Carriages and Scab: Elite Contention Against the Law in Nineteenth Century Tasmania

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> Can such violations of abstract justice and constitutional right, and of recognised fundamental principles of law, be perpetrated with impunity in the face of a community who are British subjects, and who fondly imagine that they inherit those constitutional rights and privileges conferred by Magna Charta - the Bill of Rights etc?[1]

Between the thirteenth and eighteenth centuries upper-class Englishmen, struggling to protect themselves from arbitrary conduct by the Sovereign, enshrined their rights and liberties[2] in symbolic documents like the Magna Carta and the Bill of Rights and made Parliament the champion of those rights and liberties. Crucial restraints on arbitrary power were the supremacy of the rule of law, the ability to seek redress for grievances in courts presided over by an independent judiciary, and the strength of local government in relation to the central state. To be sure the men of property, status, and wealth were the main beneficiaries of these developments and the Parliament they dominated at times threatened rights and liberties but by 1800 the tradition of the freeborn Englishman had undeniable rhetorical force and was an important rallying cry in the face

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1 *Examiner*, 1 January 1876, letter by Theodore Bartley.

2 R W Davis (ed), *The Origins of Modern Freedom in the West*, Stanford: Stanford University Press, 1995); J H Hexter (ed), *Parliament and Liberty From the Reign of Elizabeth to the English Civil War*, Stanford: Stanford University Press, 1992; J R Jones (ed), *Liberty Secured? Britain Before and After 1688*, Stanford: Stanford University Press, 1992; H T Dickinson, *Liberty and Property: Political Ideology in Eighteenth-Century Britain*, London: Methuen, 1979.

of continued oppression throughout Britain and its empire.[3]

Not surprisingly, the free settlers who wanted to create an Antipodean England in the penal colony of Tasmania (known as Van Diemens Land until 1855) brought with them and revered the traditions of the freeborn Englishman.[4] Although benefiting from generous land grants and free convict labour, free settlers emulated their forebears in resisting the Governor's arbitrary and unjust interference in their lives. Although they secured important hallmarks of the freeborn Englishman, such as their own courts and juries as well as a nominated Legislative Council, the Governor remained all powerful while convicts continued to be transported to Tasmania.[5] An anti-transportation movement emerged in Launceston to "demand all the rights and privileges of British subjects" and "the liberties of their country".[6] Through the organized resistance and united action of other colonies, the movement succeeded in ending convict transportation in 1853 and in securing self-government for Tasmania in 1855.

The coming of self-government did not signal the acquiescence of Tasmanians - certainly not those of the anti-transportation generation - in the actions of their bicameral Parliament. An elite of Northern landowners opposed government policies antithetical to their interests at every opportunity. They looked upon government as dominated by Southern merchants, professionals, and bureaucrats much as it had been during the dark days of Governors George Arthur and William Denison. The elite highlighted the unrepresentative character of Parliament (until 1870 only 11,971 men or 42.08 per cent could vote) to secure, sometimes successfully, democratic or populist support for their causes.[7] Unpopular laws ignited the flame of resistance and Northern landowners felt it their duty to defend perceived threats to rights and liberties. They believed that the principles of British law had been corrupted by Tasmania's bastardised form of parliamentary government and that therefore citizens were not

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[3] The extent to which the lower classes shared the rhetoric if not the benefits of the Ancient Constitution has been discussed in D Underdown, *A Freeborn People: Politics and the Nation in Seventeenth-Century England*, Oxford: Clarendon Press, 1997 and E P Thompson, "The Rule of Law in English History" (1979) 2 *Haldane Society Bulletin* 7-10; C Hill, *Liberty Against the Law: Some Seventeenth Century Controversies*, London: Allen Lane/Penguin Press, 1996; D Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales*, Cambridge: Cambridge University Press, 1991; A Atkinson, "The Free-Born Englishman Transported: Convict Rights as a Measure of Eighteenth-Century Empire" (1994) 144 *Past and Present* 88-115.

[4] S Morgan, *Land Settlement in Early Tasmania: Creating an Antipodean England*, Cambridge: Cambridge University Press, 1992.

[5] A Castles, *An Australian Legal History*, Sydney: Law Book Co, 1982.

[6] J West, *The History of Tasmania* (edited by A.G.L. Shaw), Sydney: Angus and Robertson, 1981, p 233, 241. First published in 1852; D Huon, "By Moral Means Only: The Origins of the Launceston Anti-Transportation Leagues 1847-1849" (1997) 44 *Papers and Proceedings* of the Tasmanian Historical Research Association 92-119.

[7] L Robson, *Press and Politics: A Study of Elections and Political Issues in Tasmania from 1856, When Self Government Came into Effect, to 1871*, MA thesis, University of Tasmania, 1954 p 301.

necessarily bound by the laws of a Parliament in which they had no faith.[8] Northern activists had no respect for the tyranny of fleeting parliamentary majorities. For them, Tasmanian law did not "imply Justice" and was often associated with its reverse.[9] As their forebears did under Robert Walpole, they were vigilant in their opposition to "legal tyranny" or "the introduction of oppression under the mask of legal forms of government."[10] They regarded the Supreme Court as an "inviolable bulwark against oppression from whatever quarter it might come."[11] Every Englishman regarded a Court of Law as the "palladium of his liberties, the protector of his life and property" and knew that he would receive justice at the hands of Judges, who were not the "creatures of this or that party."[12]

As the British politician Sir Charles Dilke noted, Tasmania was "cast in more aristocratic shape" than the other Australian colonies and a relatively small number of large landowners, the elite of the landed gentry, were tremendously influential in their local communities, where they controlled municipal councils and importantly were justices of the peace.[13] They were particularly sensitive to government attempts to weaken these two spheres of influence as well as attempts to impose taxes and to interfere with their property.[14] One individual, Theodore Bryant Bartley, was at the forefront of anti-government campaigns and personified the defence of traditional liberties, as the quote heading this article indicates. Born in Gloucestershire in 1803, Bartley arrived in Sydney in 1819 and was employed as Governor Macquarie's assistant secretary and tutor to his son.[15] In 1821 he visited Van Diemens Land with Macquarie, who gave him 500 acres near Launceston. After a period as Under Sheriff and as a public servant in Launceston, he became a successful farmer. He became a justice of the peace in 1832. Styled by some as "the self-constituted champion of oppression in every form", Bartley had begun his opposition to

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8 *Cornwall Chronicle*, 19 January 1874.

9 *Tasmanian Tribune*, 21 February 1874.

10 K Wilson, "A Dissident Legacy: Eighteenth Century Popular Politics and the Glorious Revolution" in Jones, *Liberty Secured? Britain Before and After 1688*, p 312.

11 *Examiner*, 9 July 1864, letter by "A Northern Magistrate", 4 March 1876; for a recent history of the Supreme Court see C Clark, *The Supreme Court of Tasmania:Its First Century 1824-1924* (edited by R Ely), Sandy Bay: University of Tasmania Law Press, 1995.

12 *Mercury*, 22 October 1868; on the supremacy of Judges in Australian history, see A Davidson, *The Invisible State: The Formation of the Australian State 1788-1901*, Cambridge: Cambridge University Press, 1991.

13 C Dilke, *Greater Britain:A Record of Travel in English-Speaking Countries During 1866 and 1867*, London: Macmillan, 1870, p 361; H Reynolds, "'Men of Substance and Deservedly Good Repute': The Tasmanian Gentry 1856-1875" (1969) 15 *Australian Journal of Politics and History* 61.

