THE VAN DIEMEN'S LAND JUDGE STORM

By P. A. HOWELL*

Until responsible government—that is, government by ministers responsible to the popularly-elected house of the local legislature—is introduced in a British colony, the judges of its superior courts are usually commissioned during the royal pleasure. They are liable to be removed by the Crown at any time without the cause being assigned. Moreover, in such colonies, judges can be suspended by the governor, and the governor may, with the advice and consent of his executive council, invoke a 1782 statute, known as Burke's Act (22 Geo. III, c.75), and 'amove' a judge. Though the verb 'amove' and the nouns 'amoval' and 'amotion' no longer have a place in normal English usage, it is convenient to retain them in references to Burke's Act. The Governor-in-Council's power of amoving a person holding an office granted or grantable by patent from the Crown differs from the power of suspending such an officer, and it differs from the power of removing lesser officials. Amotion under Burke's Act is more punitive than suspension. When an officer is amoved, the resultant vacancy can be filled at once. Further, prior to 1870, unless and until the amoved officer made a successful appeal to the Privy Council, the amotion was not subject to review. But when a governor *suspends* an official appointed by the Crown, the matter is always considered by the imperial authorities, and the vacancy cannot be filled until they have pronounced their opinion on the merits of the suspension. On the other hand, an amoval under Burke's Act is less punitive than removal by the Crown or by a governor. Whereas an order for removal issued in exercise of the royal prerogative is final, and whereas a removal effected by a governor can be reviewed only at the pleasure and discretion of the Crown, in the case of an amotion under Burke's Act the right of appeal is *strictissimi juris*, being provided by the statute itself.[1]

Since the beginning of the nineteenth century, the Crown has generally exercised its power over colonial judges with intelligent restraint. By contrast, colonial executives have sometimes been impetuous when invoking their powers to suspend or amove. This has usually resulted from a failure to understand the constitutional role of the superior

* M.A. (Tas.); University of Tasmania Overseas Scholar, St. Edmund's House, Cambridge.

[1] For the history of Burke's Act and an examination of the reasons for the insecure tenure granted to judges in colonies not enjoying responsible government, see P. A. Howell, *The Boothby Case*, M.A. thesis, Univ. of Tas., 1965, pp. xxii-lxi, xcv-cx, 251-330.

judiciary. The 'Judge Storm' which convulsed Van Diemen's Land in 1847-8 provides a classic illustration of such phenomena. Though it has been the subject of comment by numerous constitutional lawyers and historians, those writers have relied too exclusively on law reports and the despatches between the Lieutenant-Governor and the Colonial Office, published in the British Parliamentary Papers, No. 566 of 1848, and No. 240 of 1849. The following account is a work of revision from the extant documents, including the relevant manuscripts housed in the Public Record Office, London, and in the Tasmanian State Archives.

In 1847, tension developed between A. S. Montagu, the Puisne Judge of the Supreme Court of Van Diemen's Land, and Lieutenant-Governor Sir W. T. Denison. Montagu was a descendant of Sir Edward Montagu, Lord Chief Justice from 1539 to 1545, and Chief Justice of the Common Pleas from 1545 until the accession of Queen Mary. His father was Basil Montagu, Q.C., legal writer, accountant-general in bankruptcy, and a leader of the English law reform movement in the first decades of the nineteenth century. A. S. Montagu had been appointed to the bench in 1833, after four years service as Van Diemen's Land's Attorney-General. Though initially he had been attacked by licentious elements of the colonial press, which alleged that he was a member of Lieutenant-Governor Arthur's 'party', he had steadily gained popularity because of his zeal in sweeping a clean broom through the law's unnecessary quirks, sophistries and superfluous verbiage. He was hailed as 'the disciple of Jeremy Bentham and Lord Campbell'.[2]

Montagu first irritated Denison by repeatedly drawing his attention to the executive's habit of allowing prisoners under sentence of death to languish in gaol for weeks, and even months, before considering the judge's reports on their cases. Montagu submitted that such delays harmed the prisoners and impaired 'the good that otherwise might ensue upon [the] prompt administration of Justice'.[3] Denison was annoyed further when Montagu advised that he thought the Lieutenant-Governor's action in displacing six members of the colony's nominee Legislative Council was illegal. The judge believed that as the displaced members had not resigned, and as the Queen had not revoked their appointments, there had been no vacancies to fill. Therefore the new members had no right to sit and vote. Denison, an army engineer who was new to vice-regal life, and who long considered that civil government should function with the strict discipline of a well-managed regiment,[4] minuted:

---

2 *Launceston Advertiser,* 16 August 1884.

3 Colonial Secretary's Correspondence Files (henceforth C.S.O.) 24/5/57.

4 P. A. Howell, *Thomas Arnold the Younger in Van Diemen's Land,* Hobart, 1964, pp. 37-39.

> Mr. Justice Montagu had better keep his opinions till they are asked for. I shall certainly not be guided in any way by them in this instance, and shall proceed as if the appointments in question were perfectly legal as I believe them to be'.[5]

But shortly afterwards, Sir J. L. Pedder, who had been the colony's Chief Justice since 1824 and a member of the Legislative Council since 1825, endorsed Montagu's view. Accordingly, Denison conceded that the local legislature was useless until the imperial government decided who the members were.[6]

