commons, *Montagu*).

[6]PRO CO 280/224, 97; Commons, *Montagu,* 52.

[7]Denison subsequently published a rather self-congratulatory two volume account of his career; William Denison, *Varieties of Vice-Regal Life*, 2 vols., London, 1870. In them he gives a fairly candid account of the *Symons* episode which seems to suggest that he regarded all his actions as politically and legally defensible.

[8]The 'Executive Council' was de facto Denison's cabinet. Its legal source lay in an exercise of the prerogative; see Loveland, 'Dog Act – Part One', n14.

[9]PRO CO 280/224, 155; Commons, *Montagu*, 59.

[10]PRO CO 280/224, 240; Commons, *Montagu*, 82; also at *VP 1847–1848*, 5, at 13.

[11]PRO CO 290/224, 243; Commons, *Montagu*, 84.

[12]PRO CO 280/224, 157; Commons*, Montagu,* 59.

[13]PRO CO 280/224, 240; Commons, *Montagu*, 84.

'wrong' solely because of its potential practical consequences. These consequences would be, it seemed, quite catastrophic. The judgment:

> Unsettles the whole law of the colony … rendering it unsafe for the Colonial Magistrate to administer that law
>
> …
>
> [I]t will raise a spirit of opposition to all the laws of the Colony by which the Ordinary revenue is raised and collected.
>
> …
>
> [I]t shakes to the very centre the Government of this Island
>
> …
>
> [T]he greater part of the Revenue as provided by Colonial enactments will be lost.[14]

The then Solicitor-General – Valentine Fleming[15] – provided what at first blush appeared a more legally informed response, and which might be taken to suggest that Denison would have been better served by having Fleming rather than Horne argue his case before the Supreme Court. Fleming's report, however, shared with Horne's the complete absence of any judicial or academic of authority to support his reasoning and conclusions. Since that reasoning and conclusion were presented in very stark terms – 'It is however my deliberate opinion that the decision in question is no less erroneous in law than, I fear, it will prove disastrous in consequence'[16] – that absence is perhaps surprising.

Fleming followed Horne in highlighting those consequences in apocalyptic terms. A judicial power to invalidate legislation would cast doubt upon the legality of all of the colony's laws: 'It were impossible to form any adequate conception of the evil, the injury and ruin which such a decision must draw in its train; were it possible, the contemplation would be fearful'.[17] Not only might such a power cut the legal ground from beneath many commercial dealings between private individuals, it might also expose judges in the criminal courts to liability for convicting colonists of

[14]PRO CO 280/224; Commons, *Montagu*, 84.

[15]Fleming was the son of a military officer. Educated at Trinity College Dublin, and called to the bar in 1838, Fleming followed the path set by Pedder and Algernon Montagu in emigrating to Van Diemen's Land to take up (in his case initially a minor) judicial post on the back of virtually no professional experience. He was appointed as Solicitor-General by Denison's predecessor as Lieutenant Governor, Sir John Eardley Eardley Wilmott in 1844; PRO CO 380/104, 550. See generally M. Gibson, 'Fleming, Sir Valentine (1809–1884)', *Australian Dictionary of National Biography*. Available online at: https://adb.anu.edu.au/biography/fleming-sir-valentine-3537 (accessed 3 May 2024).

[16]Commons, *Montagu*, 84.

[17]Ibid., 85.

non-existent crimes. Such laws would be – the metaphor seemed a popular one – mere 'waste paper'.[18]

In broad constitutional terms, Fleming's argument was that the Supreme Court had overstepped the proper constitutional boundary between the legislative and judicial function. The argument was disingenuously put, as Fleming repeatedly failed to acknowledge the distinction – in terms of their normative status – between imperial and colonial Acts in arguing that what the Supreme Court had done in *Symons* must have been incorrect as: 'not even the Judges of Westminster Hall could exercise the power that has in this case been assumed; for they are equally concluded by statutory enactment, and cannot say that shall not be binding which the Legislature has pronounced shall be so'.[19]

Fleming's primary legal assertion – and the tone of his opinion is clearly assertion rather than suggestion – was that the Court had wholly misunderstood the effect of section 22. The crux of his argument appeared to be that if the Queen's approval of a certified 'Act' cured (or overrode) any repugnancy, then her assent to or failure to disallow (per section 30) a non-certified 'Act' must have a similarly curative (or overriding effect): '[I]t appears to me that the Legislature has marked out the allowance by the Queen as the final event to give the law validity notwithstanding its repugnancy'.[20] There is no express textual basis in the 1828 Act for that proposition. Its internal logic is compromised by the simple point that 'section 22 allowance' would be granted in the context of an informed imperial government decision to override judicial concerns as to repugnancy. That position would not exist in the context of 'ordinary allowance'; (i.e. which occurred in respect of Acts which had been passed without the section 22 process being triggered).

Fleming perhaps stood on firmer legal ground with a secondary assertion, best characterized as a plea that there be 'institutional equivalence' within the governmental system created by the 1828 Act. What Fleming appeared to say here was that if the Legislative Council was to be held to a very strict construction as to the limits of its powers under the 1828 Act, then the same principle should apply to the Supreme Court. And absent an explicit grant to the Court in the Act of a power to invalidate colonial Acts, that power should not be assumed to arise as a matter of inference. The manifest weakness of this position is that judicial review of the exercise by statutory bodies of statutory powers was (then) an implicit rather than explicit feature of the British constitutional tradition, something to be taken away rather than granted by express legislative provisions.

[18]Ibid. The 'waste paper' label having been employed in Alfred Montagu's first instance submissions and Montagu's judgment in *Symons*; see respectively *Courier (Hobart)* 18 September 1847, 3; and 2 February 1848, 3.
[19]Commons, *Montagu*, 86.
[20]Ibid., 87.

The next stage of Fleming's opinion was the contention that if the Supreme Court did indeed have the power to invalidate colonial legislation, that power had been wrongly deployed in this case because the Dog Act was not inconsistent with section 25. This is the most feeble part of Fleming's opinion. The feebleness is seemingly rooted in mendacity rather than incompetence. The proposition advanced was that section 25 required only that revenues raised by an Act be used for 'local purposes', a concept which would encompass any expenditure for any purpose anywhere within the colony. However, the section 25 restraint was not simply focused on whether the revenues raised under the relevant Act were used for 'local purposes', but also that those local purposes were 'distinctly and particularly stated'. Pedder's judgment expressed that position with perfect clarity. Fleming's argument here is absurd.

The legal weakness of Fleming's opinion is also illustrated by his failure to engage – like Horne – with a rather obvious issue, namely the nature of the Court's remedial jurisdiction. The authority asserted by the Supreme Court in *Symons* was found as a matter of inference from the scheme of the 1828 Act and – albeit much less obviously – from basic constitutional principle. A *prima facie* plausible argument might be made that this inferred jurisdiction encompassed a power to treats Acts as either void or merely voidable, depending on the circumstances of the case. Equally, it might credibly have been suggested that the Court had discretion as to the nature of relief granted pending any appeal to the Privy Council. This point is clearly tied to the question raised in *Symons* as to whether section 25 was a mandatory or merely directory requirement. The case law on which Pedder had relied in deciding that section 25 was mandatory in nature – and so could lead only to the conclusion that an Act which breached it was void *ab initio* – did not involve colonial legislation, and its relevance to the Dog Act scenario was certainly questionable.[21]

This omission, and the dogmatic (no pun intended) tone of both law officers' opinions, undermines any assumption that they were written with a view to evaluating the merits of pressing the matter on appeal or referral to the Privy Council.[22] Neither law officer expressly evaluated the likelihood of any appeal succeeding. Rather than address *Symons* by identifying aspects of the judgment which might credibly be challenged before the Privy Council, the law officers' opinions appeared to assert very bluntly not only that the judgment was 'wrong', but also that there was no credible basis for thinking that it might be 'right'. Denison and his law officers had, it would soon become clear, other audiences than the Privy Council in

[21] Loveland, 'Dog Act – Part One', 192.

[22] s.4 of the Judicial Committee Act 1833 empowered the Monarch: 'to refer to the said Judicial Committee for hearing or consideration any such matters whatsoever'.

mind. In the immediate term, Denison had already turned to solving what he perceived as the problem of Algernon Montagu.[23] By the time these reports were put before the Executive Council, a significant series of events had begun and concluded at a breakneck pace.