14 M Sprod, *Politics and Government Finance, Tasmania 1856-1880: A Study of Government Financial Policy as a Political Issue During the First Twenty Four Years of Self-Government in Tasmania*, Bachelor of Education dissertation, TCAE 1980, pp 87-92.

15 C E Vickers and Y Phillips, "Theodore Bryant Bartley (1803-1878)", *Australian Dictionary of Biography*, Melbourne: Melbourne University Press, 1966, vol. 1, pp 63-4;Y Phillips, *Bartley of Kerry Lodge: A Portrait of a Pioneer in Van Diemens Land*, Blackwall: The Author, 1987.

government heavy-handedness during the anti-transportation campaign when he became the Secretary of the Anti-Transportation League.[16]

After self-government began in 1856, Bartley assiduously defended property from government financial policies and never tired of writing letters to the press with the fanatical sermonising of a religious zealot (he was apparently an "evangelical Anglican").[17] He expressed his opposition in high principles, namely the rights of Englishmen to dispose of their property as they liked, but there was more than a whiff of self-interest in the various causes he espoused. Bartley refused to enter Parliament but was regarded as "member maker" for Launceston and the North and had great political influence.[18] For Bartley, resistance was good for the soul and the very struggle itself made rights and liberties more secure. In 1861 he headed a campaign to introduce the Torrens system to Tasmania, mainly for the benefit of large landowners.[19] In late 1867 he helped form the Association for the Repeal of Succession Duties to remove an "oppressive, injurious, and unjustifiable tax upon property and capital."[20] In 1872 he opposed the imposition of a property and income tax and in 1873 he was a leading proponent of resistance to paying the Launceston and Western Railway rate.[21] Debates over railway development poisoned politics and accentuated regional rivalries in the 1860s and 1870s.

Bartley was prominent in two other campaigns that form the subjects of this paper. In 1863 he began to fight for the repeal of the *Carriage Duties Act* and in 1870 formed the Anti-Scab Act Association to dilute the stringent provisions of the *Scab Act*. Even one of his enemies, James Whyte grudgingly (and disapprovingly) referred to Bartley as "the great Tasmanian knight of La Mancha", who wanted "to save the constitution and the birthrights of Tasmanians as Englishmen".[22] In contesting the right of government to pass such legislation in Police Courts, in Parliament, and in the Supreme Court, landowners like Bartley raised a number of constitutional and legal issues relating to the independence of the magistracy, the right of a citizen to disobey what he regards as an unjust law, the right of an accused citizen to be tried in a court of law, and the obligation of government not to pass oppressive or confusing laws.

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16 *Examiner*, 19 September 1876, letter by "Consistency"; Phillips, *Bryant of Kerry Lodge: A Portrait of a Pioneer in Van Diemen's Land* p 61; *Tasmanian*, 23 November 1878.

17 E A Beever, *Launceston Bank for Savings 1835-1970: A History of Australia's Oldest Savings Bank*, Melbourne: Melbourne University Press, 1972, p7; T Bartley, *The Financial Crisis in Tasmania and How to Meet it*, Launceston: Examiner 1872.

18 *Cornwall Chronicle*, 26 November 1876.

19 Phillips, *Bartley of Kerry Lodge: A Portrait of A Pioneer in Van Diemen's Land* pp113-15; S Petrow,"Knocking Down the House? The Introduction of the Torrens System to Tasmania" (1992) 11 *University of Tasmania Law Review* 167.

20 *Examiner*, 19 October 1867, letter by Bartley, 31 October 1867; *Launceston Times*, 15 November 1867.

21 S Petrow, "Resisting the Law: Opposition to the Launceston and Western Railway Rate 1872-1874" (1996) 15 *University of Tasmania Law Review* 77.

22 *Examiner*, 21 August 1875, letter by James Whyte.

Carriage Duties

On 15 July 1863 the Colonial Treasurer Charles Meredith introduced the Carriage Duties Bill to raise revenue by taxing carriages. Meredith did not intend to tax carts and carriages used for farming and trade but "varnished and ornamented vehicles - in fact those in which the rich man rides." Owners would only pay tax on two vehicles even if they owned twenty. Meredith thought this tax would add £1,750 a year to the revenue. The Attorney-General R. B. Miller pointed out that the bill did not go as far as the English Act, which taxed the horse and carriage, as they realized that in country districts horses were a major mode of transport. To avoid appointing an "army of tax-gatherers, the simple machinery of a licence", which could be paid by post, was introduced.[23]

Despite being a relatively innocuous tax, the bill was angrily received. William Sharland, representing the rural electorate of New Norfolk, argued that many people rode in carriages as "a matter of necessity, because they could not get about in any other way" and they would find the tax "extremely oppressive".[24] The tax was a way of gaining popularity by taxing the rich but the poor would be most affected. Pointing out the budget surplus, some thought this "class tax" unnecessary.[25] Others thought that if the money would be used for road purposes, imposing the carriage tax would have made more sense. At least three quarters of carriages were used for business purposes and it would be unfair to impose a £4 tax for a vehicle that was used for an occasional recreational drive on Sundays. The Assembly easily passed the bill.[26] In the Legislative Council opinion was more sharply divided and some amendments were made. Clergymen were exempted from paying and the tax was reduced to £2 for a four-wheeled carriage drawn by one horse.[27] Ultimately the Carriage Duties Bill was passed on the casting vote of the President.

The government had underestimated the extent to which people depended on carriages. Without railroads or other means of public conveyance, individuals were required to provide their own means of transport. Attendance at church and "social visiting between families in the bush" depended on the use of carriages but these diversions were threatened as few could afford to pay the tax. J.T. Livingston of Marydale thought that, although the *Carriage Duties Act* "may arrogate the stilted designation of *law*, it never can truthfully assume the sacred name of justice".[28] Along with other colonists, he claimed "a common right" to ask that every statute should be "characterised by justice".[29] It soon became clear that this

[23] As above.
[24] As above.
[25] As above.
[26] *Mercury*, 16, 18 July 1863.
[27] *Mercury*, 25 July, 6 August 1863.
[28] *Mercury*, 16 October 1863, letter by Livingston, emphasis in original.
[29] As above.

view was shared by many carriage owners, including magistrates, in northern Tasmania, who decided not to pay the carriage tax.[30] The magistrates, with Theodore Bartley in the lead, also believed the *Carriage Duties Act* had been defectively drafted, was difficult to interpret, and, until redrafted, was invalid.[31] The Attorney General refused to take Bartley's case to the Supreme Court to test its validity.[32] Some alleged that "a conspiracy" had been hatched by the magistrates not to try cases or at least to inflict the minimum penalty on offenders.[33] In February 1864 the Inspector of Police John Forster asked all municipalities to instruct their police forces to provide him with the names of carriage owners who had not paid the tax.[34] Only the northern Municipal Councils of Longford, Westbury, Deloraine, and Fingal refused.[35] As Forster had no statutory control over these police forces, he could do nothing. Already disaffected by the government's refusal to support railway development, the imposition of the carriage tax strengthened northern antipathy.

Convinced that they would not get a fair trial in the North, the Whyte Government decided to summon the most prominent defaulters to Hobart Town. On 11 May Stipendiary Magistrate A.B. Jones and two other magistrates W. Knight and Alfred Kennerley heard the proceedings at the Hobart Town Police Court.[36] W.L. Dobson appeared for the Crown. Dobson, who sympathized with the defendants, noted a resolution to resist the *Carriage Duties Act*. He believed it was the "duty of every Executive to take care that the law was not infringed", and that it was "the duty of every good citizen to obey the laws".[37] The minority had always to be bound by the majority as voted by the representatives in Parliament. If the defendants "disputed the law, that Court was not the place, nor were the means adopted the proper means to test the question". They should take "the proper constitutional steps" to obtain the repeal of the Act, but, while it remained on the statute books, it was their duty to obey it.

