THE STRUGGLE FOR JUDICIAL INDEPENDENCE: THE AMOTION AND SUSPENSION OF SUPREME COURT JUDGES IN 19th CENTURY AUSTRALIA

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While judicial independence was sought by the Australian public in the 19th century, and formally written into colonial constitutions after 1850, the colonies remained subject to Imperial law. That law removed from the local parliaments the power to dismiss judges and placed the power to suspend or amove judges in the hands of the local executive and the Privy Council. The conflict between Imperial law and local law on judicial tenure came to a head in two major incidents in South Australia and Western Australia, in which Imperial law and policy prevailed over local sentiment. The paper shows how popular opinion favoured judicial independence as part of the shift towards responsible government as a means of both loosening Imperial control and asserting more local control over the judiciary. The other finding of the paper is that the de-coupling of the judiciary from legislative and executive functions after 1860, as the result of the institutional changes following the introduction of responsible government, did as much as formal legal changes to enhance the independence of the judiciary and to reduce conflicts between the courts and the executive.

I INTRODUCTION

It is now taken for granted that the independence of the judiciary from the executive is an essential element of the rule of law, secured by the holding of office during good behaviour and by the requirement that judges can only be removed by an address of the legislature.[1] This was proposed at least three times in the 17th century in England, beginning in 1642[2] and established by the *Act of Settlement*[3] in 1701, before being extended by the *Demise of the*

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1 See, eg, *Constitutional Reform Act 2005* (UK) ss 3, 33; *United States Constitution* art III § 1; *Constitution Act 1867* (Imp) 30 & 31 Vict, c 3, s 99; *Constitution Act 1986* (NZ) s 23; *Australian Constitution* s 72(ii).

2 See Proposition No 12 of the 'Nineteen Propositions', *Journal of the House of Lords*, vol 5 (1642) 99; The Heads of Grievances 1688, item 18 in Lois G Schwoerer, *The Declaration of Rights, 1689* (Johns Hopkins University Press, 1981) 300; a proposed Bill in *Journal of the House of Lords*, vol 15 (1692) 84, 91–2, which was passed by Parliament but was refused the royal assent; J Corson, 'Judges and Statutory Tenure in England in the Seventeenth Century' (1930) 42 *Juridical Review* 136, 148.

3 12 & 13 Will 3, c 2 ('*Act of Settlement*').

Crown Act 1760.[4] In large measure, these arrangements have succeeded, for the removal of a judge is now rare. The last British instance of judicial amotion was in 1830,[5] though there have been some recent cases in Commonwealth countries.[6] In contrast, British colonial law and practice, until the onset of responsible government in the 1840s and 1850s, did not fully respect the concept of an independent judiciary.[7] This situation arose from certain practices that tied the judges to the executive. In the smaller colonies, the concentration of power and the deep involvement of the judges in the legislative and executive branches of government were usual rather than exceptional. At the same time, the judges had a power, denied to the bench in England, to invalidate local legislation if it should be repugnant to the laws of England.[8] These two functions might conflict when, for instance, a judge certified an Act as not repugnant to English law, but held otherwise when the legislation was challenged in an actual case. As we shall see, during the Crown Colony period judges were regarded as part of the public service and were not accorded security of tenure until the 1850s.

British policy on the removal of colonial judges was based on two considerations. On the one hand there was limited recognition of the importance of judicial independence and the need for legality[9] and, on the other hand, it was colonial policy to insulate judges from local

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4 1 Geo 3, c 23, s 2. This Act provided that judicial salaries would not be lowered during the tenure of the judge.

5 See the discussion of the removal of Judge Jonah Barrington where the judge was allowed to appear before the House of Commons with counsel. See also United Kingdom, *Parliamentary Debates*, House of Commons, 22 May 1830, cols 965–79; W P M Kennedy, 'Removal and Tenure of Judges' (1947) 6 *University of Toronto Law Journal* 463, 465.

6 *Landreville v The Queen (No 2)* (1977) 75 DLR (3d) 380, 394–5; *Crane v Rees* [1994] 2 AC 173; *Barnwell v Attorney-General* [1994] 3 LRC 30; *Therrien v Québec (Ministre de la justice)* (2001) 200 DLR (4th) 1; *Re Chief Justice of Gibraltar* [2010] 2 LRC 450; *Re Levers J* [2010] 5 LRC 827; *Chief Justice of the Cayman Islands v Governor of Cayman Islands* [2013] 3 WLR 457; F A Trindade, 'The Removal of the Malaysian Judges' (1990) 106 *Law Quarterly Review* 51, 51–86.

7 See United Kingdom, *Parliamentary Debates*, House of Commons, 13 May 1825, cols 586–9; United Kingdom, *Parliamentary Debates*, House of Commons, 12 July 1849, col 256 also reported in 'Colonial Judges Not Independent', *Sydney Morning Herald* (Sydney), 8 December 1849, 2. But later in the 19th century the concept was applicable even in Crown Colonies. See Duke of Buckingham and Chandos, *Correspondence Respecting the Removal and Suspension of Colonial Judges* C 139 (1870) 3. By the late 1940s the concept was fully applied to the colonial judiciary: United Kingdom, *Parliamentary Debates*, House of Commons, 16 November 1949, col 2020: '[t]he independent status of Colonial judges in relation to the executive is fully established and is well understood by Colonial governors'. For a late colonial example see *Hong Kong Letters Patent 1917* art XVIA, later amended by *Laws of Hong Kong 1976* vol 21 app 1.

8 See *Newspaper Act Opinion* [1827] NSWSupC 23; '*Symons v Morgan'*, *The Courier* (Hobart), 2 February 1848, 3,4 ;*'Hutchinson v Leeworthy'*, *The South Australian Advertiser* (Adelaide), 29 May 1860, 3;*'Driffield v The Registrar-General', The South Australian Register* (Adelaide), 17 December 1862, 3; *Rusden v Weeks* (1861) 2 Legge 1406, 1413–6. See also South Australia, *Functions of Supreme Court*, Parl Paper No 143 (1861) in which the duty of judges to decide on the validity of local legislation is defended in a letter written on Boothby J's behalf by the associate to the judges.

9 See, eg, Duke of Newcastle to Daly, No 25, 24 April 1862 in South Australia, *Despatch on Addresses For Removal of Judge Boothby*, Parl Paper No 68 (1862) 2 where he wrote, 'I hold the practical independence of the Superior Courts of a Colony to be… among the links that bind together the Colonial Empire of Great Britain,' and later, '[i]t is of vital importance …that these Courts should exercise their functions in entire independence not only from the Local Executive but of the popular feelings which are from time to time reflected in the Legislature'.

political pressures.[10] In short, the independence of the judiciary in the colonies meant, to the British, independence from the legislature not the executive. This was in keeping with a wariness in London towards the local legislatures, which was manifested in 1844 when a Select Committee of the New South Wales Legislative Council, on general grievances, argued strongly for judicial independence on the English model, and sought to shift the power to dismiss judges from the executive to the legislature.[11] The British refused to allow this because local parliaments could not be trusted, since the supposed lack of an informed public and local passions might affect the situation.[12] As a result, in the 1840s the British refused to relinquish executive control over the removal or suspension of judges in Australia.[13]

As a matter of practice, in the early days of the Australian colonies the executive did interfere with judicial decisions, though the judges were quick to assert their independence. Prior to the creation of the Supreme Court of New South Wales, Governor Lachlan Macquarie had no qualms about interfering with the decisions of the judge-advocate. This attitude flowed in part from the status of the judge-advocates, a military title, who were regarded by the executive as subordinate to a Governor with military rank. The Governor's intervention in an admiralty case in 1818 was the subject of a complaint about the system of justice to the Bigge Commission in 1821.[14] Matters improved somewhat after the creation of the Supreme Court in 1823,[15] though old attitudes persisted. A major dispute developed in New South Wales when Forbes CJ refused to certify legislation to regulate the press in conformity with the laws of England. The judge, who was also a member of the legislature, was obliged to certify legislation. However, after considering the matter he concluded that it was repugnant to the laws of England. He was clearly uncomfortable in dealing with what he called 'a nude matter', ie a legal question without the benefit of full legal argument in a court of law. The potential for clashes with the executive was enhanced by the assumption made by the Governor that the judge would do his bidding. The clash between the Chief Justice and the Governor has been the subject of important legal scholarship and shows that the placing of the judges in the dual roles of certifying legislation before the matter came before a fully argued submission in a legal case brought the bench into conflict with the executive.[16]

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10 See the extract of the New South Wales Executive Council minutes in *The Maitland Mercury and Hunter River General Advertiser* (Maitland), 5 December 1856, 3; Despatch of the Duke of Newcastle, 10 July 1861 in South Australia, *Parliamentary Debates*, Legislative Council, December 1866, cols 1208–9.

11 'Report of the Select Committee on General Grievances', *Sydney Morning Herald* (Sydney), 18 December 1844, 2.

12 British suspicion of the democratic temper of the Australian colonies was noted in the important memorandum to the Queen in May 1849 in which consideration was given to granting responsible government. See *Papers Relative to the Proposed Alterations in the Constitution of the Australian Colonies* in BPP, vol 11, 65–77 and the earlier comments to the same effect in United Kingdom, *Parliamentary Debates*, House of Commons, 19 August 1835, cols 672–5.

13 See 'Independence of the Judges', *The South Australian Register* (Adelaide), 6 April 1850, 2.

14 John Ritchie (ed), *The Evidence to the Bigge Reports: New South Wales Under Governor Macquarie* (Heinemann, 1971) vol 2, 168–9.

15 See *New South Wales Act 1823* (Imp) 4 Geo 4, c 96; *Charter of Justice*, 13 October 1823 for New South Wales in United Kingdom, *Statutory Rules and Orders Revised* (1950), vol II, 1041.