1. Amoving Montagu …

Denison initially sought to suspend Montagu from office. Section 1 of the Australian Courts Act 1828 provided that Supreme Court judges held office at pleasure. Montagu was Denison's first target. The suspension proceedings were, ostensibly, not taken in response to Montagu's judgment in *Symons*. The accusation was rather that Montagu had abused his judicial position to evade payment of a debt. The apparent nature of the abuse was that Montagu was refusing to pay various debts, that such debts could be recovered thorough litigation only in an action before the Supreme Court, and that because 'the Court' had to consist of two judges – of whom Montagu was one – the case could not proceed. Pedder had indeed issued a judgment to that effect.[24]

There seems little doubt that Montagu, who lived in perpetual financial embarrassment, was seeking to evade his obligations. Nor was this the first time. Several years earlier, the then Secretary of State for the Colonies had written to Denison's predecessor as Lieutenant Governor, Eardley-Wilmot, to instruct the Lieutenant Governor to order Montagu either to pay the debt or take a leave of absence so that debt proceedings could be brought against him.[25] Montagu had an apparently well-founded reputation as a man who did not take his financial obligations very seriously.[26] Montagu had also consistently provoked concerns about his conduct on the bench. On 29 December 1843, Eardley-Wilmot had written to the Secretary of State: 'I believe it has long been known to the Home Government as to this colony, that Mr Justice Montagu is accustomed to use violent and energetic language in court, being easily excited, and of an eccentric character'.[27]

Those concerns did not however surface in the suspension proceedings. Additionally, the particular complaint about debt now being aired had been

[23]Official records (mostly held in PRO CO 280/223 and 280/224) relating to issues discussed here are in Commons, *Montagu*. The CO records are mostly in handwritten form; the Commons papers are in typescript. Others are in House of Commons Papers, *Correspondence Between Secretary of State for Colonies and Lieutenant Governor of Van Diemen's Land Respecting Taxation Ordinances Passed by Legislative Council*, 1849, no.240 (hereafter 'Commons, *Doubts Act*').

[24]In *M'Meehan* v *Montagu*, reported in the *Colonial Times*, 26 Nov. 1847, 2. No suggestion was raised that Pedder had acted improperly in doing so.

[25]Commons, *Montagu*, 5–7.

[26]See Bryan Keon-Cohen, 'Mad Judge Montagu: A Misnomer', 2 *Monash Law Review* (1975), 50, at 51–52, 56 and 67.

[27]Commons, *Montagu*, 5. A *Colonial Times* leader (28 December 1847, 2) touched on both points but also commended Montagu on his legal knowledge and his speedy despatch of judicial business. It nonetheless concluded that Montagu's efforts to evade his debts rendered him unfit for judicial office.

investigated by Denison just days before *Symons* was decided; at that point Denison thought no action was warranted. The complaint then suddenly acquired a thitherto unappreciated potency immediately after *Symons* was issued. Prima facie the proceedings focused solely on the debt issue, but press reports indicate a widespread belief in the colony that Denison's real motive was to punish Montagu for his Dog Act judgment and to free up his place on the Court for a more politically pliant incumbent.[28]

Denison pursued the suspension in practice as a matter for the Lieutenant Governor in Council, although *strictu sensu* it was a decision he could have made alone. The Executive Council invited written submissions from Montagu's creditors (and their lawyers). Montagu was offered the opportunity to make his own written submissions, but his request for an oral hearing was refused.

In lengthy sessions on 29 and 30 December 1847, the Executive Council reached the decision that Montagu's suspension would be justified. But at this point, the ground suddenly shifted. Rather than seek to suspend Montagu from office, Denison sought to *amove* him. From Denison's perspective, the rationale for the shift sems to have been that while he qua Lieutenant Governor could take the initial decision to suspend Montagu, Montagu's dismissal consequent upon suspension was, per section 1 of the 1828 Act, a matter for the imperial government. Montagu's suspension per se would not remove him from office; and Denison it seemed was keen to place Attorney-General Horne in the Court's second seat.

The Colonial Leave of Absence Act 1782[29] was one of several measures Edmund Burke promoted to reduce corruption, nepotism and inefficiency in the government service.[30] The Leave of Absence Act was directed primarily at the (to modern eyes extraordinary, but to late eighteenth-century eyes quite commonplace) practice of people being given lucrative colonial offices and then delegating the carrying out of official tasks to a person of their own choosing, sometimes without even setting foot in the colony concerned.[31] Section 2 – a verbosely drafted provision – provided that:

> Governor and Council may amove Officers for Neglect of Duty
>
> II. And be it further enacted by the Authority aforesaid, That if any Person or Persons holding such Office, shall be wilfully absent from the Colony or

[28] See for example the *Launceston Examiner,* 5 Jan. 1848, 6; *Hobart Town Advertiser*, 4 Jan. 1848, 2; *The Courier*, 5 Jan. 1848, 2; and the *Cornwall Chronicle,* 29 Jan. 1848, 2.

[29] 22 Geo. III c.75.

[30] 'Reduce' being a relativistic concept. Burke had no scruples about appointing his family and friends to government posts which were effectively sinecures.

[31] On Burke's reformist legislative agenda see Frederick Lock, *Edmund Burke, Volume 1: 1730–1784*, Oxford, 2008, ch.13: Stanley Ayling, *Edmund Burke: His Life and Opinions*, London, 1988, 110–117. Burke's thinking is perhaps best explained by his letter to the Marquis of Rockingham (the then Prime Minister) of circa 5 April 1782, reproduced in John Woods, *The Correspondence of Edmund Burke: Volume 4 July 1778–June 1782*, Chicago, 1963, 433–434.

> Plantation wherein the same is or ought to be exercised, without a reasonable Cause to be allowed by the Governor and Council for the Time being of such Colony or Plantation, or shall neglect the Duty of such office, or otherwise misbehave therein, it shall and may be lawful to and for such Governor and Council to amove such Person or Persons from every or any such Office: And in case any Person or Persons so amoved shall think himself aggrieved thereby, it shall and may be lawful to and for the Person or Persons so aggrieved to appeal therefrom, as in other Cases of Appeal from such Colony or Plantation, whereon such Amotion shall be finally judged of and determined by his Majesty in Council.[32]

The attraction of amoval from Denison's perspective was that Denison and the Executive Council could dismiss Montagu from office, thereby creating a vacancy on the bench, to which Denison could appoint a new judge, although per section 1 of Huskisson's Act any such appointment would be provisional until such time as approved by the Queen. Whether the shift in strategy was entirely Denison's initiative, or was rather put to him by one or both of the law officers, is not clear.

The path towards Montagu's amoval rather than suspension was eased by an 1846 Privy Council 'judgment' concerning a New South Wales Supreme Court judge, *Willis* v *Gipps*.[33] Gipps, the Governor of New South Wales, had amoved Willis following repeated complaints from parties who had appeared before him over his judicial conduct. The 'judgment' label is used guardedly, in part because the 'court' included a non-lawyer, William Gladstone, then Secretary of State for the Colonies, but primarily because (as was then often the practice in the Privy Council) the decision was barely reasoned. Willis' counsel made extensive and eminently credible submissions that Burke's Act was not intended by the legislators who enacted it in 1782 to embrace judicial offices and could not be read as if it did. The Privy Council simply concluded without explanation that the Act did apply to judges. It also concluded, again without reasons, that the complaints raised against Willis provided grounds for amoval. Willis succeeded in his appeal on procedural fairness grounds, because Gipps had given him no opportunity to respond to the complaint against him before the amoval was effected.

On 30 December 1847, having received advice from the Law Officers that Montagu's conduct towards his debtors was 'misbehaviour' in the section 2 sense, all members of the Executive Council concluded that amoval was appropriate.[34] Waverers from Denison's preferred path were evidently

[32]The reference to 'Council' in section 2 is to a colony's Executive Council, not its Legislative Council. There is little legislative history to clarify whether Burke (or other members of either House) had judges in mind when passing the bill.

[33](1846) 5 Moo PC 379. On the amoval power's use in the Australian colonies see generally 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. Denison regarded *Gipps* as a 'lucky precedent' (Denison, *Varieties*, vol.1, 73–74).

[34]Commons, *Montagu,* 15–19.

swayed by the point that in his written defence Montagu had made assertions concerning his readiness to pay the debt that the Executive Council considered untrue, which 'falsehoods' were regarded as adding further and egregious dimensions to Montagu's misbehaviour. Some Council members initially expressed unease that proceedings should shift from suspension to amoval without giving Montagu a further opportunity to state his case. The colonial Law Officers advised that further proceedings were unnecessary.[35] Nonetheless on 31 December the Council drafted Montagu a letter telling him that he would be amoved; 'unless you shall show cause to the contrary before 12 o'clock on Wednesday next, the 4th January 1848', a delay which the letter explained was attributable solely to the Council's decision to seek Montagu's amoval rather than simply him being suspended by Denison.[36] However, in response to that draft, Denison again presented the Council with advice from the then Solicitor-General that a new hearing was not required. A majority of the Council accepted that advice; the final decision to amove Montagu was made on 31 December.[37]

That draft amoval notice had also originally contained several additional paragraphs specifying the detailed charges against Montagu. But when Montagu subsequently asked Denison for a thorough listing of the actions which constituted the 'misbehaviour' in issue, for copies of any documents which the Legislative Council had relied upon and for a record of all 'the minutes or observations made thereon'.[38] Denison refused to specify the charges and to provide copies of the Council minutes.[39]

Montagu immediately intimated that he would challenge his amoval before the Privy Council under the appeal procedure in the 1782 Act,[40] and made plans to return promptly to London. His departure was overlain by farce of a nature which suggests that his removal from the bench – if effected in quieter constitutional times – might have been no bad thing. In a letter to a friend written on 31 January, Denison's wife recorded:

> Judge Montagu was very near not being able to go home after all, for the day before the ship was to sail his butcher seized upon him for the payment of a debt. The judge's brother came here with the modest request that the Executive Council would pay the debt, so as to allow him to go. This, of course, was declined, as Government money could not be applied to paying a man's private debts; but W [Denison] gave him £20 out of his own pocket for the purpose, and some other gentlemen subscribed likewise; and so the debt was paid, and the judge is gone![41]

[35]Commons, *Montagu*, 15–18.
[36]PRO CO 280/223, 513; Commons, *Montagu*, 19.
[37]PRO CO 280/223, 514; Commons, *Montagu*, 21.
[38]Letter of 26 January 1848; PRO CO 280/223, 513–514.
[39]PRO CO 280/223, 514.
[40]Montagu's petition to the Privy Council and related documents are at PRO CO 280/224, 49–55.
[41]Denison, *Varieties*, vol.1, 79–80.