No defendants appeared in person but they were represented by their counsel Charles Rocher, who agreed that it was the duty of the Executive to enforce the law of the land.[38] But it was also the duty of the Executive "not to oppress or attempt to coerce persons if they thought they had a justifiable defence against any statute". Informations had been laid against seven northern magistrates yet the cases were tried in the South. The northern defendants did not "question the integrity of the southern magistrates, but certainly a more extraordinary proceedings was never heard

30 *Mercury*, 7 January 1864; *Hobart Town Advertiser*, 1 August 1864.
31 *Mercury*, 1 August 1864; *Cornwall Chronicle*, 6 August 1864.
32 *Cornwall Chronicle*, 18 May 1864.
33 *Cornwall Chronicle*, 14 May 1864, letter by "A Justice and Conservator of the Peace"; *Examiner*, 28 May 1864.
34 Tas, Parl, *Journal* LC [1864] Vol 10, Paper 43, *Carriage Duties Act*.
35 *Hobart Town Advertiser*, 1 August 1864.
36 *Examiner*, 12, 14 May 1864; *Hobart Town Advertiser*, 12 May 1864.
37 As above.
38 *Examiner*, 14 May 1864.

of". They regarded the tax as "obnoxious" and believed that they had "a just defence against the law". R.P. Adams, counsel for one of the defendants, bluntly questioned whether the Government had put "some sort of pressure on the Bench" to hear the cases so far from where the offence was allegedly committed.[39] Apart from the laying of informations, Jones denied having any communications with the government, adding that a magistrate could not refuse to hear a case when an information was laid.

Dobson and Rocher had agreed to state a case to the Supreme Court on certain defects in the *Carriage Duties Act*. When presenting his case, Rocher highlighted the major defect. Section 1 held that it was unlawful for anyone "to keep or use any carriage described in the schedule".[40] But the schedule containing the form of licence stated that the person must be the owner of the carriage. Therefore, Rocher submitted, the prosecution needed to prove that not only did the person keep and use the carriage but that he was also the owner. The Bench overruled this and the other objections. Only one defendant was found not guilty. That case was dismissed on proof that the carriage he used was licensed to his brother-in-law.

The proceedings outraged many in the North, the government being accused of reviving the Star Chamber.[41] But the government soon committed a more provocative act. Before the Supreme Court delivered its decision, the government erased from the Commission of the Peace the names of three of the recently convicted magistrates - H.B. Nickolls, George Gibson, and George Ritchie - for "wilful resistance to the law".[42] Attorney-General R.B. Miller justified their dismissal by asserting that they, as magistrates "placed in authority for the purpose of causing the laws to be respected by others, not only set an example of disobedience" by not paying the carriage tax, but also as municipal councillors prevented the Longford Municipal Police from providing the Inspector of Police with information on defaulters.[43] This conduct proved that they wilfully resisted the law and showed that they could not administer a law that conflicted with their "personal feelings" or they regarded as "obnoxious".

Affronted by this assault on their respectability and integrity, a large number of magistrates, many political opponents of the government, including Theodore Bartley, met at the Launceston Mechanic's Institute in May 1864.[44] Five resolutions, moved by magistrates who had paid the carriage tax, were passed on 27 May. The first resolution criticized "the unconstitutional course" of the government in instituting proceedings at

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[39] As above.
[40] As above.
[41] As above.
[42] Tas, Parl, *Journal* LC [1864] Vol.10, Paper 51, Carriage Duties Act: Correspondence in Regard to Prosecutions, pp 3-4.
[43] As above.
[44] *Examiner*, 28 May 1864; for an earlier meeting see *Examiner*, 19 May 1864; *Hobart Town Advertiser*, 31 May 1864.

Hobart Town against defendants living in the North for alleged breaches of the *Carriage Duties Act*. This action was contrary to the practice hitherto adopted in Tasmania of trying breaches of colonial law before magistrates in the district where the offence had been committed. William Archer said that they should resist any interference with "the rights and independence of the Magistracy".[45] W.P. Weston, a former Premier, objected in principle to moving the place of trial because it gave the Executive "the power of oppressing the poor man", who could not afford the expense of leaving his work and home.[46] If the magistrates had not enforced the law, thought R.Q. Kermode, then the government would have had grounds for changing the venue, but they had not been given the opportunity to try any cases.

The next resolution protested at the "highly contemptuous" attitude of the government towards the northern magistrates.[47] The government's "most oppressive and arbitrary" action was "fraught with danger to the community". In supporting the resolution, William Archer considered that, as a Warden of a municipality and therefore *ex officio* a magistrate, it was his duty to enforce the law, even when it was odious. But the Deloraine Council justifiably refused to provide the government with information as the municipal police were not appointed to collect taxes, but to conserve the peace, and followed the directions of aldermen, not the Inspector of Police or the Colonial Secretary. He would always resist turning constables into "common spies" of the government used for spying about sheds to see if poor men had taken their families to church in their carriages: to use the police in this way would "stink in the nostrils of the people".[48]

The third resolution censured the government for "the unconstitutional and unprecedented course of choosing their own tribunal ... combining the functions of judge and jury".[49] In future anyone "actuated by political, interested, or malicious motives" would make similar "encroachments upon the rights and liberties of the community". The fourth resolution criticized the dismissal of the three magistrates while the validity of their convictions was before the Supreme Court, especially as the cases had been referred to the Judges with the consent of counsel chosen by the Ministry. This "highly unconstitutional, arbitrary, and unjust procedure disregarded the universally established principle that no British subject can be dealt with as guilty of an imputed offence" until he had a chance to defend himself in court.[50]

The final resolution expressed the view that the sanction by the Governor of the government's action would result in "very serious conse-

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[45] *Examiner*, 28 May 1864.
[46] As above.
[47] As above.
[48] As above.
[49] As above.
[50] As above.

quences" for the colony.[51] The community looked to the Governor for protection against "all such arbitrary, unjust, and unconstitutional proceedings" by the Ministry. The government did not enforce the law impartially, claimed Richard Dry. They selected certain men to prosecute at Hobart Town and dismissed only three magistrates when others had acted no differently. It was no coincidence that these three men were opponents of the Ministry, which sought to place a "social stigma on their names".[52] Englishmen, said Dry, were accustomed to act by precedent. In the reign of Henry II the principle was established that "justice should be brought as near as possible to every man's door" and that principle had remained until the present day. Dry declared that it was their duty "to oppose such tyrannical and unconstitutional proceedings, and support the principles dear to them and all Englishmen". The meeting decided to ask the Governor to restore the names of Nickolls, Gibson, and Ritchie to the Commission of the Peace.