When Montagu's personal financial difficulties became public later in the year, Denison temporarily considered the judge's behaviour in a more objective spirit. In the 1830s, Montagu had bought the 'Rosny' estate, which extended for two miles along the River Derwent, opposite Hobart Town, and had invested heavily in cattle breeding and experimental farming. In the 1840s, there was a prolonged slump in land and stock prices, because of a commercial depression which was aggravated by the withdrawal of all assigned servants on the introduction of the probation system of convict discipline. On 27 October 1847, Thomas Young, a solicitor acting on behalf of one Anthony MacMeckan, wrote to Montagu requesting payment of an old debt of £283, and threatening legal action if settlement was not made within a week. In reply, Montagu noted that he had given acceptances for the amount on the understanding that they were to be held until he sold certain securities for the debt, which securities had not yet been wholly realised. Young ignored this plea, and a summons was issued against Montagu on 8 November. Montagu then warned that he thought the solicitor was pursuing an illegal course. He offered MacMeckan a cheque in full settlement of the debt, but excluding the costs incurred in obtaining the summons. Young, who had harboured a spite against Montagu since 1833,[7] advised MacMeckan to refuse to accept payment. As for the alleged illegality of the summons, Young retorted that he hoped to teach His Honor otherwise. On 17 November, Montagu obtained a summons from the Chief Justice, calling on MacMeckan to show cause why *his* summons should not be set aside for illegality. Next day, Pedder heard counsel for both sides, and reserved judgment. On 22 November, he made Montagu's summons absolute on the ground that the Supreme Court was so constituted that each judge formed an integral part of it. As the court could not be constituted without both judges, neither of them could sue or be sued in it.[8]

MacMeckan petitioned Denison to suspend Montagu until MacMeckan could recover a judgment against him for the debt. After a

---

5 C.S.O. 24/36/1057.

6 *Hobart Town Advertiser*, 23 July 1847. For an account of this Legislative Council crisis, see W. A. Townsley, *The Struggle for Self-Government in Tasmania*, Hobart, 1951, pp. 79-92.

7 Colonial Office Correspondence Files, London (henceforth C.O.), 280/117/510; T. Young, *Letter to . . . the Secretary of State*, Hobart Town, 1839, pp. 12-16, App. pp. iv-ix.

8 C.S.O. 24/36/1057.

prompt inquiry (during which Montagu explained that he had excluded the costs of MacMeckan's summons from his offer of payment because he considered that summons illegal, and that he had been entitled to apply for a counter-summons to stop illegal and unconstitutional proceedings), Denison exculpated the judge from imputations of misconduct in the affair. When Young made a further complaint, Denison wrote on it a minute instructing his Colonial Secretary to ignore it, for he considered the case closed. Two days later he added another minute, noting that he was extremely perturbed by the decision the judges had just handed down about the local Dog Act.[9]

On the day Denison penned this second minute, both judges had judicially declared that an 1846 Legislative Council enactment imposing a tax on dogs was null and void. From September 1846, John Morgan, editor of the *Britannia and Trades' Advocate*, had used that newspaper to attack the Dog Act and other revenue Acts on the ground that they were unconstitutional. He focused his agitation primarily against the Dog Act, because it directly affected the pocket of the man in the street. He claimed that it was repugnant to the Huskisson Act, an imperial statute of 1828, which had reconstituted Van Diemen's Land's Legislative Council. The Huskisson Act provided that the colony's legislature

> shall not impose any Tax or Duty, except only such as it may be necessary to levy for local purposes; and the purposes for which every such Tax or Duty may be so imposed, and to or towards which the amount thereof is to be appropriated and applied, shall be distinctly and particularly stated in the body of every Law or Ordinance imposing such Tax or Duty.[10]

Morgan pointed out that the Dog Act said nothing about its application to particular local purposes, and that it directed that the income derived from it must go into the general revenue.[11] In nearly every number of the *Britannia* issued during the next six months, Morgan continued to denounce the Act. After a lull, he renewed his attack in July 1847, and in September he published an open letter to the Chief Police Magistrate declaring that he owned three dogs for which he had not and would not pay the prescribed tax unless compelled to do so, under protest, by process of law. He asserted:

> I do not oppose this, or any other *such* local enactment, from factious, or disloyal motives, but solely upon the principle, that if one encroachment of arbitrary authority is permitted to pass unnoticed and unresisted, the community will be subjected to others equally objectionable.[12]

Colonial Secretary J. E. Bicheno advised Denison that the dog tax was too important to the revenue to abandon because some persons thought it illegal and unconstitutional. Denison agreed, and directed

---

9 *Ibid.*

10 9 Geo. IV, c. 83, s. 25. This statute was subsequently entitled 'The Australian Courts Act, 1828'.

11 *Britannia*, Hobart Town, 3, 17 and 24 September 1846; 10 Vic., No. 5, (Tasmanian Statutes).

12 *Britannia*, 2 September 1847.

that proceedings be instituted against Morgan.[13] On 16 September, Police Magistrate A. H. Eardley-Wilmot convicted Morgan of keeping an unlicensed dog, fined him one pound and ordered him to pay fifteen shillings costs, Morgan appealed to the Hobart Town Quarter Sessions, which upheld the conviction on 30 October.[14]