Denison sent a despatch to Earl Grey on 17 January 1848 to explain his actions towards Montagu.[42] The despatch contains a compendious collection of the written exhibits that had been before the Executive Council, which prompted Denison to begin his own account with the observation that: 'I shall therefore limit myself to a brief abstract of the facts'. That 'brief abstract' ran to twenty-nine double-sided foolscap handwritten pages. It made no mention of *Symons*.[43]

Montagu's dismissal brought an immediate benefit for Attorney-General Horne, who Denison appointed to the Supreme Court's now vacant second seat. Press reports aired the view that Horne would be simply a conduit for Denison's preferred views on all 'constitutional' legal issues.[44] Horne had also acquired a considerable reputation for shirking his own financial obligations, a matter which prompted some sarcastic press comment given the supposed basis for Montagu's amoval.[45] The new judge was swiftly into action, and with perhaps an eye on rebutting any charge that he was simply the Lieutenant Governor's man, pursued a distinctly pro-defendant line in his first list of criminal sittings.[46] The knock-on effects of Horne's promotion were advancement for Valentine Fleming from Solicitor-General to Attorney-General and the appointment of one Francis Smith as Solicitor-General.[47]

Rumours also swirled in the colonial press that Denison would appoint a third judge to create a judicial majority to overcome Pedder's anticipated continued adherence to the logical consequences of his *Symons* judgment. The presumption aired in press and public circles – and evidently also by Denison and the Executive Council[48] – was that the colony's lower courts would refuse to apply all statutes tainted by section 25 invalidity, that they would also find for the claimant in actions seeking repayment of 'invalid' fees, and that any government appeal against such judgments to the Supreme Court would fail because the Court would divide one to one on the issue.[49] However Denison chose not to seek a third judge. Getting rid of Pedder altogether was his preferred solution.

[42]PRO CO 280/223, 405 et seq; Commons, *Montagu,* 5 et seq.
[43]Denison seemingly doubted the adequacy of the case against Montagu. On 23 January 1848 he sent a further despatch listing all the previous occasions – beginning in 1829 – when Montagu's conduct attracted official disapproval: Commons, *Montagu*, 46.
[44]*Colonial Times*, 7 Jan. 1848, 2; *The Courier*, 8 Jan. 1848, 2; 19 Jan. 1848, 2.
[45]See the comment in the *Colonial Times*, 7 Jan. 1848, 3.
[46]See the summary of cases reported in the *Launceston Examiner*, 12 Jan. 1848, 5.
[47]Smith emigrated to Van Diemen's Land as a child. He returned to England to attend University College, London and read for the bar before beginning practice in Van Diemen's Land. He subsequently became the colony's Premier and then Chief Justice (J.M. Bennett and F.C. Green, 'Smith, Sir Francis Villeneuve (1819–1909)', *Australian Dictionary of Biography*. Available online at: https://adb.anu.edu.au/biography/smith-sir-francis-villeneuve-4603 (accessed 3 May 2024)). He was an unsuccessful competitor for the defence brief in *Symons* (Loveland, 'Dog Act – Part One', 181).
[48]Minutes of the Executive Council, 4 Jan. 1848 in Commons, *Montagu*, 62–63.
[49]*Colonial Times*, 7 Jan. 1848, 2.

2. … and not amoving Pedder

Denison's 17 January 1848 despatch concerning Montagu's amoval made no reference to (significant) events which had by then occurred with respect to Pedder's position as Chief Justice. The Lieutenant Governor had it seemed determined also to remove Pedder from the bench. But while, if only ostensibly (and quite implausibly), *Symons* had played no role in amoving Montagu, the judgment and its broader implications were candidly in the forefront of Denison's actions towards Pedder. In a (soon to be written) series of addresses to the Legislative Council and despatches to the Imperial government, Denison reported himself as being extremely perturbed by the judgment in several significant respects. These were in essence a reiteration of the adverse consequences submissions made by Horne before the Supreme Court and repeated by both Horne and Fleming in their respective December opinions.

The first concern was of a relatively narrow fiscal nature. Invalidation of the Dog Act would apparently deprive the colony of some £3000 in annual revenue from total government revenues recorded in the 1847 Financial Abstracts of just £135,000. Denison did not explain how he arrived at that (prima facie preposterously high) £3000 figure. Licence revenues to that point lay in the hundreds rather than thousands of pounds,[50] and since a new section 25 compliant Act might be enacted quite soon there was no reason to anticipate any long-term loss of revenue.[51]

Denison's broader fiscal concern was that *Symons* would lead the Court to find that other revenue-raising statutes were invalid because of non-compliance with section 25. He had commissioned the then newly appointed Solicitor-General – Francis Smith – to identify Acts which might fall into this category.[52] The Solicitor-General's report of 17 February 1848 noted fifteen such measures – among them the Auctioneers Act, the Pawnbrokers Act, the Restdown Ferry Act and the Stagecoach Regulation Act. Smith apologized for the haste with which he had compiled his list, and expressed uncertainty as to its accuracy.[53] There is at least one omission of relevant legislation,[54] and Smith made no attempt to marry his identified statutes with the fiscal consequences of their invalidation. Some of those

[50]The estimates for 1847 record £366 of Dog Act licence revenue: *VP 1847–1848*, item 10.

[51]A suitably amended bill was already in circulation (Loveland, 'Dog Act – Part One', 183). An amended Act could not be passed immediately because the Council was still suspended pending Imperial government approval of Denison's 'new' appointees (Loveland, 'Dog Act – Part One', 180). Once the Council convened, there was not even any obvious impediment to enacting such legislation with retrospective effect, although that would likely have prompted Morgan or others of Dennison's opponents to begin legal action contending that retrospectivity was invalid for repugnancy in the section 21 sense.

[52]Commons, *Doubts Act*, 4–5.

[53]Ibid., 5.

[54]The Kangaroo Act is not included in the list. Like the Dog Act, the Kangaroo Act imposed a licencing requirement and licences had to be purchased (see Loveland, 'Dog Act – Part One', 176).

consequences were likely trivial.[55] In fiscal terms, much the most important statute identified was the 15 per cent import duties legislation, but it seems unlikely that this Act breached section 25.[56] Denison was nonetheless greatly worried that the invalidation of those statutes would have further undesirable consequences for the colony's financial stability. All those Acts could be put on a sound section 25 footing through subsequent re-enactment as and when the Legislative Council reconvened, again with the possibility that such curative measures could be retrospective rather than merely prospective in effect.

Still more broadly, again in the fiscal sense, Denison raised the spectre that if Montagu's 'restrictions' analysis was correct, then other revenue-raising statutes might also be void for non-section 25 reasons. The Solicitor-General's report placed another dozen or so Acts in that category. These adverse fiscal consequences were exacerbated by a fear that *Symons* would prompt myriad restitutionary actions in the lower courts by litigants seeking to reclaim various fees paid under Acts which might now be held void.[57]

Denison's alarm about losses of revenue shaded into a more pervasive worry about governmental paralysis. The ratio of *Symons* appeared to be that an Act which breached section 25 was invalid entirely, not simply to the extent of its tax-levying provision. Repugnant sections could not be severed from a colonial statute's text, leaving any non-tax raising provisions in place. Section 22 credibly lends itself as readily to a severability as to a void *in toto* analysis, but the point seems not to have been recognized either by counsel or the Court in *Symons*.[58]

All of these difficulties, it seemed to Denison, could be resolved by easing – and if not by easing than by ejecting – Pedder from the bench. But Pedder presented Denison with a more formidable obstacle than Montagu. While he had acquired a reputation as a slow, indecisive judge,[59] no questions were ever raised as to his personal integrity, whether as to his judicial conduct or his financial or social dealings.

The Chief Justice stoutly (and very publicly) resisted Denison's initial suggestion (made on 4 January 1848)[60] that Pedder take a leave of absence while

[55]The 1847 Financial Abstract recorded £9500 revenue from licences to alcohol sellers: £342 for licences from 'Hawkers, Carriers and Butchers'; £217 under the Port Act; £33 from the Stagecoach Act; £180 from pawnbrokers; and – with meticulous attention to detail – £10 from steamboat licences.