16 *Newspaper Act Opinion* [1827] NSWSupC 23. For important discussions see C H Curry, *Sir Francis Forbes: The First Chief Justice of the Supreme Court of New South Wales* (Angus and Robertson, 1968) 200–21; J M Bennett, *Sir Francis Forbes: First Chief Justice of New South Wales, 1823–1837* (Federation Press, 2001) 83–100; Brendan Edgeworth, 'Defamation Law and the Emergence

In an important dispatch by Forbes CJ to London in March 1827,[17] the judge wrote that under the constitution the King had delegated his judicial powers to his judges in both England and in New South Wales. Chief Justice Forbes asserted that, just as in England the judges were independent of the ministerial authorities, so they were in New South Wales. He pointed out that the instructions to the Governor gave him no power over the judges. While judges may be removed:

> [T]he judicial office itself stands uncontrolled and independent, and bowing to no power but the supremacy of the law. This is a lawyer's view of the Supreme Court, but I rather suspect that the Governor looks upon it in the light of a court martial, the proceedings of which are subject to the revision of the commander-in-chief.[18]

The Chief Justice then proposed an admonition be sent from London to remind the Governor of the proper relationship between the two branches of government.

II THE LEGAL FRAMEWORK

Colonial governors were issued with two prerogative legislative instruments setting out the powers of their office: the Letters Patent and the Royal Instructions. Typically, these powers included the appointment of all public officers as well as a power to suspend such officers if necessary.[19] The suspension power required a hearing and a report to England setting out the record of the hearing and the grounds for the decision. Neither of these instruments provided for dismissal but they did include a power to act immediately in an emergency by permitting the Governor to interdict a public officer.[20] All public officers in the colonies, including the judges, were appointed at pleasure.[21] This meant that the Governor could dismiss a public officer without notice, without a hearing, and without giving reasons. The holding of office at

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of a Critical Press in Colonial New South Wales (1824–1831)' (1990) 6 *Australian Journal of Law and Society* 50, 66–70.

17 *Historical Records of Australia*, series IV, vol 1, 703, 716–27 ('*HRA*').

18 Ibid 726. See also *Re Byrne* [1827] NSWSupC 9 where the Governor wrote to Stephen J asking about his judgment as reported in the press, an action the judge thought improper.

19 See *Letters Patent Constituting the Office of Governor and Commander-in-Chief of the Colony of Western Australia*, 17 November 1882 in Western Australia, *Royal Instructions Under Which the Government of the Colony of Western Australia is Administered*, Parl Paper No A1 (1885) 5 where cl V deals with the appointment of judges, and cl VII with the power to suspend commissioned officers. This was a common provision: see Arthur Mills, *Colonial Constitutions* (John Murray, 1856) 25.

20 Western Australia, *Instructions to the Governor and Commander-in-Chief of the Colony of Western Australia*, Parl Paper No A1 (1885) 11, cl 23 conferred a power to interdict officers. For an interdiction of the Attorney-General see *The West Australian* (Perth), 4 May 1886, 3; *The West Australian* (Perth), 8 May 1886, 8.

21 For appeals from Western Australia and New South Wales, respectively, that set out this common law rule see: *Shenton v Smith* [1895] AC 229, 234–5; *Gould v Stuart* [1896] AC 575, 577, unless, as pointed out in *Gould*, an enactment made an exception to this rule. For other examples of colonial judges appointed at pleasure see *Administration of Justice (West Indies) Act 1836* (Imp) 6 & 7 Will 4, c 17, s 5; *East India (High Court of Judicature) Act 1861* (Imp) 24 & 25 Vict, c 104, s 4. In the Ionian Islands local judges were appointed for a fixed term because they were sometimes subject to corrupt motives and had to be removed quickly: 'Colonial Judges', *South Australian Register* (Adelaide), 25 July 1863, 5. For an affirmation of this position during the Crown Colony period in Australia see *Meymott v Piddington* [1877] Knox 306, 312.

pleasure was subject to any legislation to the contrary,[22] and in some cases, legislation confirmed this starting point. The *Australian Courts Act 1828*,[23] for example, provided in section one that judges, in what was then New South Wales and Van Diemen's Land, held office at pleasure, being removable 'as occasion shall require'. However, this legislation did not apply to either South Australia or Western Australia as these colonies were created independently of eastern Australia.[24] Nevertheless, the early statutory provisions on judicial tenure made it plain that the power to appoint was 'until the pleasure of Her Majesty be known'.[25]

The problem for Australia was that the *Act of Settlement*,[26] which protected judges in England, did not apply to the colonies in the 19th century.[27] There were two reasons for this. First, the procedure in the *Act of Settlement* required addresses of the houses of Parliament in Britain before a judge could be removed, and this could hardly have been intended to apply to the removal of judges in the colonies.[28] Subsequent British legislation designed to replace section three of the *Act of Settlement* was in terms applicable only to British judges, not to those in the colonies.[29] Second, where an Imperial Act was made specifically for the colonies, that legislation displaced any other British legislation on the same subject. The English position in the 19th century was that the governing Imperial statute on the amotion of judges, as it was called, was the *Colonial Leave of Absence Act 1782*.[30] As the preamble to the Act shows, it was initially intended to root out some of the worst aspects of public office

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22 For a rare example see 'The Opinion of the Attorney and Solicitor, Ryder and Murray, on the Commission Granted to De Lancey, the Chief Justice of New York', 25 July 1753 in George Chalmers, *Opinions of Eminent Lawyers on Various Points of English Jurisprudence: Chiefly Concerning the Colonies, Fisheries and Commerce of Great Britain – Collected and Digested from the Originals in the Board of Trade and Other Depositories* (Reed and Hunter, 1814) vol 1, 177–8. For other laws in colonial America that sought to provide security of judicial tenure but which were disallowed in London see Leonard W Labaree, *Royal Government in America: A Study of the British Colonial System Before 1783* (Frederick Ungar Publishing, 2nd ed, 1964) 388–400.

23 (Imp) 9 Geo 4, c 83.

24 See *White v McLean* (1890) 24 SALR 97, 99; United Kingdom, *Parliamentary Debates*, House of Commons, 3 June 1867, col 1494; *R v De Baun* (1901) 3 WALR 1, 14.

25 *Supreme Court Act 1840* (NSW) s 1; *Supreme Court Act 1852* (Vic) s 3; *Supreme Court Ordinance 1861* (WA) s 11.

26 For a discussion of this Act see: Robert Stevens, 'The *Act of Settlement* and the Questionable History of Judicial Independence' (2001) 1 *Oxford University Commonwealth Law Journal* 253–67; Barbara Aronstein Black, 'Massachusetts and the Judges: Judicial Independence in Perspective' (1985) 3 *Law and History Review* 101, 103–08.

27 Joseph H Smith, 'An Independent Judiciary: The Colonial Background' (1976) 124 *University of Pennsylvania Law Review* 1104, 1104–56.

28 See *Terrell v Secretary of State for the Colonies* (1953) 2 QB 482, 492–3.

29 See S A de Smith, 'Tenure of Office by Colonial Judges' (1953) 16 *Modern Law Review* 502, 505.

30 22 Geo 3, c 75, s 2 ('*Burke's Act*'). Possibly a false name as the *Civil List and Secret Service Money Act 1782*, 22 Geo 3, c 82 was also known by that name: see Arthur Mills, *Colonial Constitutions* (John Murray, 1856) 10. Nevertheless, the *Colonial Leave of Absence Act 1782* was called *Burke's Act* in official documents in 1862: see 'Law Officers to Newcastle', 12 April 1862 in South Australia, *Despatch on Addresses For Removal of Judge Boothby*, Parl Paper No 68 (1862) 3; 'Memorandum by Sir Frederick Rogers: The Removal of Colonial Judges' in United Kingdom, *Correspondence on the Removal and Suspension of Colonial Judges*, C 139 (1870) 4. For the application of this Act to the colonies see United Kingdom, *Parliamentary Debates*, House of Commons, 3 June 1867, col 1495.

corruption in the 18th century colonies, whereby bidders for colonial offices would appoint unsuitable deputies to act in their place in the colony.

The Act was well known in 19th century Australia and was reprinted in several 19th and early 20th century collections of Imperial Acts that applied in the Australian colonies.[31] Section two of the Act provided that colonial officials appointed by Patent could only be removed from office for three causes: (1) persistent absence from the colony without leave; (2) neglect of duty; or (3) other misbehavior in office. The Act also required a hearing to be held prior to removal and the person amoved had the right to appeal to London 'whereupon such amotion shall finally be judged by His Majesty in Council'.[32] In two Australian appeals in the late 1840s the Judicial Committee held that *Burke's Act* did apply to colonial judges, even though judges were not specifically mentioned in the Act.[33] The Act applied to all public officers and this shows that judges were then regarded as public servants, not as a special class of public officer.[34] One matter of practice that emerged in the late 1840s was that the complaints from the colony about a judge had to be brought in a timely fashion. If the dispute in the colony arose many years before the complaint was made, the Judicial Committee might decide not to act on the matter.[35] The Act was amended in 1814 to add strict reporting requirements, whereby governors were to notify the House of Commons whenever an officer was granted leave.[36] In a case on the Act from New South Wales involving the Commissioner for Crown Lands, the Judicial Committee held that offices held at pleasure did not come within the Act, though by the 1870s a wider view was taken and the Act was applied to offices held both at pleasure and on good behavior.[37] The power under *Burke's Act* was personal to the Governor-in-Council in the colony concerned and could not be delegated to a commission.[38]

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31 See H B Bignold (ed), *Imperial Statutes in Force in New South Wales* (Lawbook, 1914) vol 2 ; F A Cooper (ed), *Statutes in Force in the Colony of Queensland* (1881) vol 2, 1282–3. The full text was reproduced in *The South Australian Register* (Adelaide), 27 June 1867, 3.