Morgan then appealed to the Supreme Court. His Counsel, A. O. Montagu, brother of the Puisne Judge, based the appeal chiefly on the plea that the Dog Act was not law because it was repugnant to the Huskisson Act. The Attorney-General (Thomas Horne) and the Solicitor-General (Valentine Fleming), on Denison's instructions, submitted that the Supreme Court had no power to pronounce a local Act void, and that if the judges assumed such power it would lead to confusion and anarchy.[15] Horne drew attention to the Huskisson Act's 22nd section, which prescribed that a governor must transmit a local Act to the Supreme Court to be enrolled within seven days of his assenting to it, that if within fourteen days from the date of the governor's assent a Supreme Court judge should represent that the enactment was repugnant to the Huskisson Act, to any charter, letters patent or Orders in Council issued in pursuance of that Act, or to the laws of England, the governor must suspend the local Act's operation. The Huskisson Act also provided that if the governor and Legislative Council should formally 'adhere' to an enactment which a judge had thus represented to be repugnant, the enactment would be binding in the colony until the crown's decision on the soundness of the judge's opinion was made known. Horne inferred that as the judges had failed to certify the repugnance of the Dog Act within a fortnight of its passage, they could not pronounce it repugnant now. He declared that even if a local Act was 'of the most oppressive character' and 'repugnant to the laws of England', if the Judges did not point this out at once, it would be law until disallowed by the Queen. 'All her subjects must obey it,' he said: 'there is no remedy, and the Supreme Court has no power'. 'What!' exclaimed Sir John Pedder. 'Do you mean to say, Mr. Attorney-General, that if by circumstances of illness, or absence, or misconception for a time, the Judges have permitted the law to pass without a certificate of disapproval, when they see its injustice, when they see the injury done by it to the subject who applied to them in this Court for redress, that they cannot interfere for his protection from the operations of a bad or oppressive law?' 'I do, your Honor', replied Horne.[16]

On 29 November, the judges, pronouncing judgment separately, quashed the conviction on the ground that the Dog Act was repugnant to the Huskisson Act and was therefore 'no Act at all'.

---

13 C.S.O. 24/26/690.

14 *Ibid.*; Under-Sheriff's Minute Book, I, 223, Tasmanian State Archives (henceforth T.S.A.) volume 2/618.

15 C.S.O. 24/26/690.

16 *Britannia*, 25 November 1847.

They held that the colony's legislature owed its existence to the Huskisson Act, which had given it limited powers of making laws; that the restrictions on the powers of subordinate legislatures were inseparably annexed to the power of law-making and must therefore be strictly complied with; that the Huskisson Act neither altered the common law rule that all powers must be executed according to law, nor prevented the Supreme Court from determining whether a local Act was a due execution of the power given to the Legislative Council. They declared that it was not only competent to the Court, but it was its duty, whenever a question arose about the validity of a local Act, to decide if the Act was beyond the powers of the legislature or repugnant to the Huskisson Act. Though the apparent object of the Legislative Council in requiring dogs to be licensed was the abatement of a nuisance rather than the raising of revenue, the licence-money was in fact a tax, just as the licences payable on stage coaches, cabs, ferries and so on were taxes. The Dog Act itself treated the licence-money as revenue because it directed that it should be paid into the ordinary revenue of the colony. Because the Dog Act left it to the government to appropriate the licence-money as it thought proper, whereas the Huskisson Act directed that taxes could only be raised for local purposes which must be distinctly defined in the enactments levying each tax, the Dog Act had been passed in violation of an imperial statute. Though the Court had been notified that the Queen had left the Dog Act to its operation, this had no bearing on the question, for the Queen had no power to override the authority of an Act of the Imperial Parliament. The Judges dismissed Horne's contention that an aggrieved subject would be left without redress if, through inadvertence or neglect, they failed to notice the unconstitutional nature of a local Act within fourteen days of its enactment. They declared that it could not have been the intention of the Imperial Parliament to bind subjects permanently by local Acts which were *ultra vires*.[17]

When Denison learnt of this decision, he immediately concluded that the judges had exceeded their powers. He thought that, in quashing Morgan's conviction, they had improperly interfered with 'the privileges of the Legislative and co-ordinate branch of the Constitution'. He saw that the invalidity of the Dog Act would cause a loss to the general revenue of more than £3,000 a year, and that, with Pedder and Montagu on the bench, other revenue Acts could be successfully challenged on the same grounds. He resolved to assume 'the responsibility of vindicating the rights' of the Legislative Council.[18]

At the end of Denison's term in Van Diemen's Land, the Colonial Office staff concluded that he was 'much wedded to his own schemes' and lacking in 'temper and calm judgment'. Further, 'like many people

---

17 Legislative Council Papers (henceforth L.C.P.) 1847-8, No. 5. The case is cited variously: as *R.* v. *Morgan*, *Symons* v. *Morgan*, or simply *Morgan's Case*.

18 C.S.O. 24/26/690; L.C.P. 847-8, No. 4.

of humble degrees in the colonies', he was in the habit of loudly denouncing imperial attempts to regulate matters of detail at the Antipodes.[19]

Though the judges' decision in *Morgan's Case* raised principles which were fundamental in the constitutional law of the empire, almost eleven weeks elapsed before Denison reported the decision to the Colonial Office.[20] Meanwhile, every day brought fresh excitment. Colonists began applying to the government for refunds of licence fees they had paid under the invalidated Act. Merchants resisted payment of the duties levied by the Differential Duties Act and other Acts which, like the Dog Act, failed to apply to specific local purposes the revenue they raised. Convinced that the judges had exceeded their jurisdiction, the Lieutenant-Governor ordered them to furnish copies of their judgments; and, with the concurrence of the Executive Council, he ordered his Law Officers to report on the decision and its implications.[21]

The embittered Thomas Young sensed a fresh opportunity of satisfying his fourteen-years' old spite against the Puisne Judge. He reapplied to Denison to suspend Montagu so that MacMeckan could launch an action against him. Denison immediately reopened the question and brought it before his Executive Council. The Council summoned the Law Officers, who advised that Denison had power to suspend a judge. Montagu was asked to show cause why he should not be suspended. He adduced evidence to show that he had made a *bona fide* offer to pay the debt and that this offer had been refused in most insulting terms. He claimed that in these circumstances he had been entitled to try to block MacMeckan's summons; that any defendant in civil or criminal action was fully entitled to take advantage of any legal technicality; that the Chief Justice's judgment on the countersummons had upheld his course of action; that after Pedder had dismissed MacMeckan's summons Montagu had again offered to pay the debt in full, but that these offers had also been refused; that this proved that Young was pursuing a vindictive course; that he was still prepared to settle the debt in cash; and that the Lieutenant-Governor had no power to suspend him.