[56]See Loveland, 'Dog Act – Part One', 22, n105.

[57]Denison to Grey, 18 February 1848, in Commons, *Montagu* 52, 55–56. Minutes of the Executive Council, 7 January 1848, in Commons, *Montagu*, 65: 'The Colonial Secretary lays on the table a letter from the Collector of Customs, enclosing eight notices of action against the Government for the recovery of monies levied under the authority of three Colonial Ordinances'.

[58]Fines levied under the Dog Act would not be a tax. But fines were contingent upon the defendant not having a licence, which were a tax, so it is plausible to assume that severability could not operate in respect of the Dog Act or any other statute which created sanctions for non-compliance with licence requirements.

[59]John Michael Bennet, *Sir John Pedder, First Chief Justice of Tasmania*, Sydney, 2003, 70–77.

[60]Denison to Pedder, 4 Jan. 1848, in Commons, *Montagu*, 63; Pedder to Denison, 5 Jan. 1848, in ibid., 64.

his judgment in *Symons* was referred to the Privy Council.[61] That suggestion was made in a letter to Pedder from Denison which, referring to the Law Officers' opinions of December 1847, included the following passages:

> [T]he effect [of *Symons*] is represented to be to unsettle the whole law of the colony as contained in the colonial statute book.
>
> The Law Officers have also demonstrated that the same decision involves a usurpation of authority over the other branches of the constitution of the colony, as illegal as it is disastrous.[62]

Whether Denison genuinely failed to appreciate that a Law Officer's opinion could at most suggest a judgment (which was subject to appeal) was erroneous – but could in no sense *demonstrate* that point – or he simply chose to ignore that basic legal principle is unclear. Either way, Denison then – on 8 January 1848 – initiated amoval proceedings against Pedder, on the twin basis (mutually contradictory perhaps) that Pedder had shown himself incompetent both in failing to certify the Dog Act under section 22 and in concluding in *Symons* that the Supreme Court could and should invalidate the Act.[63]

Denison and the Executive Council refused Pedder's request that he be permitted to argue his case in person before the Executive Council.[64] Pedder subsequently made extensive written submissions in defence of his behaviour, and unsurprisingly attracted substantial press and public support for his position, both because – in the narrow sense – he was widely regarded, unlike Montagu, as a man of great personal integrity, and – more broadly – because Denison's conduct was seen as improper attack on the constitutional principle of the independence of the judiciary.[65]

Pedder's position was that he had given due consideration to the question of whether the Dog Act should be subject to a section 22 repugnancy certificate when it was referred to him. He did not then identify any constitutional difficulty. He did not appreciate until the matter was fully argued in court that the Dog Act could not be reconciled with section 25. He seemed to take as read that the Supreme Court had the power to invalidate the Act in those circumstances:

> What does the case amount to? Simply this. That I was of one opinion with respect to the operation of the Act of Council before I heard argument

[61] It seems unlikely that Denison ever sincerely expected to follow that course. Had Pedder taken a leave of absence, Denison would have been empowered by section 1 of the Australian Courts Act 1828 to appoint a temporary replacement to the bench.
[62] Commons, *Montagu*, 63.
[63] Ibid., 65–66.
[64] 10 January 1848; ibid., 66–67.
[65] Morgan was a major force on this point, co-ordinating a (very well attended) public meeting on 15 January 1848 at which castigating Denison on grounds of constitutional principle was the main business: *Britannia*, 20 Jan. 1848, 2.

> upon it, and of another opinion after I heard such argument … [T]his affords no presumption of negligence on my part: if it does, it will follow that every man who changes his opinion must be taken to have formed such opinion carelessly and negligently.[66]

Sufficient members of the Executive Council were persuaded by Pedder's argument (and influenced perhaps by press and public criticism) to conclude on 10 January 1848 that amoval was not justified. The conclusion was however conveyed to the Chief Justice in what can best be described as a grudging manner. While Pedder's defence was taken by the Council to be an adequate answer to the charge: 'it by no means exonerates him from all blame. Ignorance of the law is never a justification, even when pleaded by the most illiterate; it is at best only an excuse'.[67] The official report of his exoneration sent to Pedder reeked of insincerity: 'It is gratifying to his Excellency and Council to be enabled, after a careful perusal of the above answer, to record their unanimous opinion that his Honour is not guilty of the neglect of duty so charged against him'.[68] Pedder therefore remained firmly in office. And with what Morgan and his supporters might have regarded as a delicious irony, the Chief Justice was promptly to find himself exercising the section 22 'legislative' power which had not been deployed over the Dog Act.

IV. Aftermaths: Colonial Legislation

Almost simultaneously with the failure of his attempt to amove Pedder, Denison received confirmation of the formal approval from the imperial government of his Legislative Council appointments.[69] The Council could once again sit, and 'remedial' legislation could therefore be enacted. Denison's solution to the presumed problem of Pedder's continued occupancy of a seat on a two man court was (the lengthily and grandly titled) 'An Act To Remove Doubts Respecting The Validity And Legality Of Acts Of The Lieutenant Governor And Legislative Council Of Van Diemen's Land', which was eventually passed in the Legislative Council on 7 February 1848 (hereafter 'Doubts Act').[70]

The Act's preamble spanned several pages, and was in effect a restatement of Denison's unsuccessful submissions in *Symons* v *Morgan*. The Act had only one substantive section, the most significant parts of which were found in its last few lines. These followed the statement that any measure

[66]Pedder to Denison, 20 Jan. 1848, in Commons, *Montagu*, 71–72.
[67]Executive Council, 21 Jan. 1848, in Commons, *Montagu*, 73–74.
[68]Ibid., 74.
[69]Minute of the Executive Council (undated, but likely 11, 12 or 13 January 1848) at Commons, *Montagu*, 68. On the significance of the issue see Loveland, 'Dog Act – Part One', 178–180.
[70]The Act is available online at: https://www.austlii.edu.au/cgi-bin/viewdb/au/legis/tas/num_act/aatrdrtvaloaotlalcovdl11vn11263/ (accessed 3 May 2024).

enacted by the Legislative Council which had not been certified as repugnant by the Chief Justice per section 22 of the 1828 Act:

> shall be deemed and taken to have been and to be and shall be from the dates respectively at which the said Laws and Ordinances respectively provide either expressly or impliedly for their coming into operation valid and binding Laws and Ordinances to all intents and purposes whatsoever *any repugnancy or supposed repugnancy of such Laws and Ordinances or any or either of them to the said herein before recited Act or to the said Charter or Letters Patent or any Order in Council issued in pursuance thereof or to the Laws of England in any wise notwithstanding*. (Emphasis added)

Section 1's final clauses amounted in effect to claims by Denison and the Legislative Council both that, narrowly, they were competent (with retrospective effect) to overturn the Supreme Court's judgment in *Symons* v *Morgan* and (very) broadly, that they were at liberty to depart both from imperial Acts in general and the repugnancy provisions of section 21 of the 1828 Act in particular.

The Doubts Act had its first reading on 26 January 1848. Second reading then followed on 2 February 1848, when the Legislative Council divided nine to five in support of the bill.[71] The bill then went immediately into committee. At third reading on 7 February, Pedder put forward an amendment to remove the bill's retrospective effect, but that was defeated by eight votes to six.[72] The unamended bill then passed by an eight to six majority.[73]

Pedder's legislative role was not exhausted by this defeat. On 21 February the Chief Justice – unsurprisingly – exercised his section 22 duty to certify the 'Doubts Act' as repugnant. Pedder's reasoning was succinct. Since *Symons* had held that the Court could invalidate Acts repugnant to the 1828 Act, an Act of the Council which purported to empower the Council to enact repugnant legislation was: 'an enactment directly repugnant to the said Act of Parliament'.[74]

Denison had already sought opinions from Attorney-General Fleming and Solicitor-General Smith as to whether Pedder's certification could and should be overridden.[75] Fleming's opinion grudgingly conceded that *Symons* was 'law' – albeit not 'good law' – until the Privy Council or Imperial Parliament reversed it.[76] That proposition was uncontentious. But Fleming then offered a poorly explained third option: 'The Council may not

[71] *Hobart Town Gazette*, 8 Feb. 1848, 130; and PRO CO 280/224, 257. The records do not identify the voters nor recount any debate.
[72] PRO CO 280/224, 257–258. The 'yeas' and 'nays' are again not identified. Denison recorded Pedder as being 'violently opposed' to the bill: Denison to Grey, 18 Feb. 1848, in Commons, *Montagu*, 57.
[73] Denison to Grey, 18 Feb. 1848, in Commons, *Montagu*, 57.
[74] *VP*, 6 March 1847–1848, 44–46; Commons, *Doubts Act*, 2. It seems likely that Pedder would have made a repugnancy certification even if his 'no retrospectivity' clause had been accepted.
[75] Fleming and Smith to Denison, 25 February 1848, in Commons, *Doubts Act*, 3. See also the contemporaneous press account in *The Courier,* 8 Mar. 1848, 2.
[76] Fleming and Smith to Denison, 25 February 1848, in Commons, *Doubts Act*, 3.