32 For Australian discussions of the Act see: Zelman Cowen and David P Derham, 'The Independence of the Judges' (1953) 26 *Australian Law Journal* 462, 464; Christine Wheeler, 'The Removal of Judges From Office in Western Australia' (1980) 14 *University of Western Australia Law Review* 305, 315–23; John Waugh, 'The Victorian Government and the Jurisdiction of the Supreme Court' (1996) 19 *University of New South Wales Law Journal* 409, 412; P H Lane, 'Constitutional Aspects of Judicial Independence' in Helen Cunningham (ed), *Fragile Bastion: Judicial Independence in the Nineties and Beyond* (Judicial Commission of New South Wales, 1997) 24; Brendan Gogarty and Benedict Bartl, 'Tying *Kable* Down: The Uncertainty About the Independence and Impartiality of State Courts, Following *Kable v DPP (NSW)* and Why it Matters' (2009) 32 *UNSW Law Journal* 75, 75–82.

33 *John Walpole Willis v Sir George Gipps, Knt* (1846) 5 Moo PC 379; 13 ER 536; *Algernon Montagu v Lieutenant Governor, and Executive Council, of Van Diemen's Land* (1849) 6 Moo PC 489; 13 ER 773; followed in *Re Squier* (1882) 46 UCQB 474, 483–5.

34 'Rights and Privileges of the Judges', *The Argus* (Melbourne), 15 December 1864, 1; 'Judges and Their Tenure', *Western Mail* (Perth), 17 September 1887, 20, 22.

35 See *In the Matter of the Representatives of the Island of Grenada and the Honorable John Sanderson, Chief Justice* (1847) 6 Moo PC 38, 42, 13 ER 596, 598. The complaints concerned activities in 1839, but the hearing before the Judicial Committee only took place in 1847. Some of the earlier matters were canvassed in *In re John Wells* (1840) 3 Moo PC 216; 13 ER 92.

36 *Public Officers in Colonies Act 1814* (Imp) 54 Geo 3, c 61.

37 *Ex parte Robertson* (1857–8) 11 Moo PC 288, 295; 14 ER 704, 705; cf 'Memorandum by Sir Frederick Rogers: The Removal of Colonial Jugdes' in United Kingdom, *Correspondence on the Removal and Suspension of Colonial Judges*, C 139 (1870) 4.

38 *Re Squier* (1882) 46 UCQB 474, 486.

The requirement of a fair hearing under *Burke's Act* was applied in *John Walpole Willis v Sir George Gipps, Knt*[39] when Willis J was amoved following a petition of 573 persons in Melbourne asserting that the community had lost confidence in the judge.[40] The judge, who was a member of the New South Wales Supreme Court, which had at that time jurisdiction over the Port Philip district, had been transferred to Melbourne in March 1841 after a falling out with Dowling CJ.[41] Unfortunately, his arrival in Melbourne did not improve the situation and his intemperate outbursts provoked powerful figures in the community. He had a dispute with the editor of the *Port Phillip Patriot* and in one case Willis J awarded damages against the editor for a libel on himself. The damages were remitted by the executive as the judge had acted in his own cause.[42] He also committed the Melbourne merchant and Justice of the Peace, J B Were, to six months' imprisonment because Were could not remember certain evidence at a trial. The matter was then sent to Governor Gipps who summarily amoved the judge on 24 June 1843.[43]

Justice Willis had had some experience in these matters, for he had been amoved in Upper Canada in 1829.[44] In 1843 the judge appealed to London on the ground that he had been removed without any sort of hearing at all. The Judicial Committee agreed with him, stressing that he was entitled to a hearing under *Burke's Act*.[45] In a twist, Willis J then tried to resign, but the authorities held that the initial failure to give him a hearing had been cured by the hearing in the Privy Council and thus it was decided to advise the Queen in August 1846 to revoke his appointment.[46] As a result, Willis J was paid all arrears of salary, given that his

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39 (1846) 5 Moo PC 379; 13 ER 536.

40 See H F Behan, *Mr Justice J W Willis: With Particular Reference to His Period as First Resident Judge in Port Phillip, 1841–1843* (Glen Iris, 1979) 281–96.

41 J M Bennett, *Sir James Dowling: Second Chief Justice of New South Wales 1837–1844* (Federation Press, 2001) 111–31.

42 Letter 105 in A G L Shaw (ed), *Gipps-La Trobe Correspondence* (Melbourne University Press, (1989) 126–7. The Governor had the prerogative power to pardon offences and to remit penalties. See *In the Matter of A Special Reference from the Bahama Islands* [1893] AC 138, 149. The Crown also remitted the punishment inflicted by Bolton CJ of Newfoundland following complaints against him in 1835: see United Kingdom, *Parliamentary Debates*, House of Commons, 19 August 1835, cols 672–5.

43 For short accounts see G B Vasey, 'John Walpole Willis: The First Resident Judge of Port Phillip' (1911) 1 *Victorian Historical Magazine* 36, 40–2; B A Keon-Cohen, 'John Walpole Willis: First Resident Judge in Victoria' (1972) 8 *Melbourne University Law Review* 703, 709–13; A G L Shaw, *A History of The Port Phillip District: Victoria Before Separation* (Melbourne University Publishing, 1996) 180–4; Janine Rizzetti, 'Judging Boundaries: Justice Willis, Local Politics and Imperial Justice' (2009) 40 *Australian Historical Studies* 362, 362–75; Janine Rizzetti, 'Sifting to the Bottom of Financial Impropriety: Judge Willis and Insolvency in Port Phillip 1841–1843' (2009) 2 *Journal of Historical and European Studies* 97, 97–109.

44 Following his removal in Canada he submitted an unsuccessful petition to the House of Commons. See United Kingdom, *Parliamentary Debates*, House of Commons, 11 May 1830, cols 551–5. See also Robert Hett, 'Judge Willis and the Court of King's Bench in Upper Canada' (1973) 65 *Ontario Historical Society* 19, 19–30; John McLaren, 'Men of Principle or Judicial Ratbags? The Trials and Tribulations of Maverick Colonial Judges in the 19th Century or A Funny Way to Run an Empire' (2009) 27 *Windsor Review of Legal and Social Issues* 145, 145–67.

45 South Australia, *Removal of Mr Justice Willis*, Parl Paper No 186 (1867) 2–3.The same papers were published as 'Mr Justice Willis', in New South Wales, Legislative Council, *Votes and Proceedings*, 1847, 459–66.

46 South Australia, *Removal of Mr Justice Willis*, Parl Paper No 186 (1867) 2–3.

amotion had initially been illegal, but was not given another judicial post.[47] One of the oddest features of the case was that the British refused to explain why Willis J was amoved, despite repeated letters by him for the details.[48] The inference to be drawn from the published decision of the Privy Council is that it was persuaded by the memorial from the inhabitants of Port Philip complaining about his conduct on the bench.[49]

The second case in the 1840s occurred in Van Diemen's Land in 1847 when Montagu J was amoved under section two of *Burke's Act.*[50] The official reason for the amotion was that the judge had manipulated the legal process to prevent a creditor from bringing proceedings against him in the courts of the colony to recover a debt from the judge.[51] When the action for debt came on before the court, the Chief Justice, Sir John Pedder, set aside the writ of summons for illegality. Under the law of Van Diemen's Land at that time, both judges were integral parts of the Supreme Court and this meant that no judgment could be obtained against Montagu J so long as he remained a judge of the Court.[52] Initially, Governor Denison proposed to suspend the judge and the matter proceeded on that footing, but eventually a decision was taken to amove Montagu J. In reality, the main reason for the amotion was that the judge had participated in the *Dogs Act* decision that had invalidated legislation imposing a tax. That decision was made on 29 November 1847.[53] Justice Montagu was then amoved at the end of December 1847.[54] The judge initially resisted his removal by arguing in a criminal

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47 *HRA*, series I, vol 25, 203–12. The cost to the government of this was the enormous sum of £6000, or four years' salary: see H G Turner, *A History of the Colony of Victoria: From its Discovery to its Absorption into the Commonwealth of Australia* (1904) vol 1, 258–61

48 See South Australia, *Removal of Mr Justice Willis*, Parl Paper No 186 (1867) 4.

49 Ibid 2 where this is specifically referred to, though not explained in detail.

50 *Algernon Montagu v Lieutenant Governor, and Executive Council, of Van Diemen's Land* (1849) 6 Moo PC 489; 13 ER 773. For secondary literature see B A Keon-Cohen, 'Mad Judge Montagu: A Misnomer?' (1975) 2 *Monash University Law Review* 50, 67–78; R W Baker, 'The Early Judges in Tasmania' (1960) 8 *Tasmanian Historical Research Association Paper and Proceedings* 71, 71–80; P A Howell, 'The Van Diemen's Land Judge Storm' (1965) 2 *University of Tasmania Law Review* 253, 253–69; Kathleen Fitzpatrick, *Sir John Franklin in Tasmania 1837–1843* (Melbourne University Press, 1949) ch 9; Dorothy O'Shea, 'The Supreme Court of Van Diemen's Land (1824–1856)' (2003) 11 *Australian Law Librarian* 222, 229–31; Stefan Petrow, 'Moving in an Eccentric Orbit: The Independence of Judge Algernon Sidney Montagu in Van Diemen's Land, 1833–47' in Hamar Foster et al (eds), *The Grand Experiment: Law and Legal Culture in British Settler Societies* (University of British Columbia Press, 2008) 156–75.

51 Denison to Grey, 17 January 1848 in *Despatches Relating to the Government and Affairs of the Colony*, (1847–8) vol 10, 279–85. For other instances of removals of court officials for insolvency see 'Mr Registrar Manning's Insolvency and Removal' in New South Wales, Legislative Council, *Votes and Proceedings*, 1843, 313–6; P V Loewenthal, 'Judicial Inability on Misbehaviour' (1972–4) 8 *University of Queensland Law Journal* 151, 151–7 on the removal of W Hirst, District Court Judge in 1878. See also the dictum in *In re James Minchin* (1847) 6 Moo PC 43, 44; 13 ER 599, 600 where a Master of the Supreme Court of Madras was cleared of financial wrongdoing.