It would be surprising if these leaders and moulders of public opinion did not engender support for their cause. As W.S. Button and James Aikenhead of the *Examiner* attended the meeting, the support of that paper was a given. Indeed, the resolutions echoed *Examiner* editorials calling on all to assert "our constitutional rights", which "came to this colony with the first free settlers".[53] The *Examiner* held it was "the indefeasible right of every subject ... to dispute the validity of any law he conscientiously believes to be inoperative from inherent defects". The *Mercury*, not noted for its sympathy with northern concerns, thought summoning the defaulters to Hobart Town amounted to "State persecution", designed to "put a quietus on Sir Richard Dry and his railway project".[54] The dismissal of the three magistrates was a conscious insult by the Whyte Government to show who held power.[55]

But the North could not claim unanimous opposition to the carriage tax. During the meeting of magistrates some pronounced a contrary view and the government line was pushed hard by its northern organ the *Cornwall Chronicle*. The *Chronicle* and its correspondents denied that the magistrates were motivated by a desire to protect hallowed rights and liberties. Amongst the magistrates were twenty agitators who had been "the vilifiers and obstructives of every Government which had ever held power in Tasmania".[56] These "demagogues" opposed every method of raising revenue unless they were exempted. Their desertion from the duty to enforce law and order was a greater threat to individual rights and the principles of justice than their dismissal by the government. If they had not been dismissed, the result would have been "Anarchy, confusion, and

[51] As above.
[52] As above.
[53] *Examiner*, 19, 24, 31 May 1864.
[54] *Mercury*, 11 May 1864.
[55] *Mercury*, 19 May 1864.
[56] *Cornwall Chronicle*, 14 May 1864, letter by "A Justice and A Conservator of the Peace".

Lynch law".[57]

The *Cornwall Chronicle* thought the aim of "the clique, cabal, conspiracy, [or] confederacy", as they were variously known, was "to damage the Government in public estimation by forcing them to take the steps necessary for the enforcement of the *Carriage Duties Act*, and the vindication of the law".[58] But the *Chronicle* thought the resolute and impartial administration of the law would consolidate government support. Moreover, the rich refused to pay their taxes and thought that "wealth, station, official position, and political influence should exempt them from the common obligation of obedience to the law of the land".[59] The colony should be governed by the Ministry formed by the peoples representatives in Parliament and not by Justices who "wilfully and persistently resist" the laws passed by that Parliament.[60]

Both sides eagerly awaited the decision of the Supreme Court. On 2 July the Puisne Judge Sir Francis Smith, after consulting the Chief Justice Sir Valentine Fleming, dismissed three objections raised by Rocher as "untenable" and concentrated on the fourth objection that the person who kept or used the carriage should be proved to be the owner and that in six cases no evidence of ownership was given.[61] After criticizing "the loose and vague construction" of the *Carriage Duties Act*, Smith held that the word owner in the schedule meant proprietor. Even though contested by Dobson, he was bound to place "that construction upon the word which is most favourable to the public" by the maxim that "every charge upon the subject shall be imposed in clear and unambiguous language, and that any ambiguity shall be construed in favour of the public".[62] Thus the carriage duty was only payable by proprietors of carriages and by hirers for a year or more and, contrary to the decisions of the magistrates, in proceedings for penalties under the *Carriage Duties Act* the government had to prove ownership. The convictions in the six cases were quashed.

Both sides claimed victory. The pro-government *Hobart Town Advertiser* pointed out that Smith had "swept away" the objections of the defaulters which had questioned the validity of the Act.[63] Proof of ownership was a "matter of evidence" and the government should now seek fresh evidence against all defaulters. According to the *Examiner*, the Judges highlighted what "a shocking botch" had been made in drafting the *Carriage Duties Act* and vindicated the magistrate's decision in not enforcing defective legislation.[64] The decision encouraged the anti-carriage duty movement to bring their protest to Parliament. On 29 July Dry moved

[57] As above.
[58] *Cornwall Chronicle*, 14, 21 May 1864.
[59] As above.
[60] *Cornwall Chronicle*, 18 May 1864.
[61] *Mercury*, 4 July 1864.
[62] As above.
[63] *Hobart Town Advertiser*, 4 July 1864.
[64] *Examiner*, 2 July 1864 and 9 July 1864, letter by "A Northern Magistrate".

three resolutions in the Legislative Council. Dry held that it was "a principle of the British Constitution that the Law shall be administered with as little delay as possible" and that the case should be heard by "a competent tribunal" near to where the offence was committed.[65] The proceedings under the *Carriage Duties Act* did not justify abandoning this principle and moving the venue was an unwarranted censure of northern magistrates and was oppressive to the defendants. According to "the first principles of natural justice", no man should be condemned without explaining his point of view and the dismissal of the three magistrates without "an opportunity of being heard in their defence" was "not justified by law nor in accordance with usage".[66]

The Premier and Colonial Secretary James Whyte justified his government's actions. They allowed much time for payment so no one "could complain that the government were going to act in an arbitrary manner" and payment by post was encouraged. A notice in the *Gazette* warned carriage owners that defaulters would be prosecuted after one month. Further time was allowed after this deadline and then he instructed the Inspector of Police to seek information on defaulters. Whyte thought this was a "moderate request" by the central government to bodies receiving support from the general revenue. He agreed that delay in hearing cases should be minimised but not that cases should always be heard near to where the offence had been committed. It had occurred often in England and Tasmania to change the venue when "any great public excitement existed in any part of the country". As for the charge that the rights of "civil liberty had been infringed", Whyte quoted William Blackstone on the powers of the executive government. Blackstone laid it down as a "'principle that in the exercise of lawful prerogative, the sovereign is so far absolute that there is no legal authority that can either delay or resist him'".[67] Blackstone also asserted that "'civil liberty, rightly understood, consists in protecting the rights of individuals by the united force of society; society cannot be maintained, and of course can exert no protection, without obedience to some sovereign power, and obedience is an empty name, if every individual has a right to decide how far he himself shall obey'". Whyte denied the government had been partial in administering the law. They first selected "the most prominent resisters to show that" prominent "gentlemen, no matter what their private position in the community ..., must obey the law". The first duty of the Executive was to enforce the law. It was not contrary to usage to dismiss magistrates, as precedents had occurred in Tasmania, New South Wales, and England. Whyte repudiated the charge that the magistrates had been dismissed for political reasons. One of the dismissed magistrates had been a friend for

[65] Tas, Parl, *Journal* LC [1864] Vol 10, 29 July 1864, 43-4; *Mercury*, 1 August 1864.
[66] As above.
[67] As above; W Blackstone, *Commentaries on the Laws of England*, Chicago: University of Chicago Press, 1979, vol. 1, pp 243-4 (first published 1765-1769).

twenty years, whom he had helped get his name on the Commission of the Peace and was a supporter of the government. At the end of the debate lasting six hours, Dry's motion was lost on the casting vote of the President.