While examining MacMeckan and Young's complaints against Montagu, the Executive Council also discussed the conduct of both judges in invalidating the Dog Act. After considering Montagu's defence, the Council recalled the Law Officers. Denison asked them if Burke's Act gave him power to amove a judge who had taken advantage of the constitution of the Supreme Court to obstruct a creditor from recovering a debt. The Law Officers replied in the affirmative. Denison then asked the Council if Montagu should be amoved at once, without being given opportunity to make further defence. After prolonged

19 C.O. 280/331/318.
20 Denison to Grey (despatch) No. 36, 18 February 1848 (T.S.A.).
21 C.S.O. 24/39/1176; C.S.O. 24/26/690; Executive Council Minutes, VIII, 487-488.

debate, the Council recommended Montagu's immediate amotion. The Colonial Treasurer, Dr Adam Turnbull, alone dissented. He argued that it would be wrong to amove the judge after having invited him only to show cause against the less punitive measure of suspension. Denison brushed aside this protest. On 31 December, with the concurrence of the other Councillors, he amoved Montagu from office. Attorney-General Horne was provisionally appointed Puisne Judge, and Solicitor-General Fleming was promoted to the Attorney-Generalship.[22]

Next, Denison directed his Council's attention towards Chief Justice Pedder. The Lieutenant-Governor asserted that the colony was facing ruin because of Pedder and Montagu's erroneous interpretation of the Huskisson Act, and that it was necessary to 'neutralize' Pedder's power of doing further harm. He suggested that Pedder be made to take eighteen months leave of absence while the judgments in *Morgan's Case* were referred to England: if the imperial authorities considered that the judges had been correct, a validating Act would be obtained from the imperial Parliament; if the judges had been wrong, the imperial government could obtain a declaratory Act, 'so as to prevent similar mistakes for the future'. When Treasurer Turnbull objected that Denison was exaggerating the gravity of the situation, as Horne was now on the bench, Denison called in the Registrar of the Supreme Court,William Sorell. Sorell advised that if a colonist sued for the recovery of taxes levied under a local Act, if there was an appeal to the Full Court from the decision at the first hearing, and if the judges were divided over the validity of the Act, the plaintiff would be entitled to his verdict. This convinced the Council that Pedder should be at least temporarily unseated.

On 4 January, Denison wrote to Pedder claiming that the Law Officers had 'demonstrated' that the decision on the Dog Act 'involves an usurpation of authority over the other branches of the constitution of the colony, as illegal as its effect is disastrous', and stating that it was absolutely necessary that Pedder accept eighteen months leave of absence to enable the imperial government to take 'the requisite remedial measures'. With courage and integrity, Pedder refused to take leave. He observed:

> I should thereby admit that I had illegally usurped authority over the other branches of the colonial constitution; . . . and I should be precluded from urging that, to call a Judge in question for a judgment given by him honestly and conscientiously, to the best of his ability, was a violation of his independence, which he was bound by every tie of duty to himself, his office, and the Sovereign, whose commission he holds, to resist to the utmost of his power. I trust I am as ready as any man to sacrifice all mere personal interest to the public welfare. But were I to accept your Excellency's proposal, . . . I should, it appears to me, be guilty of a shameful abandonment of my official duty; I should be forever after disgraced, and *ipso facto* render myself unworthy of holding the lowest office or employment which it is in Her Majesty's power to bestow on a subject.

22 C.S.O. 24/36/1057; Executive Council Minutes, VIII, 489-527.

The reasoning was that of a Holt or a Mansfield.[23]

Denison was a clever tactician. After his Councillors had considered Pedder's letter for two hours, they were presented with a letter from the Collector of Customs, enclosing eight notices of action against the government for the recovery of monies levied under three local enactments. The Council agreed that this indicated that the decision in ***Morgan's Case*** was indeed having evil consequences. Denison then proposed that Pedder should be suspended for misconduct in having failed to report the repugnancy of the Dog Act within a fortnight of its enactment. Debate ensued. The Council unanimously resolved that Pedder should be invited to show cause why he should not be suspended for neglect of duty in not certifying the unconstitutionality of the Dog Act 'within the period prescribed by law for that purpose', as this neglect had shaken the safe and certain administration of the law and had put the entire revenue in jeopardy. The Clerk of the Council was ordered to write to Pedder to this effect.

In reply, Pedder, who was busy presiding over the January criminal sessions in Hobart Town, claimed that Denison was not empowered, no more in Montagu's case than in his own, to conduct the prosecution of a judge by means of 'an epistolatory correspondence'. Even the meanest criminal was entitled to be represented by counsel during the hearing of a charge that he had disobeyed the law. In a speedy exchange of letters, the Council adamantly denied Pedder's right to be represented by counsel, but conceded that he could appear in person. However, Pedder was not prepared to adjourn all criminal cases for several weeks. He considered that this would be an unjust hardship for the prisoners, witnesses and counsel, and that, in the long run, he would have nothing to fear if the Lieutenant-Governor in Council denied him natural justice. Pedder observed that the only answer he had to give in writing was a general denial of the charge. He declared that he and Montagu had examined all local enactments as soon as they had been enrolled in the Supreme Court. This was correct. James Stephen at the Colonial Office, and successive Lieutenant-governors, especially Denison's immediate predecessor, Sir J. E. Eardley-Wilmot, had thought that the judges were over-eager to represent that local Acts were repugnant to the provisions of the Huskisson Act.[24] Pedder also claimed that at the time that the Dog Act was enacted he had not noticed that it was repugnant, because, until hearing the arguments of counsel in *Morgan's Case*, he had considered that if a local enactment directed that the money it raised should be paid into the colony's general revenue, such provision fulfilled the Huskisson Act's prescription that revenue could only be raised for local purposes. At length, on 21 January 1848, Councillors decided that this last submission entitled Pedder to be acquitted of neglect of duty, but, in the same breath,

---

23 *Cf.* Lord Campbell, *The Lives of the Chief Justices*, London, 1849, II, 148-152, 463-466.