52 This rule was changed in later legislation. See *Judges Removal of Doubts Act 1854* (VDL) 17 Vict, No 19; *Supreme Court Act 1856* (Tas) 19 Vict, No 23, s 1. Section 2 specifically provided that a judge may be sued either at law or in equity.

53 *Symons v Morgan*, *The Courier* (Hobart), 2 February 1848, 3, 4. For the background to the case see Peter Bolger, 'Lieutenant John Morgan: The Dog Tax Martyr' (1969) 55 *Journal of the Royal Australian Historical Society* 272, 272–81.

54 See 'Government Gazette Notice No 1', *The Courier* (Hobart), 5 January 1848, 2. The notice stated that Montagu J was amoved on 31 December 1847.

case that his successor, Horne J,[55] had not been validly appointed because he, Montagu J, had not been legally amoved.[56] After Pedder CJ rejected this argument, Montagu J challenged the decision to amove him on appeal in London on various grounds, including that he thought that the matter involved suspension, not amotion. The Judicial Committee upheld the amotion saying that the judge was not prejudiced by the eventual decision and they also agreed that severe financial embarrassment was a ground for dismissal.[57] The matter was also the subject of a question in the House of Commons, where the government in a revealing comment stated that:

> The relations also between the Governments of the Colonies and the judges was essentially different from those which existed between the Government and the judges at home, for the independence of the judges did not exist in the colonies.[58]

III CONSTITUTIONAL PROTECTION OF JUDICIAL INDEPENDENCE

When the eastern Australian colonies wrote their own constitutions in the 1850s they adopted one of two courses towards judicial independence. In three cases they wrote *Act of Settlement* procedures into their Constitution Acts,[59] while in three jurisdictions they passed specific legislation to achieve the same result.[60] On the face of it, the colonial judges were then in the same position as judges in the United Kingdom, but this proved to be an illusion because the 1782 Imperial Act, *Burke's Act*, still held sway. In any case, the protections written into these Acts followed the British model and restricted the executive to removal of judges for lack of good behavior, though this was a rather oblique position. All judges held their commissions during good behavior but the Crown could remove a judge for any grounds upon addresses of the local legislature. The removal provisions did not state grounds for removal and there is an argument that the *Act of Settlement* allowed Parliament to remove a judge for any reason at all, while the Crown could only remove a judge for misbehavior.[61] There were variations on this model. The Tasmanian legislation also forbade the Governor from even suspending a judge unless there was an address of both houses, but still did not specify the grounds for either suspension or amotion.[62] Later in the century, provisions became more explicit as in the *County Court Judges Tenure of Office Act 1884* (Vic), which permitted their removal by

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55 Justice Horne had been the Attorney-General who had introduced the *Dogs Act* legislation that had been struck down in *Symons v Morgan*. He was appointed to the bench by 'Government Notice No 2', *The Courier* (Hobart), 5 January 1848, 2. He was also in considerable debt: see Petrow, above n 50.

56 '*R v Glazebrook*', *The Courier* (Hobart), 2 February 1848, 2, 3.

57 *Algernon Montagu v Lieutenant Governor, and Executive Council, of Van Diemen's Land* (1849) 6 Moo PC 489, 499; 13 ER 773, 777.

58 United Kingdom, *Parliamentary Debates*, House of Commons, 12 July 1849, col 125.

59 *Constitution Act 1855* (NSW) ss 38–9; *Additional Judges Act 1865* (NSW) s 3; *Constitution Act 1855* (Vic) s 38; *Constitution Act 1856* (SA) ss 30–1.

60 *The Independence of the Judges Act 1857* (Tas); *Supreme Court Judges Act 1858* (NZ) ss 3–4; *Supreme Court Act 1867* (Qld) s 9.

61 *McCawley v The King* (1918) 26 CLR 9, 58–9 (Isaacs and Rich JJ). Alfred Stephen came to the same conclusion in a letter entitled 'Independence of the Judges', *Sydney Morning Herald* (Sydney), 1 August 1881, 5. All newspapers cited, unless otherwise indicated, were accessed on the National Library of Australia Digital Newspaper Collection via the Trove portal.

62 *The Independence of the Judges Act 1857* (Tas).

the Governor on the grounds of wilful absence without reasonable cause, or for neglect of duty, or, without grounds upon the address of both houses of the legislature: section three.[63] The *Australian Constitution*, in contrast, specifically restricts the parliamentary addresses to 'proved misbehavior or incapacity'. In other words, the Governor-General-in-Council cannot remove a federal judge unless there is an address from both houses of the Commonwealth Parliament in the same session based on one or both of the two constitutionally approved grounds.[64]

Salaries were provided by parliamentary appropriations and were deemed to continue 'so long as his Patent or Commission continues in force'.[65] Periodically, special legislation was passed to increase judicial salaries,[66] but little noticed was legislation to reduce judicial salaries during the great depression of the 1890s. In the Victorian case, the reduction only applied to future appointees to the bench,[67] while South Australian legislation passed in 1893 to reduce public salaries was expressly stated not to apply to the judges.[68]

IV AUSTRALIAN AWARENESS OF JUDICIAL INDEPENDENCE

An impressive feature of press coverage of questions of judicial independence in the 19th century was a clear understanding of English constitutional history. References to leading constitutional treatises, cases and statutes were common in the press and, of course, legal cases and parliamentary proceedings, including the full text of dispatches, were reported verbatim in many newspapers.[69] At least amongst the reading public, which in a newspaper age was considerable, awareness of political and constitutional (and therefore legal) history was well entrenched. School history curricula, for example, were heavily biased towards a knowledge of constitutional landmarks,[70] though occasionally the students wrote answers with hilarious results.[71] There were, in consequence, frequent references to the differences

63 See also the *District Courts Act 1858* (NSW) s 29 which also required notice of at least 21 days of the intention to remove the judge and the opportunity to be heard in his defence.

64 *Australian Constitution* s 72(ii).

65 *Constitution Act 1889* (WA) s 56; *Constitution Act 1854* (Vic) s 46;

66 *Judge's Salaries Act 1872* (Vic) s 1; *Supreme Court Act 1873* (SA) s 1.

67 *Judge's Salaries Act 1895* (Vic) s 2.

68 *Public Salaries Act 1893* (SA) s 2, sch.

69 During the Montagu affair in Van Diemen's Land in 1848 the press published the law on the subject. See 'The Law of the Case: Suspension of Judges', *Launceston Examiner* (Launceston), 29 January 1848, 2, 3.

70 See also the references to *Magna Charta*; the *Habeas Corpus Act 1679;* opposition to arbitrary taxation by John Hampden, 'The Tasmanian Struggle', *The Register* (Adelaide), 25 September 1855, 2; *Colonial Times* (Hobart), 8 October 1855, 2; *Colonial Times* (Hobart), 8 October 1855, 2; the letter to the editor citing a schoolbook on *Magna Charta* in *The Mercury* (Hobart), 28 October 1874, 3.

71 See the schoolboy howlers drawn from history examination answers in 'Errors in Examination Papers', *Western Mail* (Perth), 29 November 1902, 42. For many years, one of the scholarships endowed by the Victorian MP and philanthropist J D Wyselaskie (1818–83) was for the subject 'English Constitutional History'. A knowledge of English constitutional history was one of the subjects tested for admission to the legal profession: see 'By-laws, Rules and Regulations of the University of Sydney' in New South Wales, Legislative Assembly, *Votes and Proceedings* of the Legislative Assembly 1857, vol 2, r 70; 'Regulae Generales' in Queensland, Legislative Assembly, *Votes and Proceedings*, 1880, 490, r 42; South Australia, *General Rules and Orders of Supreme Court*, Parl Paper No 39 (1877) 2, r 17.

between the tenure of English and colonial judges in the newspapers.[72] These comparisons were not always favourable because 19th century Australian settlers pressed for the protection of the independence of the judges in learned letters to the press, resolutions passed at public meetings and in petitions to the Governor.[73] In one case, legislators asked that the new constitution to bring in responsible government also include a provision that judges should hold office during good behavior and 'only be liable to removal by Her Majesty, upon the address of both Chambers of the Legislature'.[74]

Two themes stand out. First, there was a recognition that the liberty of the people depended upon the independence of the judges from executive control. There was considerable resentment towards those governors who were seen to infringe upon judicial independence and this was in the political context of the demand for responsible government. It was thought that responsible government would lead to greater security for the judges, though in practice, as we shall see, this was not always the case. Many colonists entertained a strong prejudice against the executive, with one writer describing the Governor as 'in a conspiracy against the Judges'.[75] Second, conflicts between the executive and the judges were often exacerbated because British appointed Governors, often with experience of smaller colonies where they enjoyed considerable power, did not fully appreciate the temper of the Australian population, which was politically more demanding than in Crown Colonies generally. Judges, especially if they were appointed from the local bar as many were from the middle of the 19th century on, were seen as members of the local community and as a bulwark against gubernatorial authoritarian attitudes.

The judges were also anxious to preserve their independence, though their protests often failed.[76] In 1866 the Victorian judges opposed proposed legislation that would permit their suspension by the executive. This followed an earlier debate on the independence of the judges and whether they were entitled to communicate directly with the Governor of Victoria in matters connected with their personal rights and privileges.[77] The judges argued that the Supreme Court Law Consolidation Bill 1866 (Vic) would undermine their independence by

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72 See 'Independence of the Judges', *Sydney Morning Herald* (Sydney), 13 May 1845, 2; 'Colonial Judges Not Independent', *Sydney Morning Herald* (Sydney), 8 December 1849, 2; 'Independence of the Judges', *The Argus* (Melbourne), 18 May 1865, 5; 'Judges and Their Tenure', *Western Mail* (Perth), 17 September 1887, 20, 22; 'The Tenure of the Judges', *Western Mail* (Perth), 24 September 1887 page 30; 'The Independence of the Judiciary', *Canberra Times* (Canberra), 24 November 1930, 2.

73 See, eg, *Colonial Times and Tasmanian Advertiser* (Hobart), 10 March 1826, 2, 3; 'Independence of The Judges', *The Australian* (Sydney), 29 June 1827, 4 ; 'Independence of The Judges', *The Courier* (Hobart), 19 January 1848, 2–4.