Continued opposition to the carriage tax failed to achieve anything of substance. On 4 August a bill to repeal the *Carriage Duties Act* on behalf of farmers living in distant parts of Tasmania was defeated in the House of Assembly.[68] The Governor's reply to northern magistrates gave little solace. He recognized "the weight which properly attaches to resolutions adopted by so many gentlemen of respectability and influence".[69] But, since the introduction of responsible government, the Governor had appointed and dismissed magistrates on the advice of the Ministry and he did not feel justified in ignoring that advice in the case of the Longford magistrates. Although the Whyte Government did not proceed with its threat to centralize the police, it did continue to prosecute defaulters.[70] In February 1865 a number of convictions, including of leading opponents Theodore Bartley and John Crookes, were obtained at the Launceston Police Office, demonstrating that northern magistrates were willing to convict under the *Carriage Duties Act*.[71] All pleaded guilty and claimed to have unintentionally neglected to pay the carriage tax.[72] This hardly seemed credible, as the *Gazette*, which published notices requiring payment, was sent to all magistrates and Bartley and his colleagues were magistrates. They were fined a nominal penalty of one shilling each with costs but the government announced it would impose the heaviest penalties on anyone who did not pay within the next ten days. These proceedings, thought the *Hobart Town Advertiser*, "will convince everybody that the law is to be universally enforced" and should remove the need for future prosecutions.[73] In September 1865 the Carriage Duties Amendment Bill was passed to clear away obstacles in the way of proving ownership and placed the onus on the defendant to prove that a carriage was licensed.[74]

Withal, government did not have things all its own way. The Treasury could not say who had failed to pay the carriage tax, as it had no means of establishing who owned carriages.[75] Differing interpretations of the *Carriage Duties Act* by the various rural benches meant that uniform administration was difficult to attain.[76] As time went on, it appears that evasion of payment became more common.[77] Under section 1 and the sched-

[68] *Mercury*, 5 August 1864.
[69] *Examiner*, 11 August 1864.
[70] *Mercury*, 2 August 1864.
[71] *Examiner*, 25 February 1865.
[72] *Hobart Town Advertiser*, 25 February, 1 March 1865.
[73] As above.
[74] *Mercury*, 16, 21 September 1865.
[75] Tas, Parl, *Journal* LC [1867] Vol 13, Paper 65, Carriage Tax Defaulters.
[76] *Mercury*, 29 September 1868, 24 August 1881, letter by "A Wheelbarrow".
[77] Archives Office of Tasmania ("AOT"), Treasury ("TRE") 1/1498; *Mercury*, 24 July 1879, letter by "Fair Play".

ule of the Act, a chaise cart used "truly and without fraud" for trade could be used to transport a family to church or for other purposes.[78] Many replaced their carriages with chaise carts, which they used for family matters but which sometimes carried a case of apples or a bag of potatoes. As the number of carriages declined after the introduction of railways, the revenue derived from the carriage tax seemed hardly worth the trouble.[79] In the first five years government collected an annual average of £1592; in the next five years £1184; and in the next five years £1178.[80] By 1880, according to one estimate, not one quarter of those liable paid the tax.[81] Finally, in 1882 the Carriage Duties Repeal Bill was passed.[82] The Giblin Government admitted that, not only was it "almost impossible" to collect the carriage tax, but that those who paid it also paid the property tax and deserved some relief.[83]

Scab

Throughout the Australian colonies, scab had been a troublesome disease for sheepowners affecting the lucrative wool trade and making consumers wary of eating diseased meat; stringent legislation was passed in New South Wales, Queensland, South Australia, and Victoria to stamp it out.[84] Although scab was rampant in Tasmania, sheepowners were tardy in dealing with it. They detested government interference with private property on their own farms, thought scab could not be eradicated in Tasmania's cold climate, and argued that rugged country prevented sheep from being collected together for dipping.[85] In 1848 Governor William Denison forced the enactment of a *Scab Act* but it provided no machinery and became a dead letter.[86] As a consequence, Tasmania, some claimed, was "tabooed among the sheepowners of the other Colonies, who dread even the very name of Tasmanian sheep".[87]

The severe depression of the 1860s forced some Tasmanian

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[78] *Launceston Times*, 6 May 1868.
[79] AOT TRE 1/1498, Mason to Colonial Treasurer, 25 May 1874.
[80] Tas, Parl, *Journal* LC [1870] Vol 16, Paper 39, Carriage Licences: Amount Received 1865-1869; Tas, Parl, *Journal* HA [1875] Vol 29 Paper 44, Carriage Licences: Return of Amounts Received 1870-74; Tas, Parl, *Journal* HA [1879] Vol 37 Paper 64, Carriage Licences: Amounts Received 1874-1878.
[81] *Mercury*, 20 January 1880, letter by "Nemo".
[82] *Mercury*, 2, 20 September 1882.
[83] *Mercury*, 20 September 1882.
[84] *Mercury*, 21 November 1863, 22 July 1869, letter by "Pastoral", 8 September 1869.
[85] *Mercury*, 8 September 1869; for the state of sheepfarming from mid-century see B V Easteal, *Farming in Tasmania 1840-1914*, M.A. thesis, University of Tasmania, 1971, pp 90-107, 184-202.
[86] 11 Vict. No. 4, Scab Act; Tas, Parl, *Journal* HA [1875] Vol 28, Paper 25, Conference of Inspectors of Stock: Report, p 27.
[87] *Mercury*, 11 May 1869.

sheepowners to consider measures for the eradication of scab to regain Tasmania's pre-eminent position in the colonial wool trade.[88] When Premier James Whyte, himself a sheepowner, introduced a Scab Bill in 1863, powerful Northern sheepowners, including Theodore Bartley, quickly denounced it and it was ultimately withdrawn.[89] But not all Northern wool kings were opponents. In 1868 George Gibson, now member for Ringwood, introduced as a private member the Scab Prevention Bill.[90] It imposed penalties for scabby sheep driven along a road, exposed for sale in markets, or found on neighbour's lands but again no Inspectors were appointed to enforce these provisions. The bill passed but did not come into operation until 1869.

Although James Whyte, now a private member, thought Gibson's Act was a sign that some sheepowners were willing to deal with scab, he doubted it would be "a workable measure".[91] Between parliamentary sessions he undertook to draft, with the help of the Attorney General, W.L. Dobson, a new bill based on his Victorian experience as a sheepowner and New South Wales and South Australian legislation adapted to Tasmanian circumstances. Whyte published a letter to sheepowners in all newspapers, pointing out the loss of £120,749 per annum in revenue caused by scab, and later circulated his new bill, asking for their comments.[92] The responses were more positive than he expected, including men of the calibre of the well-respected sheepfarmer Robert Clerke of Malahide, who put the loss at £145,676.[93] But most did not accept stringent legislation. Theodore Bartley and other sheepowners formed The Anti-Scab Act Association and sought to strike out "certain unconstitutional and vexatious clauses" and to retain the power of appeal against the decisions of magistrates.[94]

Correspondents to newspapers similarly attacked the bill. Some of the powers proposed for Inspectors, such as ordering the muster of flocks and enforcing the keeping of stock books, were "an invasion of the rights of Englishmen over their private property".[95] One correspondent "A.J.O." (presumably the Richmond magistrate and land nationaliser A.J. Ogilvy) thought the proposed statute would fail because of the "passive resist-

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88 *Mercury*, 14 September 1868, 11 May 1869, 24 May 1870; Tas, Parl, *Journal* HA [1868] Vol 14, Paper 72, Select Committee on Agricultural and Pastoral Depression: Progress Report and Evidence. This Committee reveals concern about the depression but cites fluke not scab as a contributory factor.

89 *Examiner*, 12 September 1863; Conference of Inspectors of Stock, p 27.

90 *Mercury*, 12, 13 September 1868.

91 *Mercury*, 8 September 1869; *Cornwall Chronicle*, 22 May 1869, letter by Whyte.

92 *Cornwall Chronicle*, 22 May 1869, letter by Whyte; Tas, Parl, *Journal* LC [1869] Vol 15, Paper 64, Scab in Sheep Bill, (No.7): Correspondence.

93 *Mercury*, 23 July 1869.

94 *Cornwall Chronicle*, 19, 30 July 1875, letters by Bartley; Phillips, *Bartley of Kerry Lodge: A Portrait of A Pioneer in Van Diemen's Land* pp 101-5.