reverse, although it may alter, the law laid down by a decision of the Court; it may enact that the principle of such a decision shall not be any longer the law'.[77] What Fleming appeared to mean here was that section 22 provided the roundabout means to achieve this end. *Symons*, he suggested, had created an 'emergency … pregnant with danger to the best interests of the community' which readily justified the override of Pedder's repugnancy certification.[78]

Fleming perhaps overstated the gravity of the 'emergency' triggered by *Symons*: '[f]or the effect of the decision is to open all Ordinances [*sic*] of the Council to question and argument at any time; thus rendering such Ordinances [*sic*] dependent for their obligation, not on their own intrinsic sanction' – and here Fleming seemed to denounce both Pedder and Alfred Montagu – 'but upon the impression which the mind of the Judge may happen to receive from the subtle arguments (and too often the sophistical casuistry) of the advocate'.[79] Fleming concluded with a casual swipe implying that Alfred Montagu qua counsel was 'dishonest'. Smith's brief had evidently been to identify (again) all of the colonial revenue-raising Acts which might be held invalid if the Doubts Bill was not passed, a task he discharged with melodramatic allusion to the apparently apocalyptic governmental consequences that would otherwise result.[80]

The Law Officers' advice evidently sufficed for Denison's purposes. The official proceedings of the Legislative Council record an eight to five vote supporting Denison's proposal that Pedder's section 22 certification should be overridden and the Doubts Act kept in force.[81] If legally illiterate, Denison's conduct was nonetheless politically astute, insofar as the audience to which he was primarily playing appeared to be the imperial government rather than the colonial press.[82] As section 22 required, Denison sent (on 18 March 1848) Pedder's reasons for certification to the imperial government.[83] They were then in effect shelved to gather dust, with the result that the Doubts Act remained valid in the colony, pending the Queen's decision on the matter; a decision which it seemed that her Ministers were in effect preventing her from making. Howell's account suggests that the Imperial government considered the Doubts Act ultra vires the Legislative Council, but overlooked that illegality in the interests of political expediency:

> [Earl] Grey had helped maintain the absurd pretence that the colonial legislature could definitively give validity to Acts embodying provisions which the

[77]Ibid.
[78]Ibid., 4.
[79]Ibid., 3.
[80]Ibid., 4.
[81]On 10 March 1848. Denison's (very brief) proclamation of the override is reproduced in *The Colonial Times*, 22 Feb. 1848, 2.
[82]As recorded in a letter from Denison's wife (*Varieties*, vol.1, 81–82).
[83]Commons, *Doubts Act*, 1.

> Imperial Parliament had defined as being beyond the power of the Legislative Council to enact.[84]

An amended Dog Act was introduced in April 1848.[85] The 1848 Act's preamble expressly stated that the 1846 Act was repealed. Given the judgment in *Symons* that there was no longer any 1846 Act to repeal, the 1848 measure offered a clear indication that Denison and the Legislative Council were refusing to accept that the judgment was correct. The 1848 Act made no reference to *Symons*; the preamble merely recited the standard formula that it was 'expedient' to repeal the earlier statute.

The 1848 Act repeated much of the 1846 legislation. But there were two notable addenda. Section 15 included the proviso that: 'no conviction under this Act shall be removed by writ of certiorari or otherwise to the Supreme Court'. In section 16, we find what seems to be an obvious if *sub silentio* acceptance by Denison that *Symons* was correctly decided: 'All fees and sums received under the authority of this Act … shall be exclusively applied to the paving, lighting, repair, maintenance and improvement of the streets and roads [of the towns or districts where the fine was levied].' The section 25 problem was therefore removed, and there is no obvious basis to think that – going forwards – the 1848 Act would not be legally effective.[86] That it would also be politically very unpopular was similarly not in doubt.

V. Aftermaths: The Imperial Government's View of Denison's Behaviour

Denison had sent explanations (and defences) of his actions towards Pedder and in promoting the Doubts Act to the then Secretary of State for the Colonies in February 1848.[87] He reiterated and endorsed his law officers' criticism of *Symons*, and their predictions as to the systemically damaging effects it would have on the colony's governance. Denison expressly disavowed any suggestion of a lack of integrity on Pedder's part, but nonetheless accused him of dereliction of duty in failing to have certified the Dog Act under section 22:

> [I]t was evident that the Judge had not certified against the Act on the score of repugnancy; it was also evident, that he had notwithstanding, decided that the Act was illegal for that repugnancy; the fair inference therefore was, that in not

[84] Peter A. Howell, 'The Van Diemen's Land Judge Storm', 2 *University of Tasmania Law Review* (1966), 253, at 262–264.
[85] The Act is reproduced in full (save for its number) in the *Hobert Town Advertiser*, 28 Apr. 1848, 4.
[86] Similarly, the Kangaroo Act was amended in 1849 (13 Vict No.7) to provide that all licence fees be used to maintain roads in the colony, although a no certiorari clause was not added.
[87] PRO CO 280/224, 97–139; Commons, *Montagu*, 52 et seq; Commons, *Doubts Act*, 1–2. Also published verbatim in the *Launceston Examiner*, 13 Dec. 1848, 4.

> certifying he had neglected his duty, and although the omission arose from another cause, and the Chief Justice was entitled to the benefit of that plea, yet he was by no means exonerated from all blame, as ignorance can never be pleaded as justification; it is at best an excuse.[88]

Denison seemed not to appreciate that he was making himself a hostage to fortune here. Should it transpire that *Symons* was correctly decided, it would of course be for him rather than Pedder that 'ignorance can never be pleaded as justification'.

Montagu, in contrast, Denison condemned as – personally and professionally – both incompetent and dishonest.[89] The Lieutenant Governor also asserted, optimistically perhaps, that his actions were supported by respectable public opinion in the colony, characterizing press opposition to his conduct as the mere personal bias of assorted newspaper editors.

If Denison had anticipated Imperial approval of all of his actions he was to be disappointed. Denison's despatch to Grey was made available to the press. Grey's reply (on 30 June 1848)[90] – which Denison received in mid-November 1848 – was not. Had it been widely and promptly publicized, Grey's despatch may have made Denison's position quite untenable as it contained a trenchant condemnation of Denison's behaviour towards Pedder and towards more abstract notions of the rule of law and separation of powers. The reply followed promptly upon – and reflected closely in substantive terms – an opinion written for Grey by Herman Merivale (a senior official in the Colonial Office) of 19 June 1848.[91] Merivale was himself a lawyer, having practiced at the bar and held judicial office before beginning his civil service career. There is no indication in the Colonial Office records that he sought the views of the Imperial Law Officers before drafting his opinion.

Merivale was not greatly concerned with the – to him – narrow legal issue of whether the Dog Act was repugnant to the 1828 Act. He suggested without explanation that it perhaps was not. That was one of: 'two questions of great nicety and difficulties raised in the action' – and here taking something of a swipe at Huskisson, Forbes, Stephen and the legislators who approved the

[88]Commons, *Montagu,* 57.

[89]Opinions will likely vary on whether – in general – Denison's despatch shared those characteristics. On one point however it clearly did. Denison claimed he had not appealed *Symons* to the Privy Council because there was Privy Council authority that appeals would not be entertained on cases involving such small sums. The colony's Charter of Justice did identify a presumptive £2000 minimum for an appeal (Available online at: https://www.foundingdocs.gov.au/item-sdid-71.html (accessed 3 May 2024)). But this was only a presumption, and the case Denison cited (*In Re Sherwin* (1844) 4 Moo PC 311) contained a short judgment in which the only basis for refusing permission was that the case concerned a dispute of fact. As Lord Brougham put it in *Sherwin* – in terms obviously applicable to *Symons*: '[i]f you could show some important question was to be determined, that might furnish a ground' (ibid.). Denison could also have sought to have the matter referred via the procedure created in section 4 of the Judicial Committee Act 1833.

[90]PRO CO 280/224, 147.

[91]Ibid., 141.