74 South Australia, *Amendment of the Constitution,* Parl Paper No (1852) cl 18. However, the provision was not adopted, but it does show that legislators were aware of the British position. Note: before 1856, parliamentary papers in South Australia were not numbered.

75 'Crown Judges in the Colonies', *The South Australian Register* (Adelaide), 14 September 1868, 2.

76 J M Bennett, 'The Legal Career of Sir Francis Smith' (1975) 49 *Australian Law Journal* 451, 459–62.

77 Victoria, *Independence of the Judges*, Parl Paper No (1865) vol 1, 834, 1169. For other judicial protests about infringements of judicial independence see Alfred Lutwyche J in *The Moreton Bay Courier* (Brisbane), 2 February 1861, 5, 6; *Sydney Morning Herald* (Sydney), 1 August 1881, 5; Hickman Molesworth in *The Argus* (Melbourne), 18 May 1895, 7; Victoria, *Parliamentary Debates*, Legislative Council, 19 June 1895, 370–80.

making them subservient to the legislature or the executive.[78] In fact, legislation passed in 1852[79] had provided the Governor of Victoria with a power to suspend a judge on the advice of the Executive Council if wilfully absent from the colony or because the judge was incapable, had neglected the office of judge or for misbehavior.[80] The local administration through the Attorney-General, George Higginbotham, disagreed with this analysis[81] and the matter was referred to the law officers in London.[82] They concluded that the opinion given by them on a reference in 1862 from Queensland applied to the situation in Victoria, namely, that *Burke's Act* was still in force in Australia.[83] Importantly, they concluded that the proposed local legislation was valid and that it did permit the suspension of the judges. Although the judges then sought aid from the Judicial Committee, that body refused to act on the grounds that the matter was as yet hypothetical, as no judge had been suspended under the local Act nor had the powers under *Burke's Act* been invoked against any of them.[84]

In 1870 the South Australian judges objected to proposed legislation on the ground that it was 'a direct attack upon the independence of the Judicial Bench'[85] because it would empower the Governor to select one of their number as the Primary Judge in Equity.[86] The appointment of such a judge was permitted by section nine of the *Equity Act 1867* (SA) ('*Equity Act*'), but that Act made no provision for a replacement if the judge should suddenly resign. The *Equity Act* was passed by the Parliament despite these objections and was intended to overcome the insistence of Gwynne J, who had heard equity matters, that he be relieved of hearing all other matters except matrimonial and testamentary causes.[87] Section one of the *Equity Act* was actually designed to prevent a judge from resigning as the Primary Judge in Equity until the Governor, on the advice and consent of the Executive Council, should accept the resignation.[88] The judge had tendered his resignation as the Primary Judge in Equity, but not from his other post as Second Judge, in protest against the lack of the necessary staff and court room facilities.[89] The government conceded the point about appropriate facilities and staff and appointments were quickly made.[90] It had expected the judges to assign the various judicial matters amongst themselves, but when this failed they brought in the Equity Bill

78 *Petition by the Judges*, Annexure V in Victoria, *The Judges*, Parl Paper No C 8 (1866) 571.

79 *Supreme Court Act 1852* (Vic).

80 *Supreme Court (Administration) Act 1852* (Vic) 15 Vict, No 10, s 5.

81 *Petition by the Judges*, above n 78, 574–5 citing *Burke's Act*.

82 Ibid, 580.

83 This was the official position in Britain. See United Kingdom, *Parliamentary Debates*, House of Commons, 3 June 1867, cols 494–5. A Victorian court in *R v Rogers; Ex parte Lewis* (1878) 4 VLR 334, 341–2 held that *Burke's Act* applied there. Judges did seek, and were granted, leave of absence in accordance with the Act. See Victoria, *Judges' Absence*, Parl Paper No C 21 (1877–8); South Australia, *South Australian Government Gazette*, No 7, 12 February 1857. Others were denied leave: *Sydney Morning Herald* (Sydney), 10 November 1859, 2.

84 *Petition by the Judges*, above n 78, 579. For the Queensland opinion see 'Despatch Relative to Mr Justice Lutwyche', *The Courier* (Brisbane), 2 May 1862, 2. For brief comments on the Victorian dispute see Enid Campbell, 'Suspension of Judges from Office' (1999) 18 *Australian Bar Review* 63, 65.

85 South Australia, *Primary Judge in Equity Act*, Parl Paper No 163 (1870).

86 For the papers see South Australia, Parl Paper No 68, 68A, 68B, 163 (1870).

87 South Australia, *Parliamentary Debates*, Legislative Assembly, 15 November 1870, cols 1336–7 for the second reading speech on the Equity Bill 1870 (SA).

88 *Equity Act 1870* (SA) 33 & 34 Vict, No 23.

89 South Australia, *South Australian Government Gazette*, No 42, 15 September 1870, 1216.

90 South Australia, *South Australian Government Gazette* No 29, 16 June 1870, 719.

1870 (SA). The Bill provided that where the Judge in Equity resigned or was otherwise unavailable due to illness or absence, the other judges could act in his place. The government thought that merely imposing extra duties on the judges did not impair their independence and cited British examples of legislation giving new judicial duties to the judges.[91] The press also thought that the claims of the judges were misconceived, pointing out that merely changing the jurisdiction of the court was a routine matter and happened nearly every year. If the Parliament could not make amendments to court legislation then the legal system could not develop.[92] The Bill proceeded despite the threat by the Chief Justice to appeal to the Governor to ask him to refuse his assent to the Bill, and failing that, the judge warned that an address would be made to the Queen as the 'guardian of their rights'.[93] In the end, the Bill passed and was reserved for the royal assent, which was duly given.[94] The opinion of the law officers in both Adelaide and London was that it was unnecessary to reserve the Bill,[95] but this was done after the judges warned that it was necessary. No doubt with the Boothby affair fresh in their minds, the government took this step to avoid the possible invalidation of the legislation on the grounds that it violated the procedure laid down in the *Constitution Act 1856* (SA).[96] With the passage of the Act, Gwynne J was persuaded to return as the Primary Judge in Equity.[97]

Salary disputes occurred before and after federation. In a case of a judge of the New South Wales District Court, an attempt was made by the executive to reduce his salary on the ground of neglect of his office. But the governing legislation did not permit this and the only measure that could be taken was dismissal though, in that case, not by the legislature. In the course of his judgment in *Meymott v Piddington*, Martin CJ noted that he could imagine a situation whereby the executive so overloaded the judge with duties that he could not perform them all and thus might attempt to accuse the judge of negligence and thereby justify reducing the salary for negligence.[98] In the same case, the point was made that the protection of judicial salaries was a support for the independence of the judges because it reduced the dependence of the judges on the goodwill of the legislature, and prevented the legislature from punishing a judge by reducing their salary. The judges, on the other hand, could proceed fearlessly without having to worry about their livelihood being undermined by a disapproving legislature.

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91 Ferguson to Colonial Secretary in South Australia, *Primary Judge in Equity Act*, Parl Paper No 54 (1871) 1–2.

92 'The Primary Judgeship in Equity', *The South Australian Register* (Adelaide), 6 December 1870, 2.

93 South Australia, *Parliamentary Debates*, Legislative Assembly, 15 November 1870, col 1337; South Australia, Parl Paper No 163 (1870).

94 The Act was proclaimed in South Australia, *South Australian Government Gazette*, No 29, 6 July 1871, 982. See also the dispatch from Kimberley to Ferguson in *The South Australian Register* (Adelaide), 16 August 1871, 5.

95 The opinions were published in South Australia, *Primary Judge in Equity Act*, Parl Paper No 54 (1871) 2, 3.

96 The Governor alluded in para 7 of his dispatch to the Secretary of State, 16 January 1871 to the Boothby affair. *Primary Judge in Equity Act*, Parl Paper No 54 (1871) 2, 2: this was that any alteration of the Act required reservation of the royal assent.

97 South Australia, *South Australian Government Gazette*, No 33, 27 July 1871, 1108.

98 [1877] Knox 306, 312.

Complaints were also made about the adequacy of a judicial salary in two instances, with satisfaction in one case and disappointment in the other. Justice Lutwyche of Queensland complained that when he transferred from the Supreme Court of New South Wales to the Supreme Court of Queensland his salary was lower as a result. In the end the same salary was granted to him,[99] but the colonial secretary made it clear that the payments of salaries to future judges of the Queensland Supreme Court were a matter for the Parliament of the colony.[100] Justice Bundey complained in the 1890s that one consequence of the appointment of Sir Samuel Way CJ as the Lieutenant-Governor of South Australia was to throw virtually the entire criminal caseload of the Supreme Court onto his shoulders and he thought that the increased workload required an increase in his salary.[101]

In 1907 Cooper CJ of Queensland was asked to pay income tax on his judicial salary. He initially refused and was also given a penalty for late payment, though he later paid under protest. He argued that as a judge he was not liable to pay the tax and the Full Court of the Supreme Court of Queensland affirmed the decision of the District Court judge who had held that section 17 of the *Constitution Act 1867* (Qld) ('*Constitution Act*') prevented a reduction in judicial salaries during the term of office of the judge. The court also held that since the income tax legislation did not in terms amend the *Constitution Act* it was ultra vires the 1867 legislation.[102] On appeal, the High Court upheld the decisions below on the ground that the procedure for amending the *Constitution Act* had not been complied with.[103] However, the Court distinguished between a reduction in a judicial salary at source, which was prohibited, and the imposition of a tax in common with all other tax payers. The latter was allowable.[104] Justice Higgins noted that the full salary was paid to the judge and that is all that the *Constitution Act* required. What happens after payment, such as when a demand to pay income tax was made, was a different matter. It followed that the tax could not be deducted before payment of the full salary, for that would be a constitutionally impermissible reduction. But when a demand was later presented, the judge had to pay the tax.[105] Of course, a judge could be asked to accept a voluntary reduction in salary. In 1931 the judges of the High Court were asked to accept a 20% reduction in salary by paying back a sum after the full salary had been paid to the judge, and three justices agreed to a reduction of their travelling allowances and part of their pay. The judge in the Federal Court of Bankruptcy refused to pay any money to the Commonwealth, while two judges of the Commonwealth Court of Arbitration and Conciliation agreed to repay 25% of their salaries for a period of two years.[106]

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99 *Supreme Court Constitution Amendment Act 1861* (Qld).