24 P. A. Knaplund, *James Stephen and the British Colonial System*, Madison, Wis., 1953, pp. 232-233; C.S.O. 8/26/219.

they resolved that it 'by no means exonerates him from blame. Ignorance of the law is never a justification even when pleaded by the most illiterate. It is at best only an excuse'.[25]

Denison was content with this strange acquittal, for he had already taken other steps to solve the dilemma facing his government. On 13 January he had received a despatch from the Secretary of State for War and the Colonies, Earl Grey, authorizing him to displace six Legislative Councillors whom Lieutenant-Governor Eardley-Wilmot had nominated in 1846. This ended the constitutional impasse which had caused the Legislative Council to be in abeyance since July 1847.[26] On receiving the despatch, Denison had summoned the Legislative Council, and on 19 January he had ordered his Attorney-General to draft a Bill to declare that all local Acts passed since 1828 which had not been certified against by the judges or disallowed by the Crown should be deemed to have been valid and binding *ab initio* for all purposes, any repugnancy to the Huskisson Act, to any charter, letters patent or Order in Council issued in pursuance of that Act, or to the laws of England, notwithstanding.[27]

Denison foresaw that if such a Bill were passed, Pedder would represent it to be repugnant to the Huskisson Act. Therefore the Bill's operation would be suspended until the Legislative Council agreed to persist with the measure in the face of the Chief Justice's opposition. Further, Francis Smith, who had been appointed Solicitor-General after Fleming's promotion, had announced that if Pedder continued to assume 'power of making and unmaking the laws of the land', he could, either when sitting as a single judge, or in the Full Court when the Judges were divided on appeal, award judgment to a plaintiff who was suing to recover taxes raised under an illegal Act. Accordingly, also on 19 January, Denison had instructed the Attorney-General to draft a Bill enabling the Lieutenant-Governor to appoint a third judge. Meanwhile the government drew up a list of possible candidates for this new judgeship, selecting only those who were known to hold that the Lieutenant-Governor and Legislative Council were, within the colony, supreme over the law.[28]

The Legislative Council assembled on 26 January. In his opening address Denison outlined dramatically the possible consequences of the Judge's decision that the Dog Act was void. He tabled reports on the decision from Horne and Smith, and said their opinions were 'very clear and conclusive as to the non-existence' of the power claimed by Pedder and Montagu. He also tabled the Attorney-General's Bill to remove doubts about the validity and legality of local Acts, and urged the Council to pass it as speedily as possible. This 'Doubts Bill'

---

25 Executive Council Minutes, VIII, 539-571. These include copies of all correspondence in the case.

26 Grey to Denison No. 195, 6 August 1847 (T.S.A.).

27 C.S.O. 24/41/1281.

28 Executive Council Minutes, VIII, 550, 558, 568; C.S.O. 24/41/1281.

contained the provisions Denison had requested. Despite spirited opposition and the presentation of several petitions against it, the Bill passed the second reading and committee stages by 3 February. On 4 February, Pedder, in his capacity as a Council member, moved that the Bill be recommitted to enable the insertion of a clause saving 'the rights of persons who may have already brought, or may hereafter bring actions before the Act shall come into operation'. On 7 February, Pedder's motion was defeated by eight votes to six. The third reading of the Bill was carried immediately by a similar vote.[29] Denison assented to the measure, and sent it to the Supreme Court to be enrolled. On 21 February, as expected, Pedder represented that this Act was repugnant to the Huskisson Act, because it declared valid and binding, Acts which the imperial statute had specifically declared to be beyond the Council's competence.[30] Denison reconvened the Legislative Council. He urged the members to disregard the Chief Justice's opinion and to 'adhere' to the Act. He claimed that this was the only available means of removing uncertainty about existing legislation. After some hesitation, on 10 March the Council acceded to Denison's request by eight votes to five, Pedder being absent.[31] This checked all actions for the recovery of licence-fees, taxes and duties. Pedder bowed to the authority of the Imperial Parliament's declaration, in the Huskisson Act, that if the Lieutenant-Governor and Legislative Council should persist with an enactment which was repugnant, that enactment would have the force of law until the Crown's pleasure was known.[32] Denison did not proceed with his Third Judge Bill.[33]

Remarkably, the Doubts Act of 1848 was never submitted to the Queen in Council. Though the Colonial Office staff saw that the Act was unconstitutional and therefore 'quite valueless' in point of law, Earl Grey considered it 'apparently unavoidable'. For fear that it might be disallowed, he decided that it would be inexpedient to risk presenting it for the signification of the Queen's pleasure.[34] This was a deliberate violation of both the letter and the spirit of the Huskisson Act's provision that an impugned colonial statute together with the judges' opinions on it 'shall be forthwith transmitted' to the monarch in Council for review.[35] Because Grey assumed power to disregard

29 Votes and Proceedings of the Legislative Council (henceforth V.P.L.C.) 1843-51, 173-179, 181-186, 188.

30 L.C.P. 1847-8, No. 11.

31 V.P.L.C. 1843-51, 189-191, 200.

32 9 Geo. IV, c. 83, s. 22.