1828 Act – 'in consequence of the wording of an extremely ill-drawn Act of Parliament'.[92] The second question, on the significance of section 22, Merivale eventually decided was an entirely red herring, of no relevance if a repugnancy certificate had not been issued. But Merivale appeared to think that the two underlying legal questions were neither 'nice' nor 'difficult'. If the Dog Act was repugnant, it was void. And it was entirely proper for the Supreme Court to have adjudicated that matter:

> The question therefore, nakedly, was this: The [1828] Act directs the Council to pass laws in a certain specified manner: they pass a law which disobeys the injunction: Does the Queen by allowing the law make it valid, and, therefore, pro tanto repeal the [1828] Act itself? I think she cannot: and, therefore, on this point agree with the Judges.[93]

Merivale offered no authority to support that proposition: perhaps because he could not find any; perhaps because he considered the proposition too obviously 'correct' to require authority; or perhaps because his primary concern was not with what had been done by Pedder and Montagu in court, but what had been done by Denison in the Executive Council and the Legislative Council: 'It is with very unfeigned regret that I must say I cannot but think Sir William Denison has been misled by his sense of the exigencies of the service into a singularly unfortunate course'.[94]

Denison's effort to amove Pedder on the basis that Pedder had changed his mind as to the legality of the Dog Act was seen as substantially undermining the independence of the judiciary in the colony. That lawyers – and especially judges – might alter their opinions on particular legal questions, especially in the light of such opinions being tested in litigation, was an entirely normal occurrence:

> It is scarcely necessary to add, that all independence and honesty on the part of the Bench would be at an end, if they were prevented from thus retracing their steps, not merely by false shame, but by actual fear of punishment.[95]

Merivale considered that Denison and his Law Officers were labouring under a 'misapprehension … as to the relative position of the Government and the Bench'.[96] Denison's evident supposition that the Supreme Court was in some sense the constitutional inferior of the Executive and Legislative Councils was wholly misplaced, as was the equally evident assumption that the colony's Lieutenant Governor and law officers had the power to determine the content of the law. Merivale was particularly appalled in this regard by: 'such insults (as they must have been considered) to the Judge

[92]Ibid., 142.
[93]Ibid., 143.
[94]Ibid.
[95]Ibid., 144.
[96]Ibid., 144.

as the letter of 4th January, where Sir W. informed him that: "the Law Officers have demonstrated that his judgment was illegal!"'.[97]

Merivale was similarly concerned by Montagu's amoval, suggesting in effect that Denison's account of this matter was wholly dishonest:

> It appears that the proceedings in this [Pedder's] case, and those against Mr Justice Montagu, were so nearly contemporaneous, that it will not be possible to answer those who choose to contend that the Governor[*sic*] was influenced in punishing Mr Montagu by the device of getting him out of the way.[98]

As to the Doubts Act as a means to resolve the financial problems which *Symons* threatened to create, Merivale was distinctly unimpressed:

> According to my hasty impressions, the Ordinance now forwarded appears to me quite valueless, inasmuch as if the Queen had no right, by allowing the former Ordinance [ie the Dog Act], to repeal the 9th Geo IV, her allowing this Ordinance can make no difference, and the same question must recur in another form.[99]

Grey's despatch to Denison adopted Merivale's critique in both substance and style. Grey declined to express any opinion of the adequacy of the Doubts Act as means to resolve the controversy. He also foreswore offering any view on the 'correctness' of *Symons* v *Morgan*.[100] He had no such reticence over some of Denison's subsequent actions. The despatch was written as a means of: 'conveying to you the expression of my ~~serious dissatisfaction with~~ great regret at the course which you have adopted towards Chief Justice Pedder'.[101] That 'serious dissatisfaction'/'great regret' had both a particularistic and systemic dimension.

Grey followed Merivale in observing that it would be commonplace even for the most 'able and conscientious lawyer' to change his mind on points of law after hearing argument. For Denison to have sought Pedder's removal on that basis was 'preposterous'. What Denison had done was 'a mere abuse of power … It is impossible to conceive that any other result [Pedder's 'acquittal] could have followed'.[102]

This criticism was elided with the observation that Denison had failed to understand the nature of the relationship between the executive and the Court:

> [A judge's] exposition of the law on a point duly submitted to him must not be questioned, save only by the appellate tribunal above him … To quarrel with

[97]Ibid., 144–145, original emphasis.
[98]Ibid., 146.
[99]Ibid., 145, original emphasis.
[100]'On the law involved in these several propositions you will understand me to abstain from all remark, ~~except that I cannot share in the confident opinion that you express that the decision of the judges was glaringly erroneous~~' (ibid., 147), the deletion appears in Grey's original draft in the Colonial Office files.
[101]Ibid., 148, deletion in original.
[102]Ibid., 150.

> his judgment because the Government finds it inconvenient – above all to inform him, as you did … that the Law Officers, his subordinates, 'have demonstrated that his decision is illegal' is wholly to misunderstand the character and importance of the Judicial Office.[103]

The despatch then turned to the systemic implications of the amoval attempt: '5. If such a proceeding was unjustifiable as regarded the judge himself, it was I am sorry to add, calculated to produce far more serious mischief as regards the community'.[104] It could hardly be expected that litigants – or the wider public – would have any confidence in the proper administration of justice if it was known that that a judge who produced a decision with which the Lieutenant Governor disagreed might find himself facing amoval. This was a problem that Grey characterized in graphic terms: 'The independence of the Bench has been menaced by the Executive Government: and it would be difficult to restore in the public mind the necessary confidence in the former, or respect for the latter.'[105]

In a contemporaneous letter written to a friend, Denison's wife recorded that Denison read the despatch out aloud to her, evidently anticipating that it would end with his dismissal.[106] But, to the Denisons' great relief, Grey's final words conveyed a quite different sentiment, suggesting that, for the Imperial government, questions of political expediency were overriding matters of legal principle: 'I am fully satisfied that it was a mistake of judgment only in a crisis of very unusual embarrassment, and that my confidence in your zeal and ability in carrying on the public service will continue to be given to you without reserve'.[107]

Denison evidently thought it politic to keep Grey's criticism a secret matter. The (very slim) record of the *Votes and Proceedings of the Legislative Council* in 1849 contain several addresses by the Lieutenant Governor; there is no mention anywhere of Grey's despatch, still less of its censorious character. Denison did however promptly pass the despatch to Pedder, requesting that he keep it confidential, which it seems Pedder did.[108]

Sir John Pedder remained on the colonial bench, without being embroiled in further acute controversies, until retiring though ill-health in 1854. Contemporaneous press coverage spoke in strongly approbatory terms of his time as Chief Justice, with his behaviour during the Dog Act controversy

[103]Ibid., 152.
[104]Ibid.
[105]Ibid., 151.
[106]Denison, *Varieties*, vol.1, 97–98.
[107]PRO CO 280/234, 154.
[108]Evidently on 13 Nov. 1848 (Denison, *Varieties*, vol.1, 98–99). It seems plausible that Denison passed the despatch to Pedder in the role of an intermediary from the Imperial Government, as Grey's despatch expressed a hope (PRO CO 280/224, 152) that Pedder would display: 'a temperate disposition and a readiness to forget his own personal feelings when the Public Service is concerned. But in order that he may be thus induced to act, I am constrained to remind you, that he must be treated with the deference which is due to his station'.

attracting particularly positive evaluation.[109] His post-*Symons* relationship qua judge with Denison appears to have been cordial both personally and professionally. Denison indeed wrote of him in warm, even glowing terms, on Pedder's retirement.[110] That retirement coincided with some members of the Legislative Council becoming aware of Grey's 1848 despatch. A Mr Gregson moved a motion in the Council to have the despatch laid before it, and by extension made available to the press and public.[111] After a heated debate, Gregson's motion was defeated by ten votes to five.[112]

Denison's conduct towards Montagu and Pedder was debated in the House of Commons on 12 July 1849. The formal subject of debate was a motion that Grey's censure of 30 June 1848 be laid before the House (and in consequence made public both in Britain and the colonies). The motion was stoutly resisted by William Gladstone, again Secretary of State, who seemed to hold Denison in high regard. The then government's position was neatly expressed by Lord John Russell, who:

> did not think, considering the difficulties which the Governor of that colony had already to contend with, that any good would result from making public a document which might have the effect of lowering the Governor in the eyes of the colonists, and subjecting him to their criticism and censure. The better course, therefore, was not to lay the despatch on the table.[113]

Denison was perhaps fortunate to have retained office given the severity of Grey's criticism. Not only Denison's display of a distinct lack of respect for the rule of law and independence of the (colonial) judiciary not lead to his recall, it also seemed to have little negative effect on his future career. He was subsequently (1855) appointed Governor of New South Wales, a significantly more important position than he previously occupied, and then briefly occupied the most important of colonial offices as (in 1863) Viceroy of India.

VI. Conclusions and Continuations

The specific legal imbroglio over the Dog Act and the other Van Diemen's Land statutes which might have been caught in its section 25 wake was eventually resolved by Imperial legislation, almost it seems as a footnote within a statute which dealt in broad terms with the next phase of the Australian colonies' constitutional development. The Australian Colonies Constitution Act 1850 made provision for the creation of mixed (elective and appointive)

[109]See for example *The Courier*, 28 Aug. 1854, 2 (reprinting verbatim an article from the *Sydney Morning Herald*); *Colonial Times*, 21 Apr. 1854, 2: *Cornwall Chronicle*, 27 Dec. 1854, 4.
[110]Bennett, *Pedder*, 111–112.
[111]Gregson was one of the original 'Patriotic Six' who had opposed attempts by Denison's predecessor to increase government revenues, see Wilfred Townsley, *The Struggle for Self-Government in Tasmania*, Tasmania, 1951, 79–86. On the Patriotic Six see Loveland, 'Dog Act Part – One', 178.
[112]*The Courier*, 24 Sept. 1854, 2.
[113]*Hansard*, series 3, vol. 107, col. 261, 12 July 1849 (HC).