100 'Despatch from the Colonial Secretary to the Governor', *The Courier* (Brisbane), 2 May 1862, 2.

101 South Australia, *Correspondence Re Appointment of Chief Justice as Acting Governor*, Parl Paper No 71 (1893); *The Advertiser* (Adelaide), 28 July 1893, 6.

102 *In re the Income Tax (Consolidated) Act 1902–1904* [1907] St R Qd 110. The judgment of the District Court appears as a note to this law report and in *The Brisbane Courier* (Brisbane), 14 February 1907, 7.

103 *Cooper v Commissioner of Income Tax for the State of Queensland* (1907) 4 CLR 1304.

104 Ibid 1316 (Griffith CJ), 1320 (Barton J), 1325–6 (O'Connor J).

105 Ibid 1332, 1334 (Higgins J).

106 Commonwealth, *Parliamentary Debates*, House of Representatives, 17 September 1931, 63.

V THE SOCIAL AND PROFESSIONAL CONTEXT

In most jurisdictions a single judge was appointed and in some cases the sole judge operated alone for a considerable time.[107] This placed the judge in an especially isolated situation, for there were no fellow judges with whom to discuss matters.[108] They were also hampered by the lack of local law reports and an up-to-date legal library. The other problem was that the institutional arrangements for a colonial Supreme Court meant that the Court combined all of the jurisdiction and powers of the superior courts of justice at Westminster.[109] Whereas English training meant that English lawyers and judges had a background in one or a few of the superior courts of justice, colonial judges had to be able to deal with the full range of judicial matters including admiralty law. Little wonder then that Sir Francis Forbes, who was about to become the first Chief Justice of New South Wales, should comment in February 1823 that colonial judges had to possess a wider range of knowledge than their counterparts in Britain.[110] If all of this were not enough, colonial judges were expected to take on duties in the lower courts in order to save money.[111] This usually entailed going on circuit, which, given the slow modes of transport in 19th century Australia, involved long absences from the capital city.[112] Early judges were also expected to advise the executive on whether legislation was repugnant to the laws of England,[113] a task they did not relish. In one instance from Van Diemen's Land, after certifying that the legislation was not repugnant, the judges changed their mind and invalidated a local statute after hearing argument in a case.[114]

VI BENJAMIN BOOTHBY IN SOUTH AUSTRALIA 1861 AND 1867

Arguably the most controversial and best remembered instance of judicial amotion in 19th century Australia occurred in 1867 when Benjamin Boothby J,[115] once described in the local

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107 South Australia, for example, had a single judge from 1837 until 1850 while Western Australia had a single judge, the Chief Justice, from 1861 to 1883.

108 Formal judicial conferences began in the 1880s, see 'Conference of Colonial Judges', *The South Australian Register* (Adelaide), 4 August 1888, 5; 'The Conference of Australasian Judges', *The Register* (Adelaide), 13 August 1888, 4, 5.

109 *New South Wales Act 1823* (Imp) 4 Geo 4, c 96, s 2; *Supreme Court Act 1844* (VDL) preamble; *Supreme Court Ordinance 1861* (WA) s 4; *Supreme Court Ordinance 1837* (SA) s 7; *Supreme Court Procedure Act 1866* (SA) s 1. This was an arrangement launched in colonial America in the late 17th century with the creation of the Supreme Court of New York (1691) and the Superior Court of Judicature of Massachusetts (1692). The exception was Canada where before the 1860s separate superior courts existed. See *Canada Act 1840* (Imp) 3 & 4 Vict, c 35, s 44.

110 Forbes to Wilmot, 3 February 1823 in J M Bennett (ed), *Some Papers of Sir Francis Forbes* (Parliament of New South Wales, 1998) 17.

111 *Small Debts Act 1853* (SA) s 1; South Australia, *Local Courts Presided Over by Judges of Supreme Court,* Parl Paper No 54 (1861).

112 See the acknowledgment of this in the preamble to the *Supreme Court Ordinance 1845* (SA).

113 See Van Dieman's Land, *A Letter from Mr Justice Horne to HE the Lt-Governor Certifying Against the Brown's River Road Act,* Parl Paper No 21 (1848).

114 *'Symons v Morgan', The Courier* (Hobart), 2 February 1848, 3–4**.**

115 There is no adequate study of his judicial career but helpful works include: John Williams, 'Judge Boothby: The Disaster That Happened' in George Winterton (ed), *State Constitutional Landmarks* (Federation Press, 2006) 21, 21–51; Peter Howell, *The Boothby Case* (MA Thesis, University of Tasmania, 1965); Alex C Castles, *An Australian Legal History* (Lawbook, 1982) 407–11; Alex C

Adelaide press as a monomaniac,[116] was amoved. Often portrayed as a pig-headed wrecker on the bench,[117] Boothby J was called to the English Bar in 1841 after a career in manufacturing and as an election agent. He later occupied the post of recorder and judge of the court at Pontefract in 1845.[118] He also published two books on the law, one of which went to a second edition.[119] He was appointed the Second Judge in 1853 on the death of Crawford J to assist Cooper CJ[120] and survived a first attempt to remove him in 1861.[121] His decisions on the bench, his behaviour towards his fellow judges on and off the bench, as well as towards members of the legal profession, so aroused the local Parliament that it voted 20 to 15 in the lower house in 1861 to petition the Crown to amove him.[122] The British decided not to accede to the plea in the petition because of the narrowness of the majority, the fact that certain eminent South Australians, such as Henry Ayers, were not in favor of his removal,[123] and also because the inquiry by the Parliament had not offered the judge a prior hearing before coming to a conclusion. The official advice from London was that since Boothby J, along with the other judges, had been right about the invalidity of the *Constitution Act 1856*

Castles and Michael C Harris, *Lawmakers and Wayward Whigs: Government and Law in South Australia* (Wakefield Press, 1987) 125–34; R M Hague, *Hague's History of the Law in South Australia 1837–1867* (University of Adelaide, 2005**)** vol 1, 219–474; vol 2, 475–529; A J Hannan, 'Mr Justice Boothby' (1957) 58 *Proceedings of the Royal Geographical Society of Australasia: South Australian Branch* 72, 72–96 ; A J Hannan, *The Life of Chief Justice Way: A Biography of Sir Samuel Way, Bart, PC, DCL, LLD, For Many Years Lieutenant-Governor and Chief Justice of South Australia and Chancellor of the University of Adelaide* (Angus and Robertson, 1960) 49–78; Bruce Kercher, *An Unruly Child: A History of Law in Australia* (Allen and Unwin, 1995) 97–102; Alpheus Todd, *Parliamentary Government in the British Colonies* (Lawbook Exchange, 2nd ed, 1894) 846–56.

116 *The South Australian Advertiser* (Adelaide), 29 April 1867, 3.

117 See the collection of unflattering 20th century newspaper articles on Boothby J in 'Biographical Cuttings on Judge Benjamin Boothby' in National Library of Australia, Bibliographical ID No 1743146. In a somewhat hyperbolic statement, John Emerson claims that Boothby J had been '[t]errorising and bullying his brother judges, barristers, politicians and the Governor since his appointment as second judge in 1853': *First Amongst Equals: Chief Justices of South Australia since Federation* (Federation Press, 2006) 22; Edwin Hodder notes that Boothby J 'rendered himself obnoxious to the Parliament, the press, and the public': *George Fife Angas, Father and Founder of South Australia* (Hodder and Stoughton, 1891) 377. In private, he appears to have been genial, urbane and affable. See 'Funeral of Mr B Boothby, Senior', *The South Australian Advertiser* (Adelaide), 24 June 1868, 2. For a more measured view of Boothby J see *Gilbertson v South Australia* (1976) 15 SASR 66, 78 (Bray CJ).

118 *The Adelaide Times* (Adelaide), 30 August 1853, 2; *The South Australian Register* (Adelaide), 22 June 1868, 2.

119 See B Boothby, *Local Courts Not the Remedy for Defects of the Law: With Suggestions of a Plan for Adapting the Superior Courts of Common Law at Westminster, the Circuit Courts of Assize, and the Sessions of the Peace to the Increased Demands of the Country, Arising from its Extended Population and Commerce* (Saunders and Benning, 1844); B Boothby, *A Synopsis of the Law Relating to Indictable Offences: In Which the Crimes in Alphabetical Order, the Respective Punishments, the Necessary Evidence, Together With Observations Embracing a Condensed Digest of Cases are Tabularly Arranged and Comprising also References to Precedents of Indictments for Each Offence and to the Text Writers on Criminal Pleading and Evidence* (William Maxwell, 2nd ed, 1854).

120 UK, *London Gazette*, No 21415, 25 February 1853, 604. Justice Boothby took the oath of office on 17 October 1853: South Australia, *Appointment of Second Judge*, Parl Paper No 125 (1861); South Australia, *Correspondence with Mr Justice Boothby*, Parl Paper No 128 (1861) 3.

121 Severe complaints about his treatment of juries emerged in 1857: *The South Australian Register* (Adelaide), 23 February 1857, 2.

122 South Australia, House of Assembly, *Votes and Proceedings*, No 82, 10 October 1861, 260.

123 South Australia, *Report of the Select Committee Legislative Council Upon the Recent Decisions and Conduct of Mr Justice Boothby*, Parl Paper No 141 (1861) 5.