95 *Mercury*, 27 July 1869, letter by "Nolumis Leges Anglle Mutare"; see also *Mercury*, 31 July 1869, letter by "An Englishman" and, for a contrary view, letter by "Magna Est Veritas Est Preoevolebit".

ance" of "popular opinion and custom" in the country districts.[96] Once the law was passed, it had to be enforced and this required "the co-operation of the people". "A.J.O." doubted that witnesses would testify against their neighbours or that magistrates would convict their fellow sheepfarmers. Adherence to "an important principle is of more consequence than the eradication" of scab. It was better to lose revenue than to admit that "the State may habitually intermeddle in private enterprise with the view of guarding against all possible contingencies". "A.J.O." believed that "all progress and improvement must emanate from the people upwards, and not from the State downwards".

Such arguments did not pass uncontested. As for the un-English nature of the legislation, "Magna Est Veritas" pointed out legislation giving English governments very extensive powers over diseased cattle.[97] Following John Stuart Mill, one sheepowner argued that scab did more than injure the flocks of individuals; it injured a trade valuable to the colony and required common action.[98] There was "no higher or more sacred principle than the highest expediency" and that was the principle of "the greatest good of the greatest number". Thus the able and energetic advocacy of liberty in the abstract by "A.J.O." had to make way for the practical need of compulsion in the interests of the majority. Whyte used this argument when introducing his bill into the Legislative Council in September 1869.[99] He dismissed the accusation that it would infringe the liberty of the subject: "where a measure was for the public good, the interests of individuals had to give way". Settlers in other colonies had submitted to some inconvenience and stringent legislation for long-term gain. Large sheepowner R.J. Archer blamed smaller owners for spreading scab and warned that they should either clean their sheep or be deprived of them. That the penal clauses would not take effect for eighteen months and that the bill was milder than legislation in other colonies smoothed its passage through the Legislative Council. But it did not escape unscathed. In committee the stringency of the bill was diminished. Penalties for offences such as obstructing Inspectors, removing sheep from quarantine districts, and allowing diseased sheep from entering clean districts were greatly reduced.[100] The operation of the Act was changed from 1 January to 1 March 1870.

In the House of Assembly the Attorney General hoped to dampen enthusiasm for further amendments by pointing out that the penalties were only enforced where "wilful disobedience" was proven and not

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[96] *Mercury*, 11 August 1869, letter by "A.J.O."; *Mercury*, 21 February 1880, letter by "Audio"; C D W Goodwin, *Economic Enquiry in Australia*, Durham: Duke University Press, 1966, p99.

[97] *Mercury*, 13 August 1869, letter by "Magna Est Veritas".

[98] *Mercury*, 18 August 1869, letter by "N.J.B."

[99] *Mercury*, 3, 18 September, 1869.

[100] *Mercury*, 9, 10, September 1869.

where "reasonable care, energy, and diligence had been exercised".[101] Although the opponents were in the minority, they denounced the bill, especially the powers given to Inspectors, and made their presence felt. They expunged the power of Inspectors to detain travelling sheep and to return them to their farms, the requirement of owners to notify Inspectors of driving sheep across the lands of others, and the requirement to provide quarantine yards or paddocks.[102] They further reduced penalties and other financial imposts. These included reducing the contribution payable to the *Scab Act* fund from a halfpenny to a farthing and the penalty for not branding an infected sheep from a penny to a halfpenny. The former amendment was particularly serious as it limited the money available for Inspectors to enforce the Act.

Although the *Scab Act* was only passed because of Whyte's political influence and was far less imposing than he had hoped, the *Examiner* felt it was most "obnoxious and tyrannical" and would ruin flockmasters who owned "tough runs."[103] It should be repealed during the next Parliament and be replaced by a *Dipping Act*, which could be easily and less oppressively worked. Opposition solidified when Whyte was appointed Chief Inspector of Sheep and remained in the Legislative Council. This drew the twin criticism that Whyte had supported the *Scab Act* to feather his own nest and, by selling himself to the government, had compromised his independence and opened the door to corruption.[104] The appointment certainly strengthened the government's ability to force measures through the Legislative Council.[105] Another explanation was that Whyte had been asked by some sheepowners to administer the Act in the expectation that he would do so in an effective but judicious manner and lessen the hostility to it.[106] Whyte certainly enforced the Act with care. In August 1870 he decided not to prosecute Israel Arthur Allison for driving scabby sheep through the properties of other sheepfarmers but to issue a warning that future transgressions would be punished.[107] Soon after, Allison committed the same offence and was the first to be prosecuted under the *Scab Act*. Again, Whyte acted judiciously by seeking the imposition of a nominal fine of £1 with costs but announcing that the full penalty would be imposed in subsequent cases. The government accepted his recommendation that the probationary period before the penal clauses were enforced be extended to 1 November 1872.[108] Whyte's approach converted many opponents into supporters and the prevalence of scab diminished

[101] *Mercury*, 23 September 1869; see also Tas, Parl, *Journal* HA [1869] Vol 18, Paper 96, Scab in Sheep: Report of the Select Committee.
[102] *Mercury*, 13, 22 October 1869.
[103] *Examiner*, 18 December 1869, 5 March 1870; Tas, Parl, *Journal* HA [1881] Vol 40, Paper 42 revised, Chief Inspector of Sheep: Report for 1880, 6.
[104] *Examiner*, 5, 26 March 1870; *Mercury*, 17 March 1870.
[105] *Mercury*, 26 March 1870.
[106] *Mercury*, 17 March 1870; Conference of Inspectors of Stock, p 28.
[107] *Mercury*, 16 August 1870.
[108] Conference of Inspectors of Stock, p 28.

as sheepowners dipped their sheep.[109]

Opposition did not completely disappear and, before the penal clauses became operational, some sheepfarmers demanded the repeal of the *Scab Act*.[110] However, Whyte's successful administration of the Act strengthened his resolve to defeat the minority of "ultra conservatives" who opposed him. Annually from 1870 to 1874 he achieved amendments to the *Scab Act* to restore most of the provisions that had been deleted in 1869, to introduce new provisions found necessary in the light of experience, to remove doubts about the meaning of particular sections, and to repeal provisions that were no longer needed.[111] Amongst the more important amendments in 1873 were increasing the contribution to the *Scab Act* fund from a farthing to a halfpenny, imposing heavy penalties for separating diseased sheep from other sheep and then driving the other sheep along public roads or offering them for sale, and penalising owners up to £50 for possessing a diseased sheep without a licence to clean the flock.[112] The most contentious provision was his power to destroy diseased sheep but this was a reserve power and he did not think he would need to invoke it.[113]

The more stringent provisions reflected Whyte's anxiety quickly to stamp out the remaining scab spots, his frustration at the evasion of small sheepfarmers who were frightened by the stringent provisions of the *Scab Acts*, and the tendency of magistrates to inflict minimum penalties.[114] In November 1874 he attended a conference of colonial Inspectors of Stock in Sydney, which resolved to step up efforts to eradicate scab: thereafter Whyte began to enforce the *Scab Acts* more strictly than in the past and thought Tasmanian laws should match the tougher laws of the other colonies.[115] In March 1875 he warned sheepowners who took diseased sheep to public sale yards or took them along public highways that he would, unless the circumstances were "exceptional", destroy all their sheep "whatever the number might be".[116]

On 27 April William Orledge, a small farmer of Quamby Bend, took 25 lambs to the Carrick sale yards, where Inspector William Brand detected one scabby sheep.[117] Brand immediately detained all the lambs.

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[109] *Mercury*, 16 August 1870; Tas, Parl, *Journal* HA [1871] Vol 21, Paper 13, Scab in Sheep Act: Inspectors Report for 1870-71, 3-4.