Legislative Councils in each colony, which Councils would be empowered (by section 32) to create legislatures composed in accordance with their own preferences to exercise the powers currently possessed by the existing Legislative Councils.[114] Section 26, tacked towards the end of the statute, addressed and overturned the invalidation of the Dog Act by the Supreme Court in *Symons* v *Morgan* and did so with retrospective effect. Section 26 also removed the possibility that any other tax-raising statute might be found invalid because of the Legislative Council's failure to comply with section 25 of the 1828 Act:

> [S]o much of the said Act of the Ninth Year of the Reign of King George the Fourth as requires that the Purposes for which every such Tax or Duty as therein mentioned may be imposed, and to or towards which the Amount thereof is to be appropriated and applied, shall be distinctly and plainly stated in the Body of every Law or Ordinance imposing every such Tax or Duty, shall be repealed; and no such Law or Ordinance made or to be made by the Governor and Council of Van Diemen's Land, and enrolled and recorded in the Supreme Court of the said Colony, shall be or deemed to have been invalid by reason of such Purposes not being so stated in the Body of such Law or Ordinance.

There was nothing in the Act's text to suggest that *Symons* had been wrongly decided either on the Dog Act point or – and this the much more significant issue – with respect to the Court's jurisdiction vis a vis 'invalid' Acts more generally. To the contrary, section 26 can credibly be taken as a tacit statutory acceptance that the Supreme Court had been correct both in concluding that the Dog Act was repugnant to the 1828 legislation and in asserting that the Supreme Court had the jurisdiction to invalidate the Act for that reason. However, the imperial Parliament evidently saw no need to take similarly pre-emptive precautions against the possibility that the Supreme Court might in future invoke Montagu J's wide-ranging 'restrictions' analysis to invalidate other Van Diemen's Land legislation.

The more striking omission in the 1850 Act – given the ferocity of the dispute over the issue in Van Diemen's Land and its likely relevance in other colonies as well – is the imperial Parliament's continuing failure to enact in express terms the principle that colonial courts (or even some of them) were either obliged or empowered to assess the validity of colonial legislation and grant appropriate remedies where such invalidity was made out. Section 14 – applicable to Van Diemen's Land, South Australia, Western Australia and Victoria – did expressly state with respect to the soon to be re-created colonial legislatures' lawmaking competence: 'Provided always, that no such Law shall be repugnant to the Law of England'. But the

[114]13 & 14 Vict. c.59.

Act said nothing at all concerning the role of colonial courts in applying and enforcing that repugnancy principle.

That failure continued – on the part of both the imperial Parliament and Australian colonial legislatures in 1854–1856 – when the colonial constitutional systems designed by the Legislative Councils in the colonies (now to include Queensland which was carved out of New South Wales) under the powers granted by the 1850 Act came into being. But neither did any of that imperial legislation expressly preclude such jurisdiction. This lacuna might again be taken as suggesting that the imperial Parliament and government were approving *sub silentio* Pedder and Montagu's assertion of an invalidity jurisdiction as a principle of general application to the colonies.

In Van Diemen's Land – now renamed as Tasmania – the powers granted to the Legislative Council under the 1850 Imperial Act were exercised in an 1854 statute, 'An Act to establish a Parliament in Van Diemen's Land And to grant a Civil List to Her Majesty'.[115] The 1854 Act created a new bi-cameral legislature,[116] which was to have the same legislative competence as its predecessor. Denison was still in office as Lieutenant Governor when the 1854 Act was passed. He made no attempt to use Tasmania's new constitutional settlement to try to remove or restrict the *Symons* jurisdictional principle which he had so fiercely deprecated and intrigued against less than ten years earlier.

That omission was a generic one in the Australian constitutional context. It is perhaps therefore unsurprising that successive imperial governments in the late 1850s and early 1860s were assailed by a plethora of Australian controversies, primarily from South Australia and Queensland, in which Supreme Court judges either held colonial legislation invalid or indicated extra-judicially that they might do so. Those judicial opinions were in turn met with a series of imperial statutes retrospectively validating the 'invalid' colonial statutes in issue.[117] Those imperial statutes seem implicitly to accept that such judicial invalidation was entirely proper, notwithstanding its lack of an express jurisdictional base. Politicians in South Australia took a quite different view, and petitioned the imperial government asking

[115]18 Vict. No.17; (original emphasis).

[116]Which would be comprised of the (now renamed) Governor, a House of Assembly and Legislative Council (s.1), the House and Council being elected through a very restrictive franchise (ss.6 and 17). The default mode of legislating would be by bare majorities in each chamber plus the Governor's assent.

[117]The cases and controversies are discussed in Ian Loveland, *McCawley and Trethowan: The Chaos of Politics and the Integrity of Law*, 2 vols., Oxford, 2021, vol.1, 68–100. In respect of South Australia see also John Williams, 'Justice Boothby: A Disaster That Happened', in H.P. Lee and George Winterton, eds., *State Constitutional Landmarks*, Alexandria, 2007, 21; D.B. Swinfen, *Imperial Control of Colonial Legislation 1813–1865*, Oxford, 1970, ch.11. On Queensland see George Shaw, 'Filched from Us: The Loss of Universal Manhood Suffrage in Queensland 1869–1863', 26 *Australian Journal of Politics and History* (1980), 372.

for imperial legislation confirming that colonial courts did not have, and never had, any invalidity jurisdiction in respect of colonial legislation:

> Relieve us from suffering under this enormous evil unknown to England's laws, to wit the power claimed by our Judges, to declare laws passed by the Parliament of this Province illegal.[118]

The controversies prompted a steady stream of opinions from the imperial government's law officers.[119] For present purposes, three of those opinions merit attention, as much for the issues they neglect as for those which they address, in casting light on the imperial government and Parliament's understandings of the invalidation principle.

The first opinion appeared in March 1862.[120] The suggestion had been raised by Boothby J in South Australia that the colony's newly fashioned legislature did not actually exist at law, since several of the colonial statutes creating it and subsequently altering its composition had not been reserved for the Queen's assent as section 32 of the 1850 imperial Act had required. The law officers considered that analysis to be correct, a conclusion which is really no more than an application of the repugnancy principle. The law officers therefore recommended that new imperial legislation, again with retrospective effect, was required to resolve the particular problem which South Australia was facing. The perhaps more significant points, rather hidden away in the opinion, are that the law officers accepted Boothby J's suggestion that South Australia's legislature (and by implication all the Australian legislatures – and perhaps those in other colonies as well) had the power to attach special conditions (Montagu J would perhaps have styled them as 'restrictions'!) to the ways in which colonial statutes dealing with specified matters could be enacted and also accepted that a failure to comply with such conditions would render any subsequent statute invalid.[121] But what the law officers did not do was engage in express terms with the question of whether *colonial judges* could give effect to that invalidity principle in their judgments.

[118] *South Australian Register*, 26 Oct. 1864, 2.

[119] The original documents are found in *Law Officers Opinions vol.1, 1860–1865. Miscellaneous, no. 54. Part I*, PRO CO 885/10 (hereafter 'Law Officers, *Opinions*'; for each citation, the first listed author is the then Attorney-General, the second is the then Solicitor-General). The titles to the opinions given here are those found in the table of contents at the start of vol.1, the opinions themselves have no titles. Palmerston's Whig administration was in government in this period.

[120] William Atherton and Roundell Palmer, 'Draft Act for the purpose of curing the irregularity of the previous Legislature in connexion with the election of members of the Legislature', no.108, 25 March 1862, in Law Officers, *Opinions*. Roundell Palmer, who became Solicitor-General in 1861 and then Attorney-General in 1863 on Atherton's resignation, subsequently played a significant role as Lord Selbourne (he was appointed Lord Chancellor by Gladstone in 1872) in developing the principles of colonial constitutional law; see especially his Privy Council judgment in *R* v *Burah* (1878) 3 App Cas 889. Palmer was a member of the Commons in 1849 when Denison's conduct was debated. He did not speak in the debate and Hansard does not reveal if he was present and/or voted for or against the motion.

[121] The condition here being a colonial statute requiring certain bills to be reserved for the Queen's assent rather than being assented to by the Governor in the ordinary way.