(SA) ('*Constitution Act*') and the *Electoral Act 1856* (SA) ('*Electoral Act*'),[124] a Parliament resulting from such suspect legal documents could not move for Boothby's J removal.[125]

It was also thought by some qualified observers that his decisions on validity matters were allowable, since it was the duty of the judges to decide such matters. One defender of the judge argued that he had not misbehaved himself while on the bench and that mere disagreement with his decisions was not a basis for removing him.[126] It should be noted that Boothby J did not invent the doctrine of repugnancy, which appears in English statutes as early as 1541.[127] The repugnancy doctrine also plagued the North American colonies in the 18th century[128] and was applied in the other Australian colonies from an early date.[129] These difficulties were normally resolved by ad hoc legislation at the time.[130] Some of his more radical claims, such as that all legislation made under the *Constitution Act* was invalid, were not thought important in London, for, as the government pointed out to the House of Commons in 1864, the other two judges did not agree with him.[131]

To place the Boothby affair in context, it is worth remembering that the British Parliament was obliged to deal with invalidity problems in other colonies where appointments were botched, resignations were mishandled, and in one case a judge in Bombay was discovered to lack the qualifications for appointment to the bench.[132] Subsequent problems with the validity of local legislation, not all of which were Boothby's J fault, for the other judges sometimes

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124 South Australia, *Despatches on Constitution and Electoral Acts, 1856,* Parl Paper No 164 (1861); Duke of Newcastle to Daly, No 25, 24 April 1862 in South Australia, *Despatch on Addresses For Removal of Judge Boothby,* Parl Paper No 68 (1862) 1.

125 See Law Officers to Newcastle, No 110, 12 April 1862 in South Australia, *Despatch on Addresses For Removal of Judge Boothby*, Parl Paper No 68 (1862) 4; D P O'Connell and Ann Riordan (eds), *Opinions on Imperial Constitutional Law* (Lawbook, 1971) 65.

126 See a pamphlet of eight pages by a member of the Irish Bar in State Records of South Australia, *Observations on the Report of the House of Assembly, South Australia on Judge Boothby's Case*, GRG 36/60 (1862). This is a restricted file and I am grateful to Alan Clark, Deputy Registrar of the South Australian Supreme Court, for permission to see it.

127 *Religion Act 1541*, 32 Hen 8, c 26; *Public Accounts Act 1695*, 7 & 8 Will 3, c 22, s 8. The term was used in early colonial charters. See *Charter of the Massachusetts Bay Company*, 4 March 1629 cited in Merrill Jensen (ed), *English Historical Documents: American Colonial Documents to 1776* (Eyre and Spottiswoode, 1964) vol 9, 78.

128 See the draft of A Colonial Laws Validity Bill (1752) in J H Smith, *Appeals to the Privy Council from the American Plantations* (Columbia University Press, 1950) 579–82. There is also an account in Enid Campbell, 'Colonial Legislation and the Laws of England' (1964) 2 *Tasmanian University Law Review* 148, 149–55.

129 See the legal opinion entitled 'Validity of Statute, 20 George II, c 19, In the Colony' (1822) in *HRA*, series IV, s A, vol 1, 414; *Newspaper Act Opinion* [1827] NSWSupC 23, 1; *R v Elliot* [1834] NSWSupC 11, 9. For a recent account of the literature see Damen Ward, 'Legislation, Repugnancy and the Disallowance of Colonial Laws: The Legal Structure of Empire and *Lloyd's Case* (1844)' (2010) 41 *Victoria University of Wellington Law Review* 381, 381–402.

130 See *Judges Doubts Removal Act 1848* (VDL) 11 Vict, No 1; *Land Grants, New South Wales Act 1849* (Imp) 12 & 13 Vict, c 22.

131 United Kingdom, *Parliamentary Debates*, House of Commons, 4 March 1864, col 1457.

132 See *Vice-Admiralty Court (Mauritius) Act 1854* (Imp) 17 & 18 Vict, c 37; *Validation of the Acts of the Chief Justice of Bombay Act 1858* (Imp) 21 & 22 Vict, c 32; *High Court at Bombay Act 1864* (Imp) 27 & 28 Vict, c 17.

agreed with him[133] as did the law officers in London,[134] were handled by the passage of ad hoc Imperial legislation,[135] which rescued the *Constitution Act* and *Electoral Act* and also all legislation made by the parliaments constituted by those two Acts. At the time, though, the Colonial Secretary expressed disquiet with the situation in South Australia and warned in remarks directed at the legislature that further remedial legislation ought not to be expected.[136]

Further problems with validity resulted from a majority decision of the Supreme Court in the case of *Auld v Murray*[137] in December 1863. In this case the three judges[138] of the Supreme Court sitting as a Full Court held by a majority that the *Real Property Act 1857* (SA) was invalid insofar as it related to certain leases, and these in turn impinged on the right to vote under the *Constitution Act*, given that there was a property qualification for upper house electors. It was argued that alterations to the *Constitution Act* had to comply with manner and form requirements in that Act and be reserved for the assent in Britain.[139] A month later, Hanson CJ wrote a letter to the Governor on the case and noted the 'utterly indefinite nature of the restriction' as to repugnancy. He then referred to the North American and West Indian colonies. Although he did not have the legislation to hand, he thought that the West Indian legislation imposed a restriction only as to Imperial legislation 'made applicable to those colonies'.[140] A subsequent opinion by the law officers in London in September 1864 took note of the Hanson view, but recommended that Imperial legislation similar to that in the *Act*

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133 See the comments in South Australia, *Correspondence on Electoral Act 1861*, Parl Paper No 129 (1863).

134 See Law Officers to Colonial Office, 25 March 1862 cited in D P O'Connell and Anne Riordan (eds), *Opinions on Imperial Constitutional Law* (Lawbook, 1971) 32–4 who agreed that the failure to reserve the *Constitution Act 1856* (SA) meant that the Parliament elected under the Act and the statutes passed by it were invalid. Also note the letter by J H Fisher, the President of the Legislative Council, who first suggested that the electoral legislation might not be valid: South Australia, *Electoral Act 1861,* Parl Paper No 23 (1861).

135 *The Australian Constitutions Act 1862* (Imp) 25 & 26 Vict, c 11; *Colonial Acts Confirmation Act 1863* (Imp) 26 & 27 Vict c 84; South Australia, Parl Paper No 130 (1863); South Australia, *Imperial Statutes Affecting the Government of South Australia*, Parl Paper No 31 (1863) 22.

136 Newcastle to Daly, No 32, 25 July 1863 in South Australia, *Confirmation of Acts of Colonial Legislatures*, Parl Paper No 130, 135 (1863) 1: 'It is not proper or desirable that the Statute Book of this country should be encumbered with enactments which are only required to extricate Colonial Governments and Legislatures from the consequences of their own irregularity or inadvertence, especially when this irregularity consists in an omission on the part of the Legislature to conform to rules of their own making'.

137 *The South Australian Register* (Adelaide), 17 December 1863, 3.

138 The other judges were Richard Davies Hanson CJ, appointed in 1861: South Australia, *South Australian Government Gazette Extraordinary*, No 49, 20 November 1861, 967; and Edward Castries Gwynne J, appointed as the third judge on 26 February 1859: South Australia, *South Australian Government Gazette*, No 9, 3 March 1859, 191, though his commission was not issued until 16 September 1862: South Australia, House of Assembly, *Votes and Proceedings*, No 64, 13 July 1865, 150 item 5; 'Governmental Laches', *South Australian Advertiser* (Adelaide), 26 September 1862, 3. Both were former Attorneys-General: South Australia, *Statistical Record of the Legislature*, Parl Paper No 49 (1900) 65, table R.

139 *Constitution Act 1856* (SA) s 34.

140 See South Australia, *Validity of South Australian Legislation,* Parl Paper No 54 (1864) 3–4.

of Union 1840[141] be applied to all of the colonies.[142] Section three of that Act allowed a legislative power to the Province of Canada and added:

> [S]uch laws not being repugnant to this or such Parts of the said Act passed in the Thirty-First year of the Reign of His said late Majesty… which does or shall, by express Enactment or by necessary Intendment, extend to the Provinces of Upper or Lower Canada.

This in turn formed the basis for the *Colonial Laws Validity Act 1865*,[143] which remained part of Australian law until 1986.[144] The *Colonial Laws Validity Act* narrowed the test for repugnancy to English law. The old view, though somewhat disputed, was that any colonial law repugnant to the laws of England, whether or not the British Act applied to the colony, was invalid. It was thought that local legislation could not be repugnant to British Acts, any charter, Letters Patent or Order-in-Council issued to the colony, or to the laws of England (taken to mean the common law).[145] At a time when colonies necessarily had to deal with situations that had not arisen in England, such conflicts were inevitable. The *Colonial Laws Validity Act* restricted the repugnancy test to conflicts between a colonial statute and an Imperial Act that either applied to the particular colony or to all colonies in general. Mere divergence from English common law, or statutes that did not apply as such to the colonies, were excluded from this narrowing of the repugnancy doctrine.[146] In this sense the *Colonial Laws Validity Act* was seen in the 19th century as liberating for the colonies.[147]

Though infamous[148] as an invalidator of statutes, Boothby J's views in particular cases were shared by others, and his decisions in this area were not the official basis for his removal in 1867. Indeed a month after the *Colonial Laws Validity Act* was passed, but before it was proclaimed in South Australia,[149] the Full Court by a majority held that the *Local Courts Act*

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141 3 & 4 Vict, c 35.

142 Ibid, s 3. See Opinion by the UK Law Officers to Cardwell, 28 September 1864 in South Australia, *Opinion on Judgment in Auld v Murray*, Parl Paper No 108 (1866) 2[1].

143 28 & 29 Vict, c 63 ('*Colonial Laws Validity Act*'). Section 7 specifically addressed the invalidity question in South Australia. For an important monograph see D B Swinfen, *Imperial Control of Colonial Legislation 1813–1865: A Study of British Policy Towards Colonial Legislative Powers* (Clarendon Press, 1970).

144 *Australia Act 1986* (Cth) s 3(1) removed the *Colonial Laws Validity Act* from state law prospectively.