[110] *Mercury*, 23 August 1870.

[111] The *Scab Amendment Acts* were 34 Vict. No.7, 35 Vict. No.1, 36 Vict. No.21, 37 Vict., No. 18, and 38 Vict., No. 22; *Cornwall Chronicle*, 4 September 1871, letter by Whyte; Tas, Parl, *Journal* HA [1872] Vol. 23, Paper 23, Scab in Sheep Act: Inspectors Report for 1871, 6; Chief Inspector of Sheep: Report for 1880, 7.

[112] *Scab Act Amendment Act No. 4* 1873, ss 2, 5, 8.

[113] As above s 4; Conference of Inspectors of Stock, p 29.

[114] *Examiner*, 23 March 1875, notice by Whyte; *Cornwall Chronicle*, 21 June 1875, letter by Bartley, 6 August 1878; Conference of Inspectors of Stock, p 29.

[115] Conference of Inspectors of Stock, iv; Tas, Parl, *Journal* HA [1875] Vol.28, Paper 26, Inspector of Sheep, 1875, iii-v, 6, 8.

[116] *Examiner*, 23 March 1875, notice by Whyte; *Cornwall Chronicle*, 21 June 1875, letter by Bartley.

[117] *Cornwall Chronicle*, 14 May 1875; *Examiner*, 18 May 1875; *Mercury*, 24 November 1875.

While he was temporarily absent, the scabby lamb was spirited away and was killed by a friend of Orledge's. Brand detained the 276 sheep that had travelled with the lambs from Quamby Bend. After giving notice of his intention, on 6 May Brand visited Orledge's farm and found 40 extremely diseased sheep across the Meander river in a paddock Orledge rented from a neighbour with a clean flock. Whyte felt that this conscious evasion warranted the heaviest penalty and, after fifteen days deliberation, ordered the destruction of the 276 sheep and 24 lambs. Their skins were stripped off and their carcases were burnt within three minutes walk of the Carrick sale yard as a lesson to the many stock owners assembled there. Strangely, Whyte returned the skins to Orledge on the condition that he dipped them according to Brand's directions.

On 17 May Whyte prosecuted Orledge at the Westbury Police Court.[118] The Westbury Bench inflicted a £10 fine and ordered payment of £3 in witnesses' costs for separating diseased sheep from clean sheep and offering them for sale and a further £10 with 7 s. and 6d. costs for possessing diseased or infected sheep without holding a licence to cleanse them; in both cases, the magistrates imposed the minimum penalty and later unsuccessfully asked the government to remit the fine. This caused Whyte to lament that if magistrates had imposed even moderate penalties over the last three years, the Orledge case would never have arisen.[119] While few condoned Orledge's conduct, many Northerners agreed with the *Examiner* that Whyte's pursuit of Orledge seemed "superlatively rigorous if not vindictive".[120] If Whyte destroyed other diseased flocks, then sheepfarming will become an insecure occupation and stock numbers would decline, striking a further blow at the export trade and increasing the price of mutton. The *Examiner* suggested that a more appropriate penalty would have been to destroy the 40 diseased sheep found on Orledge's farm, to dip the rest at his expense, and to fine him for possessing diseased sheep. A significant number of the leading breeders of fine wool sheep and other pastoralists supported Whyte. In June they gave him a testimonial and praised him for holding "the rod of terror" over recalcitrant small sheepfarmers, whose laxity caused scab to spread.[121] Whyte told the *Examiner* that he acted to save other small sheepfarmers who might have bought Orledge's diseased sheep.[122]

What seemed like a campaign of persecution gave Theodore Bartley an excuse to defend small sheepfarmers against Whyte's autocratic inclinations, evident only, Bartley conceded, since Whyte's notice to

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[118] *Examiner*, 18 May 1875; *Mercury*, 24 October 1876, comment by Just in the House of Assembly.

[119] *Examiner*, 3 June 1875, letter by Whyte.

[120] *Examiner*, 20 May 1875.

[121] *Cornwall Chronicle*, 21 June 1875; according to one critic, Whyte had been lenient with a number of those contributing to his testimonial, *Cornwall Chronicle*, 21 June 1875, letter by "Merino".

[122] *Examiner*, 3 June 1875, letter by Whyte.

sheepfarmers in March.[123] According to Bartley, Whyte's great sin was to deprive Orledge of his "unchallenged privilege and constitutional right", his "birthright", to be tried first by "a legally constituted tribunal" and only to be liable for punishment if he was found guilty.[124] Orledge should not have been arbitrarily punished by Whyte, who claimed that he was empowered to do so by the *Scab Acts*. Reading these various Acts, noted Bartley, was "a herculean feat" and it was hardly possible for an "uneducated sheepowner" to understand them but what is more important Bartley questioned whether Whyte could usurp and exercise the powers of magistrates. According to legal convention, Whyte certainly had no right to be "prosecutor, judge, and executioner", to cause Orledge a loss of £250 in stock, and then to prosecute him before the Westbury Bench, thus punishing him twice for the same offence. While Bartley did not deny that Orledge's offences were "most serious", Whyte should have referred the case to the local magistrates and, if their decision was unsatisfactory, then appealed to the Supreme Court. In another case involving 5,000 sheep belonging to a co-operative owner, Whyte exercised his characteristic "wise discretion, forbearance, and courtesy" and destroyed the only sheep with scab.[125] In Orledge's case, Whyte "ignored every consideration of equity, or even of common humanity". If he had dipped all the sheep, they would have been cured. Whyte punished Orledge under "a mistaken sense of duty. His zeal has got the better of his discretion". No other "British community" would "tolerate such a violation of all constitutional right, and of every principle of law as well as equity".[126] Following the example of "our forefathers in Great Britain", the young men of Tasmania should not submit to such "arbitrary inflictions" and should join him in resisting them to "the uttermost".

Bartley proposed two lines of attack: to amend the *Scab Acts* to ensure no other sheepfarmers suffered Orledge's fate and to seek redress for Orledge. Bartley claimed that since 1870 amendments to the *Scab Acts* of the most arbitrary, absurd, and tyrannical kind had been "smuggled through" Parliament.[127] Bartley criticised "the obscure, contradictory, and, in many instances, absurd construction" of all *Scab Acts* and advocated their repeal in favour of "one simple, intelligible, constitutional, humane, and ... efficient Act". Whyte had already determined to introduce a consolidated *Scab Act* but he went further and again tried to introduce harsh provisions.[128] These included detaining dipped sheep that became infected for six months and penalising shepherds for hiding the existence of scab

[123] *Cornwall Chronicle*, 16 August 1875, letter by Bartley; see also T. Bartley, *The Tasmanian Scab Acts and the Chief Inspector of Sheep* (Launceston: *Examiner*, 1875).
[124] *Cornwall Chronicle*, 21, 28 June 1875, letters by Bartley; *Examiner*, 1 January 1876, letter by Bartley.
[125] *Cornwall Chronicle*, 28 June, 16, 19 July 1875, letters by Bartley.
[126] *Cornwall Chronicle*, 2 August 1875, letter by Bartley.
[127] *Cornwall Chronicle*, 2 August 1875, letter by Bartley.
[128] *Cornwall Chronicle*, 6 August 1875.