Just two weeks later, the law officers returned – at least in part – to that hitherto unanswered question. Their opinion entitled 'Desirability of dismissing Mr Boothby, Puisne Judge of the Supreme Court, and method of such dismissal' was written in response to judgments and extra-judicial comments made by two of South Australia's three Supreme Court judges.[122] The *Opinion* was styled as answers to questions posed by Sir Frederic Rogers, a senior Colonial Office official. For present purposes, questions and answers 1 and 2 are of most interest:

> Questions
>
> 1. Is the Supreme Court of South Australia bound or at liberty to enquire into the validity of an Act passed by the Colonial Legislature, and assented to, either by the Queen in Council, or by the Governor on behalf of Her Majesty; and in the case of an Act assented to by the Governor, does the fact that such an Act has or has not been left to its operation by Her Majesty make any difference respecting its validity?
>
> 2. Supposing the Judge at liberty to pronounce on the validity of a Colonial Act, is he to pronounce such an Act invalid, if its provisions are, in his opinion, inconsistent with those of an Imperial Statute, intended by the British Parliament to extend to the colonies in general, or to South Australia in particular?
>
> Answers
>
> 1. The powers of the Colonial Legislature being conferred by Act of the Imperial Parliament and limited by the same enactment, and so valid or invalid, as they keep within or transgress the prescribed limits, the Supreme Court of South Australia is, in our opinion, bound (and certainly at liberty) to satisfy itself of the legal validity of any Act of the Colonial legislature, the provisions of which it is called upon to administer …
>
> 2. We answer this question in the affirmative, (as in the case supposed an unquestionable 'repugnancy' would be apparent between the English law and the colonial enactment); and the Colonial Legislature is debarred from the enacting of law being thus repugnant (13th and 14th Vic., c. 59 [the 1850 Act], s.14.)

That Rogers raised these matters is presumably an indication that there was no obvious authority on or answer to the questions. But while evidently admitting of no doubt on the point, as exercises in legal reasoning Atherton and Palmer's answers are feeble phenomena. They are wholly devoid of any authority, whether statutory or judicial, imperial or colonial, in nature. They offer no view on whether their conclusions are of general applicability to all colonies or just to South Australia. Nor do they advance any justification

[122]William Atherton and Roundell Palmer, 'Desirability of dismissing Mr Boothby, Puisne Judge of the Supreme Court, and method of such dismissal', no.110, 12 April 1862, in Law Officers, *Opinions*.

drawn from constitutional theory or practice for the conclusion that they offer. *Symons* v *Morgan* is conspicuously absent from the opinion as a matter of form; but in terms of substance, it is on all fours with the law officers' conclusions.

In November 1862, the law officers were drawn into a similar controversy then ongoing in Queensland.[123] In this opinion, the law officers offered a response to various issues that were then raising serious dispute between the Queensland government and its (at that time one judge) Supreme Court.[124] The particular concern was whether Queensland's Supreme Court could invalidate colonial legislation on the basis that members of the Legislative Assembly who had approved its passage were not qualified under imperial and colonial legislation to take their seats. Atherton and Palmer concluded – again without offering any legal authority for the assertion – that such matters could not found a basis for invalidation. But that was an exception to a more generally applicable – and once again wholly unreasoned and unexplained – but now it seemed quite orthodox principle:

> The Judge of the colony is no doubt empowered, sitting and acting judicially in matters properly before him, to form and express an opinion as to whether de facto enactments of the Colonial Legislature have or have not the authority of law.

The Queensland controversy was resolved by the emollient diplomatic intercessions of the colony's new Chief Justice.[125] But notwithstanding the law officers' repeated approval of the principle that Pedder and Montagu had asserted twenty years earlier, and the enactment of imperial legislation to validate the apparently invalid colonial Acts, many of South Australia's politicians were loath to accept such a judicial power existed. This ongoing dispute prompted a further opinion from the imperial law officers in September 1864.[126] This opinion again took the form of answers to a series of questions from a senior Colonial Office civil servant, on this occasion Thomas Elliot, who had been in post as an under-secretary since 1847. However, rather than confine themselves to an analysis of South Australia' particular constitutional woes, Elliot, Palmer and Collier used the opinion to advance reform proposals which they suggested should apply throughout the Empire; and they did so in a fashion which appeared to take entirely as read a colonial court jurisdiction to invalidate laws inconsistent with either imperial or colonial statutory requirements.

[123]William Atherton and Roundell Palmer, 'Petition by Mr Lutwyche, Judge of the Supreme Court in Queensland, against the confirmation of an Act recently passed and which he argues is invalid', no.144, 19 November 1862, in Law Officers, *Opinions*.
[124]The one judge being Albert Lutwyche.
[125]See Loveland, *McCawley and Trethowan*, vol.1, 79–80.
[126]Roundell Palmer and Robert Collier, 'Questions raised as to the validity of certain laws consequent upon the judgment of the judges of the Supreme Court of South Australia in the case of Auld v Murray', no.275, 28 September, in Law Officers, *Opinions*.

Elliot's first question concerned the meaning of 'repugnancy' in the imperial statutory context, and elicited from the law officers the proposal that imperial legislation be enacted which limited that concept to imperial statutory provisions applicable to the colony. Neither orders in council nor 'the law of England' should in future constrain colonial legislative autonomy.

Questions (and answers) two to four were concerned with the circumstances in which colonial legislation would be invalid if it had been enacted without the support of such enhanced majorities as might be required by either imperial or colonial law. In Palmer and Collier's view, any such 'Act' would be void both *ab initio* and in its entirety. Moreover, it seemed that the law officers' presumption of an invalidation jurisdiction in such circumstances was now one that embraced a judicial duty and not simply a power, as had been suggested in the April 1862 and November 1862 opinions:

> When the power of legislation with regard to a particular subject is given, not to a simple majority, but to certain specified majorities in one or both branches of the Legislature, it is evident that such majorities are a *conditio sine qua non* to its exercise; and consequently, that *the Judges are not at liberty to treat any law on that subject as valid* if it appears, either on the face of the law itself or by other proper evidence, that it was not, in fact, passed by the required majorities.[127]

The final question asked whether Boothby's views on the invalidity of certain South Australian Acts were correct, and if so whether curative imperial legislation was required. Palmer and Collier considered some, but not all of Boothby's views to be well-founded. Retrospective imperial legislation would therefore be needed to regularize the legal basis of South Australia's Parliament, which legislation the law officers thought could advantageously be extended to all colonial legislatures to confirm that they were competent to regulate their own respective constitutions in a fashion which would enable their courts to invalidate 'Acts' which did not conform to whatever manners or forms of legislative lawmaking which those constitutions might require.

That 1864 Report led promptly – and it seems directly – to the enactment of the Colonial Laws Validity Act 1865. The Act passed through Parliament with no substantive discussion at all in either house, and is in broad terms a faithful application of the suggestions made by Palmer and Collier in their 1864 opinion, which in turn endorsed and built upon the earlier opinions that the law officers had offered from 1862 onwards. The broad thrust of those opinions, and of the 1865 Act, was that any imperial legislative intervention in these colonial controversies was directed towards confirmation –

[127]Ibid.; emphasis added.

not alteration – of the already existing legal position. And there was it seems therefore no need for the imperial Parliament expressly to spell out that colonial courts presumptively possessed an invalidation jurisdiction in such circumstances. The point was evidently too obvious to need stating.

Yet forty, fifty and sixty years later, the Australian colonial courts again found themselves embroiled in a series of hard-fought constitutional cases in which the application and even the existence of such a jurisdiction were central issues.[128] The continued absence of any explicit statutory approval of the *Symons* principle continued to provide fertile ground for argument about its applicability. *McCawley* and *Trethowan* were eventually argued before the Privy Council. In both cases the Privy Council – like the law officers of the 1860s – proceeded on the unspoken and unexplained presumption that the invalidation jurisdiction was an implicit ingredient of the colonies' constitutional recipes; providing, at long last, a formal if not well reasoned 'authority' in vindication of Pedder and Montagu's boldly innovative conclusion.

Pedder and Montagu had seemed notably sure of their footing on what was – when *Symons* was argued – untravelled legal ground. In taking those steps, they gave a tangible existence to what to that point in British colonial legal history could at best be seen as an implicit presumption, passed over even by eminent legal commentators. The judges' roles as legal pioneers therefore perhaps merit rather more acknowledgment and appreciation than they have hitherto received.

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[128]The cases being respectively *Cooper* v *Commissioner of Income Taxes* [1907] St R Qd 110 (Queensland Supreme Court), [1907] 4 CLR 1304 (High Court of Australia); *Taylor* v *Attorney General* [1917] St R Qd 208 (Queensland Supreme Court), (1917) 23 CLR 457 (High Court of Australia), [1918] St R Qd 194 (Privy Council permission to appeal application); *McCawley* v *The King* [1917] St R Qd 62 (Queensland Supreme Court), (1918) 26 CLR 9 (High Court of Australia, [1920] AC 69 (Privy Council); and *Trethowan* v *Attorney General for New South Wales* (1930) 31 SR NSW 183 (New South Wales Supreme Court), (1931) 44 CLR 394 (High Court of Australia), [1932] AC 526 (Privy Council). The Queensland cases are discussed sequentially at some length in Loveland, *McCawley and Trethowan*, vol.1, chs.7–11. *Trethowan* has received substantial academic analysis, e.g.: W. Friedmann, 'Trethowan's Case, Parliamentary Sovereignty and the Limits of Legal Change', 24 *Australian Law Journal* (1954), 103; Henry William Rawson Wade, 'The Basis of Legal Sovereignty', 13 *Cambridge Law Journal* (1955), 172; Jeffrey Goldsworthy, 'Trethowan's Case', in Lee and Winterton, *Landmarks*, 98; Ian Loveland, *McCawley and Trethowan: The Chaos of Politics and the Integrity of Law*, vol.2, Oxford, 2021.

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