33 In a Colonial Office minute dated 19 June 1848, permanent Under-Secretary Merivale stated that Denison had provisionally appointed a third judge. C.O. 280/224/145. However, Denison had decided that he had no power to make such an appointment, because the colony's Charter of Justice, issued in pursuance of the Huskisson Act, provided that the Supreme Court should be constituted of two judges only. C.S.O 1/544/11841; Denison to Grey, No. 57, 4 March 1848

34 C.O. 280/224/145; Grey to Denison No. 144, 7 September 1850 (T.S.A.).

35 9 Geo. IV, c. 83, s. 22.

the imperial statute, the Doubts Act of 1848 still remains on the Tasmanian statute book.[36]

Pedder and Montagu's decision in *Morgan's Case* had placed the Van Diemen's Land government in a ridiculous position. The colony's Solicitor-General had shown that four-fifths of the local revenue legislation could be challenged on the ground of repugnancy to the Huskisson Act.[37] Grey had helped maintain the absurd pretence that the colonial legislature could definitively give validity to Acts embodying provisions which the Imperial Parliament had defined as being beyond the competence of the Legislative Council to enact. In fact, he was encouraging the colonial legislature to say: 'We have the power to ignore our constitution simply because *we* say we have the power'. Grey did realize that an imperial validating Act was the proper remedy for the colony's dilemma.[38] But instead of obtaining such a statute at the earliest possible opportunity, he waited and inserted a clause, which legally solved the situation in the Australian Colonies Government Act.[39] This Act did not become law until August 1850, that is, more than two years after Grey had received a despatch from Denison, enclosing copies of the judgments in *Morgan's Case* and the colonial Law Officers' reports on the consequences of those judgments.[40] Even then, Grey failed to advise the Queen to disallow the Van Diemen's Land Doubts Act. He noted that it had 'served its immediate purpose', and considered that there was still 'no necessity for the signification of Her Majesty's pleasure respecting it'.[41] Not only had he violated the Huskisson Act, he had bridled a prerogative rule which had a continuous history since the celebrated Poyning's Law was imposed on the Drogheda Parliament in 1495—the rule that the legislation of colonial assemblies must be submitted for review by the king in Council.[42] Yet this tradition was stronger than the Secretary of State. He appears to have honoured it in the case of all other colonial enactments.

Meanwhile, in 1848, in Van Diemen's Land, there had been intense public criticism of Denison's treatment of Montagu and Pedder. The *Hobart Town Courier*, the *Cornwall Chronicle*, the *Launceston Examiner*, the *Hobart Town Guardian*, the *Colonial Times*, and other local newspapers accused Denison of having committed a 'mean', 'despicable', 'indefensible', and 'monstrous' interference with the administration of justice. None doubted that Montagu's judgment in *Morgan's Case* was the real reason for that judge's amoval.

The public indignation at Denison's conduct towards the Chief Justice was even greater, for in his private life, Pedder was propriety

---

36 11 Vic., No. 1.

37 C.S.O. 24/26/690.

38 C.O. 280/224/145; Grey to Denison No. 144, 7 September 1850 (T.S.A.).

39 13 and 14 Vic., c. 59, s. 26.

40 Denison to Grey No. 36, 18 February 1848 (T.S.A.).

41 Grey to Denison No. 144, 7 September 1850 (T.S.A.).

42 J. Goebel, 'The Matrix of Empire', in J. H. Smith, *Appeals to the Privy Council from the American Plantations*, New York, 1950, pp. lvi-lvii.

personified.[43] If he had been less modest, he could (as his friend, J. W. Willis once did on the Melbourne bench) have applied to himself the words of Samuel:

> Behold, here I am, witness against me, before the Lord, and before his annointed. Whose ox have I taken, or whose ass have I taken, or whom have I aggressed, or of whose hand have I received any bribe, to blind mine eyes therewith?[44]

Through 1848-9 the cry against Denison was taken up in the House of Commons by T. C. Anstey, an English barrister who had once been Commissioner in Insolvency in Van Diemen's Land, and then professor of jurisprudence in the Roman Catholic college at Prior Park in Somerset. After two false starts, the House debated a motion that the Queen be addressed to disallow the Van Diemen's Land Doubts Act, and to direct Denison to respect the independence of the Supreme Court. The Russell ministry opposed the motion. W. E. Gladstone claimed full responsibility for sending Denison to Van Diemen's Land, and stressed the fact that colonial judges were not given the independence that English judges possessed. He avowed that it was 'very often' the duty of governors to 'interfere' with judges, and that governors should be given all the support they could reasonably look for from the imperial government. The House divided on party lines, and the motion was defeated by seventy-two votes to twenty-four.[45]

Either in the local press or in petitions to the Queen, almost every leading colonist had criticized Denison's treatment of the judges. Yet the legal profession in Van Diemen's Land had behaved like a set of time-servers. The sole exception was A. O. Montagu, the only outstanding barrister in the colony. However, Denison dismissed his views as partisan, on the ground that he was Judge Montagu's brother. Fleming was talented, and Smith showed great promise, but like the remainder of their colleagues they were eager for promotion. When news leaked out that Denison intended to suspend Pedder and create a third judgeship, the Van Diemen lawyers had become extremely vocal—not in defence of their Chief Justice, but seeking preferment for themselves.[46]

Early in 1848, Montagu had gone to England to exercise his right of appeal. The Judicial Committee considered the question in June-July 1849. Possibly because he was stunned and demoralized by the unexpected set-back to his career, more probably because he was unlucky in his choice of counsel, his case was poorly argued. His counsel rested the appeal chiefly on the argument (which had been

---

43 Historical Records of Australia iii, IV, 227, 245: Arthur to Glenelg, separate, 2 November 1837 and encl. (T.S.A.); Glenelg to Franklin, separate, 12 April 1838; (T.S.A.); *Colonial Times*, Hobart Town, 26 March 1839; *Launceston Examiner*, 8 January 1848; Denison to Newcastle No. 135, 7 August 1854 (T.S.A.); Grey to Young No. 4, 2 January 1855 (T.S.A.).