in a flock. In August and September 1875 Bartley spoke at meetings at Longford, Westbury, and Deloraine against the new powers, for repealing existing powers, and for giving more discretion to magistrates to enforce penalties under the *Scab Act*.[129] A petition embodying their demands was sent to the Governor.[130] The campaign, petitions to Parliament, and disquiet at Orledge's treatment paid dividends. To the great joy of sheepowners, the *Scab Act* 1875 repealed Whyte's power to destroy sheep unless they were strays and their owner was unknown, strengthened the powers of magistrates to deal with offences, and blocked a number of objectionable provisions, such as doubling the contribution to the Scab Fund.[131]

As for Orledge, Bartley helped raise funds to defend his case in the Supreme Court, himself making a sizeable contribution.[132] Events did not proceed as Bartley had hoped. Before the trial was to be heard on 19 October, Whyte applied to Justice Dobson to change the venue to Hobart Town, claiming that he would not receive "a fair trial" in Launceston.[133] In his affidavit, Whyte held that the public meetings against the Scab Bill and Bartley's letters to the press would prejudice the jury against him. Dobson agreed to change the venue unless Orledge's counsel Byron Miller consented that the only question to be decided by the jury would be the value of the destroyed sheep and not the circumstances leading to their destruction. As Orledge was medically unfit to travel and could not afford to pay his witnesses to attend the court at Hobart Town, Miller reluctantly agreed. Bartley was livid.[134] Whyte did not approach the Bench with "clean hands", having himself written letters to the *Examiner* condemning Orledge after the action had begun.[135] Whyte skilfully evaded a potentially damaging investigation of the act of destruction and escaped examination on oath before the jury.

When the case was heard, the parties agreed to value the sheep at £187 10s.[136] The legal points were subsequently argued as a special case before both Supreme Court Judges at Hobart Town. Although Chief Justice Francis Smith thought the Chief Inspector's powers were "enormous", both Judges held that the Chief Inspector was empowered to destroy sheep without referring the case to a magistrate under section 4 of the *Scab Act* 1873.[137] The decision deeply disillusioned Bartley. Having been present at

[129] *Cornwall Chronicle*, 20, 25 August 1875, 3 September 1875.
[130] AOT Colonial Secretary's Department (CSD) 10/29/449, Petition to the Governor in Council from Sheepowners, Graziers, Farmers and other Inhabitants of the Northern Division of Tasmania, 21 August 1875.
[131] *Mercury*, 25, 26, 27, 28 August 1875, 1, 11 September 1875; *Cornwall Chronicle*, 6 December 1875, letter by Bartley; *Examiner*, 30 November 1875. See especially sec. 48, 39 Vict. No. 20, *Scab Act* 1875.
[132] *Cornwall Chronicle*, 9 July 1875, letter by William Hartnoll jnr.
[133] *Examiner*, 11, 16 December 1875, letters by Bartley.
[134] *Examiner*, 30 December 1875, 1 January 1876, letters by Bartley.
[135] For one of Whyte's letters, see *Examiner*, 21 August 1875.
[136] *Examiner*, 21 October 1875.
[137] *Mercury*, 24 November 1875.

the opening of the Supreme Court in 1824, he had "never seen such an utter miscarriage of justice in any cause decided in that Court".[138] The *Examiner* urged the Judges to change the rules of the Supreme Court and prevent "improper affidavits" otherwise their faith in judicial independence would be "destroyed entirely".[139] It cost £230 to defend Orledge but, as many sheepfarmers refused to sanction Orledge's negligence, Bartley was left out of pocket by some £130.[140] Later, a testimonial, signed by 107 leading Northern colonists, raised £600 to reward Bartley personally for his decades of vindicating "the interests and protect[ing] the rights of colonists" and being "the champion of the oppressed".[141] Bartley accepted £200 as reimbursement for his expenses and gave the rest to the Launceston Benevolent Society.[142] Despite inadequate staff and legislative power, and despite the imposition by magistrates of minimal fines, Whyte continued to enforce the *Scab Act* with diligence and managed gradually to eradicate scab by March 1881, thus improving the profitability of the wool and stud sheep trade.[143] By 1883 the other colonies admitted Tasmanian sheep that had not been dipped.[144]

Conclusion

Despite the insistence of men like Theodore Bartley, the rights that Englishmen held so dear such as the independence of the magistracy and the right of an accused to be tried in court were never really threatened in mid-nineteenth century Tasmania. Although government at times acted with dubious propriety and unnecessary harshness, it did not become habituated to acting above the law. It merely enforced the laws that Parliament passed. True, Parliament itself was sometimes negligent in passing poorly drafted legislation that opened the door to oppressive practices. But the onus was on the opponents of such legislation to amend or repeal it when they assumed power or by persuading parliamentarians that their arguments had force. Government did not interfere with the workings of magistrate's courts but did invoke its right to appeal against questionable magisterial decisions in the Supreme Court, whose role as final arbiter all sides accepted unreservedly. In reality, the large landowners or "bloated haristocrats", who waged campaigns against the carriage

[138] *Examiner*, 1 January 1876, letter by Bartley.
[139] *Examiner*, 4 March 1876.
[140] *Cornwall Chronicle*, 22 December 1875, letter by Bartley, 8 March 1876.
[141] *Mercury*, 29 September 1876.
[142] Phillips, *Bartley of Kerry Lodge: A Portrait of a Pioneer in Van Diemens Land*, p 123
[143] Tas, Parl, *Journal* HA [1876] Vol 30, Paper 27, Inspector of Sheep: Report for 1875, 3, 6; Chief Inspector of Sheep: Report for 1880, 3; Easteal, *Farming in Tasmania 1840-1914*, pp 184-88; *Mercury*, 24 October 1876.
[144] *Mercury*, 24 October 1883.

tax and the Chief Inspector of Sheep, were motivated economically by self-interest and politically by opposition to antagonistic governments.[145] With an eye to obtaining political advantage, the landowners sought to provoke government into indiscretion, a tactic that sometimes succeeded, and encouraged resistance to the law.

Without denying these realities, perhaps we would be wrong to doubt Bartley's sincere devotion to "the constitutional rights and privileges conferred" by the Magna Carta and the Bill of Rights.[146] Men like Bartley, the *Examiner* eulogised, were "the salt of society; but for them a community would be in danger of stagnating and becoming an unthinking and submissive prey to tyranny".[147] Although unable to agree with all their opinions and actions, "we honor their virtue, their spirit, their outspoken manliness, and their burning hatred of every form of injustice". Bartley certainly fought hard but did not always win. He conceded that "my public efforts have in too many instances failed to accomplish" their objectives.[148] Depressed by an "overwhelming sense of unworthiness and unprofitableness" (and suffering a serious heart condition), Bartley's life ended when, in a fit of temporary insanity, he plunged into a well in November 1878.[149] His timing was impeccable. By then the power and influence of the large landowners had started to recede.[150] Central control of public works and the imposition of a property tax in 1880 heralded the growing ascendancy of liberalism in Tasmanian politics and the beginning of an era when political debate became orientated towards social needs and obligations rather than individual rights and liberties. Bartley's world would soon be turned upside down.

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[145] *Examiner*, 25 November 1875, letter by "H"; see also *Cornwall Chronicle*, 24 November 1875, letter by D Murray.

[146] *Examiner*, 1 January 1876, letter by Bartley.

[147] *Examiner*, 4 March 1876.

[148] *Mercury*, 29 September 1876.

[149] *Examiner*, 26 November 1878; *Cornwall Chronicle*, 22 November 1878.

[150] Reynolds, "Men of Substance and Deservedly Good Repute: The Tasmanian Gentry 1856-1875", 71-2; Sprod, *Politics and Government Finance, Tasmania 1856-1880*, pp 99-102.