44 H. G. Turner, *A History of the Colony of Victoria*, London, 1904, I, 259-260.

45 *Hansard*, third series, XCIX, 250; CIII, 685; CIV, 378; CVII, 251-261.

46 C.S.O. 24/26/690, and 24/36/1057; P.P. (U.K.) 1848, 566; Executive Council Minutes, VIII, 568.

rejected in *Willis* v. *Maitland and Willis* v. *Gipps*)[47] that Burke's Act did not apply to judicial offices. Secondly, they submitted that the amotion was irregular and therefore illegal because it had been made at the conclusion of a proceeding for Montagu's suspension.[48] But there was more to the case than this. The Executive Council had actually taken points from Montagu's defence to the threat of suspension and had, to a considerable extent, grounded the order of amotion on those points. The Council had convicted him, in his absence, and without giving him the benefit of being represented by counsel. Again, *after* Montagu had been asked to show cause why he should not be suspended, Denison had continued to collect opinions adverse to his character, and the Lieutenant-Governor's staff had continued to probe the official records of the colony in search of earlier complaints against the judge. Denison used this material to bolster his case. Moreover, the complaints preferred by MacMeckan and Young had been supported by circumstantial evidence and hearsay, whereas Montagu had furnished statements from respected citizens in support of his denials of MacMeckan and Young's allegations.[49]

On 3 July 1849, Lord Brougham announced: 'Their Lordships have agreed upon the report they will make to the Queen: they do not state their reasons in these cases'. Their report declared that Denison and his Council had had power, under Burke's Act, to amove a judge, and that,'upon the facts appearing before the Governor [*sic*] and Executive Council, as established before their Lordships, . . . there were sufficient grounds for the amotion of Mr. Montagu'. Following the precedent of *Willis* v. *Gipps*, the report did not mention what the 'grounds' were. The report concluded:

> there was some irregularity in pronouncing an order for amotion, when Mr. Montagu had been called upon to show cause against an order for suspension; but, inasmuch as it does not appear to their Lordships, that Mr. Montagu has sustained any prejudice by such irregularity, their Lordships cannot recommend a reversal of the order.[50]

It seems that 'the worldlings of Whitehall'[51] erred on this point. But the significant part of their decision was that there were sufficient grounds for the amotion. On 18 July, the report was confirmed by an Order in Council dismissing the appeal. No direction was given as to costs, so Denison had to find £471 to pay his counsel.[52]

After an examination of Montagu's amotion, a former professor of law in the University of Tasmania has concluded that it 'must be

---

47 5 Moo. P.C., 379-393.

48 *Montagu* v. *the Lieutenant-Governor and Executive Council of V.D.L.* (6 Moo. P.C., 495-497).

49 Executive Council Minutes, VIII, 510-525, 527-539. (These Minutes were presented to the Judicial Committee). C.S.O. 24/36/1057; Denison to Grey: No. 19, 17 January 1848, and separate, 23 January 1848 (T.S.A.).

50 6 Moo. P.C., 499-500.

51 Smith, *op. cit.*, p. 503.

52 6 Moo. P.C., 500. C.S.O. 24/36/1057. The amount was eventually paid out of the imperial vote for the Van Diemen's Land police and gaols. Grey to Denison No. 207, 18 December 1849 (T.S.A.).

seriously doubted whether there were really sufficient proper grounds for removing *[sic]* him'.[53] There was indeed one sufficient ground for the amotion. The spate of rebuttals and counter-allegations, which had followed MacMeckan and Young's initial complaints, had established that in December 1847, Montagu had owed almost £600. Montagu had not denied this. On the other hand, it was not established that Montagu was *unable* to pay these debts. They amounted to less than half his annual salary, besides which he reportedly had 'a very large annual income' as co-heir of his maternal grandfather, Sir William Beaumaris Rush, of Roydon, Suffolk, and Wimbledon, Surrey, a wealthy landowner who had had no son.[54] Yet Montagu's father had taught him the habit of postponing settlement of all debts until the last moment that the law allowed.[55]

The Judicial Committee would have had good cause for taking the view that a judge becomes unfitted for office the moment he falls into debt. His creditors would be largely deprived of their legal remedy, as few barristers would be prepared to launch an action against him for fear of prejudicing their careers. Again, if such a judge's creditors were sued by a third party and he dared to preside over the hearing, or if the case came before him on appeal, he could afterwards be open to the charge of having procured a miscarriage of justice. If judgment was awarded to the plaintiff, the judge might be accused of vindictiveness towards his creditors. If the plaintiff lost his suit, the judge might be accused of bias in favour of his creditors.

However, assuming that the Judicial Committee supported the amotion on the ground that Montagu's indebtedness was inconsistent with the due and unquestionable administration of justice in the Supreme Court of Van Diemen's Land, the whole affair still manifests two piquant ironies. In the first place, Montagu's successor, Thomas Horne, who as Attorney-General had advised Denison and the Executive Council that they had both power and sufficient reason to amove the judge, was, at that time and for years afterwards, notoriously in debt to a greater extent than Montagu had ever been. Even the respectable *Hobart Town Courier,* which scrupulously abstained from printing the gossip beloved of its contemporaries, suggested that Horne be commissioned 'during bad behaviour'.[56] By 1851, Denison was bitterly regretting that he had elevated Horne to the bench.[57] In 1860, Horne brought about his own downfall by asking the plaintiff in a suit in equity, referred to him in chambers, for a loan of £500.[58]

---

53 R. W. Baker, 'The Early Judges in Tasmania', *Tasmanian Historical Research Association Papers and Proceedings,* VIII, 80.

54 C.S.O. 24/36/1057; *Tasmanian and Austral-asiatic Review,* Hobart Town, 24 January 1834.

55 P. A. Howell, *Of Ships and Sealing Wax: the Montagus, the Navy, and the Law,* Hobart, 1966, pp. 11-13, 15, 22, 29.

56 26 January 1848.

57 Denison to Grey, confidential, 18 February 1851 (C.O. 280/274).

58 Baker, article cited, p. 83.

In the second place, while Denison and the Executive Council had amoved Montagu ostensibly for taking advantage of a legal technicality to obstruct a creditor, they themselves were prepared to use every conceivable means to obstruct the claims of colonists who tried to recover license-fees, taxes and duties that had been levied under unconstitutional enactments.[59]

Whereas the Colonial Office had virtually ignored Montagu's amotion and had left him to assert his right of appeal,[60] Denison's conduct towards Pedder was examined in detail. Permanent Under-Secretary Herman Merivale and Parliamentary Under-Secretary Benjamin Hawes thought that Denison should be severely censured for his treatment of the Chief Justice. Grey agreed, but, like Gladstone, made 'great allowance' for the crisis that had faced the colonial government. He directed that a despatch pointing out the impropriety of Denison's behaviour be written immediately.[61] This despatch was prepared by Merivale. It described the Executive Council proceedings against Pedder as an 'unjustifiable . . . abuse of power', and declared that the Chief Justice had done well to resist them. Denison was told that Pedder must be treated with the deference due to his station as the highest legal authority in the Colony:

> The conduct of a Judge . . . may be the subject of . . . animadversion; but his exposition of the law on a point duly submitted to him must not be questioned, save only by the appellate Tribunal above him, and this, not for his own sake, but that suitors may have confidence in the Courts which adjudicate their rights. To quarrel with his judgment because the Government finds it inconvenient—above all, to inform him, as you did in your letter of 4th Jan., 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. Similar cases have not unfrequently occurred in this Country; cases in which enactments of the Legislature after they had been understood and acted upon in a particular sense, have been, on argument, decided to bear another, to the extreme inconvenience of the Public and danger of parties concerned;—but the course usually followed on such occasions has been simply to provide for the safety of such parties by an Act of indemnity: never, since England enjoyed free Institutions, to interfere with, much less to punish, the Judges who made the decision.

No one at the Colonial Office doubted the judges' power to pronounce local Acts invalid, for as it was their duty to declare what the law was, it was also their duty to declare what was not law. In either event, their decision could only be reviewed by the Judicial Committee of the Privy Council. To say that the Queen, after considering a colonial enactment which had not been passed in the manner specified by the Huskisson Act, could give validity to that enactment simply by leaving it to its operation, was to say that she could *pro tanto* repeal the Huskisson Act itself. But an imperial statute could only be repealed by the Queen *in Parliament*. The despatch acknowledged the embarrassment that had resulted from the discovery that a Van Diemen's

---

59 C.S.O. 24/26/690, 24/39/1176.

60 C.O. 280/223/428 *et seq.*; *Hansard*, third series, XCIX, 250.

61 C.O. 280/224/141-154.

Land revenue Act had not been passed in the form prescribed by the imperial statute, and continued:

> for the Executive Government to endeavour to escape the consequences of such untoward occurrences by controuling or overawing the Judicial Authorities into more favourable decisions, is, assuredly, to aggravate the evil: because the law is certain, sooner or later, to prevail, and, in all probability, the ultimate redress to be given will be the heavier by all the accumulated arrears of illegalities which will have thus been committed or allowed.

Merivale ended the despatch on this note. Grey added another sentence, avowing that it had given him much pain to 'write' the despatch, and that, as he was satisfied that a crisis of very unusual embarrassment was the only cause of Denison's 'mistake of judgment', 'my confidence in your zeal and ability in carrying on the public service will continue to be given to you without reserve'.[62]

The denouement was enacted in Van Diemen's Land. The July mail from London arrived unusually early. On the afternoon of 9 November, on returning to Government House after their customary promenade through Hobart Town, the Denison family were startled to find 'an awful-looking bag of despatches' on the drawing-room table. Denison and his wife had anticipated with great dread the Colonial Office's response to his handling of what they called 'the Judge Storm', and he at once tore open Grey's confidential despatch. He read it aloud, 'as fast as he could get the words out of his mouth'. His children sat mesmerized on a sofa, Lady Denison distractedly 'pacing up and down just in front of them'. She was appalled at the severe 'rap over the knuckles' which her William had to endure, and believed that 'a sentence of recall was coming every moment'. When Denison reached the tremendous anti-climax of Grey's concluding sentence, his wife thought she would never be able to 'sit down composedly again'. Denison took the despatch as a warning that he should never again 'meddle with judges'. And indeed, he never did.[63]

---

62 Grey to Denison, confidential, 30 June 1848 (C.O. 280/224).

63 W. T. Denison, *Varieties of Vice-Regal Life*, London, 1870, I, 75, 96-98.