145 See the recitals in the preamble to the *Act to Remove Doubts Respecting the Validity and Legality of Acts of the Lieutenant-Governor and Legislative Council of Van Diemen's Land 1848* (Imp) 11 Vict, No 1.

146 See *Phillips v Eyre* (1870) LR 6 QB 1, 20–1. For a full discussion see *Memorandum on Sir Arthur Gordon's Confidential Despatch*, 23 February 1876, CO 881/4/54 /3–13.

147 See Edwin Gordon Blackmore (*The Law of the Constitution of South Australia: A Collection of Imperial Statutes, Local Acts, and Instruments Relating to the Constitution and Government of the Province, with Notes Historical and Constitutional* (C E Bristow, 1894) 64) who described the *Colonial Laws Validity Act* as 'The Charter of Colonial Legislative Independence'. The Act was given a liberal interpretation in the Australian courts: *R v Whelan* (1868) 5 W, W & a'B 7, 19.

148 A view still held in South Australia. See *Maurici v South Australia* [2008] SASC 145 [26]. See also Mark D Walters, 'The Common Law Constitution in Canada: Return of *Lex Non Scripta* as Fundamental Law' (2001) 51 *University of Toronto Law Journal* 91, 122–6.

149 The Act received the royal assent on 29 June 1865, but only became part of the law when it was proclaimed and published in South Australia, *South Australian Government Gazette Extraordinary*, No 39, 18 September 1865, 843–5.

1861 (SA) was invalid. In *Dawes v Quarrel*,[150] Gwynne J agreed with Boothby J that local courts could not be constituted by South Australian legislation. One of his main reasons was that the judges of such courts did not enjoy the security of tenure afforded to Supreme Court judges by the *Constitution Act*.[151] Justice Boothby's argument, despite the fact that he had presided in such courts since 1854,[152] was that local courts could only be erected by either the royal prerogative or by Imperial legislation,[153] neither being within the powers of the local legislature. One effect of this decision was that upwards of 20 000 cases already heard in the local courts were put in jeopardy.[154] Nevertheless, given that Boothby J was not always alone on validity matters it is not surprising that, though validity matters were mentioned in the charges against him, they were not the main focus of attention.

Justice Boothby's subsequent difficulties in South Australia had more to do with his attitude towards the profession and his fellow judges. He had refused requests to forward his notes on the case of *Copeland v Wentzel*[155] to the Court of Appeals on the ground that he did not recognise such a court.[156] In March 1866 in *Murray v Ridpath*[157] in a dissenting judgment, Boothby J had held that legislation constituting a local Court of Appeals was invalid. But of course, as a dissenting judgment it had no legal weight, though this was a point lost on the legislature, and a day after the decision the Court of Appeals proceeded to hear another appeal on the basis that it was validly constituted.[158] Neither of these cases involved repugnancy arguments, but rather claims about the limits of colonial legislative power apart from the repugnancy limitation.

Matters came to a head in May 1866 when Boothby J refused to allow any indictments to be presented at the criminal sessions because he did not recognise the right of Randolf Stow QC to appear, as he did not think that the Governor of the colony had the power to create Queen's Counsel.[159] He demanded to see Stow's licence from the Crown and threatened to subpoena

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150 [1865] Pelham 1; South Australia, *Judgments in Dawes v Quarrel*, Parl Paper No 120 (1865). This did not deter a motion in the Legislative Council to ask for remedial action by Britain, though it failed. See South Australia, Legislative Council, *Minutes of the Proceedings*, No 27, 20 July 1865, 60.

151 *Dawes v Quarrel* [1865] Pelham 1, 5.

152 *The South Australian Register* (Adelaide), 5 January 1854, 3.

153 *Dawes v Quarrel* [Pelham] 1, 8–10. Section 5 of the *Colonial Laws Validity Act* made it clear that a colonial legislature had the power to erect courts of law.

154 Speech by the Governor in South Australia, Legislative Council, *Minutes of the Proceedings*, No 35, 4 August 1865, 82. The other effects were to transfer the caseload to the Supreme Court: South Australia, House of Assembly, *Votes and Proceedings*, No 35, 28 June 1865, 117 item 7 and to invalidate the *Third Judge and District Courts Act*; South Australia, House of Assembly, *Votes and Proceedings*, No 50, 25 July 1865, 184 item 9.

155 *The South Australian Register* (Adelaide), 22 December 1865, 4.

156 See South Australia, *Proceedings in Court of Appeals*, Parl Paper No 6 (1866) 1–2, where the associate to the judges, Lionel J Pelham, wrote on Boothby's J behalf on 25 May 1866 to say that the lack of a formal seal and a lack of a decision of the Full Court prevented him from sending the documents.

157 In South Australia, *Proceedings in the Court of Appeals*, Parl Paper No 6 (1866) 4–6; *The South Australian Register* (Adelaide), 5 March 1866, 3.

158 '*Walsh v Goodall*', *The South Australian Register* (Adelaide), 5 March 1866, 3.

159 Stow, Richard Andrew, a former Attorney-General and William Wearing, the Crown Solicitor,

Stow's clerks to prove him guilty of falsehood. He also refused to allow the 31 indictments[160] signed by the Attorney-General,[161] James Penn Boucaut, to be presented on the ground that such an office did not legally exist in the colony.[162] The chief law office had been called the Advocate-General at the outset of colonisation in 1836, in part because South Australia was designated a province rather than as a colony and provinces were initially seen as military in character.[163] But after the inauguration of responsible government in 1856 the title of the chief law officer was changed to that of the Attorney-General.[164] Justice Boothby's refusal to allow the indictments to be presented caused consternation because the gaol could not be cleared and prisoners had to be held over until the next session in August.[165] A report on the matter by counsel, including the Crown Solicitor, recommended that the only solution was to ask the South Australian Parliament to petition the Queen for Boothby J's removal.[166]

While the judge was not expected to preside at the sittings for the rest of 1866, a decision was made in 1867 to keep him off the bench. Under existing legislation, the Governor could, and did, issue special commissions nominating a judge to preside at the sittings of the Supreme Court in the south-eastern towns of Robe and Mount Gambier. Normally, the commission was issued to the third or most junior judge, in this case Gwynne J. At the beginning of 1867, legislation was passed to confer on the Governor a power to issue commissions for the Supreme Court in Adelaide as well as for regional centres.[167] Despite the commissions issued to the Chief Justice and Gwynne J to cover both the criminal and civil sittings, Boothby J attended court at the criminal sittings in February 1867 and read a protest denouncing the commission as illegal before leaving the bench.[168] Matters descended into a farce when he

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had been appointed Queen's Counsel by the Governor in March 1865. See South Australia, *South Australian Government Gazette*, No 11, 16 March 1865, 237; Daly to Cardwell, No 15, 14 March 1865 in CO 13/117/4860/183–4.

160 See the list in South Australia, *South Australian Government Gazette*, No 18, 26 April 1866, 406.

161 Appointed in March 1866: South Australia, *South Australian Government Gazette*, No 13, 28 March 1866, 317.

162 The transcript of these exchanges was reproduced in South Australia, *Proceedings in Supreme Court*, Parl Paper No 4 (1866–7) 2–11. The point about Boucaut appears at page 5 and the point about Queen's Counsel at pages 3–4.

163 Thus Richard Davies Hanson, later Chief Justice, was appointed Advocate-General in 1853: South Australia, *South Australian Government Gazette*, No 18, 5 May 1853, 294; *Civil List Act 1853* (SA) sch A, pt 1.

164 In 1856 the name was changed in the *Constitution Act 1855–6* (SA) sch A, pt 1 to the Attorney-General; South Australia, *South Australian Government Gazette*, No 47, 25 October 1856, 970. See also *Supreme Court Procedure Act 1866* (SA) s 2.

165 By which time there were 57 criminal cases pending: South Australia, *South Australian Government Gazette*, No 33, 2 August 1866, 760.

166 Further opinion by W A Wearing and Rupert Ingelby, 6 June 1866 in South Australia, *Proceedings of Mr Justice Boothby*, Parl Paper No 5 (1866) 2.

167 *Third Judge and District Courts Act 1866–67* (SA) s 1. See South Australia, *South Australian Government Gazette*, No 6, 7 February 1867, 115–6; South Australia, *South Australian Government Gazette*, No 21, 9 May 1867, 450; South Australia, *South Australian Government Gazette*, No 25, 6 June 1867, 518; South Australia, *Minutes of Proceedings of the Executive Council Relating to The Conduct of Mr Justice Boothby*, Parl Paper No 22 (1867). This source gives the verbatim transcript of the eight-day hearing of the Governor-in-Council, held over the period 24 June – 29 July 1867.The original legislation that applied to commissions for country districts only was the *Third Judge and District Courts Act* 1858 (SA) s 2.

168 *The South Australian Register* (Adelaide), 13 February 1867, 3.

later adjourned the *Moonta Mines* case to a date different to that of the other judges, and attended court on the due date to find that no one appeared before him.[169] The special commissions did not involve interdiction or suspension, though in practice they had this effect. The Colonial Secretary disapproved of the legislation that created the special commission power as disproportionate to the emergency, arguing that the legislation should have been made temporary and should not have been extended to civil matters, as the problems had only involved criminal cases.[170]

Momentum to hold an inquiry in order to remove Boothby J gathered pace in April 1867 when the other judges wrote a letter to the Governor complaining about Boothby J's conduct towards them.[171] Justice Boothby had claimed that he was the sole rightful judge, since he disputed the right of the Governor to appoint his fellow judges and refused to recognise the validity of his colleagues' appointments, even though he had served with them for years and had never previously raised the point.[172] In theory, if taken seriously, two of the three judges could not sit at all and the entire business of the court would devolve solely on Boothby J. The effect on the operation of the legal system would have been extremely serious, to say the least. Chief Justice Hansen and Gwynne J attempted to reason with Boothby J, but to no avail. The judges, in their letter, pleaded with the Governor to 'adopt remedial measures,' though they did not suggest what they might be.

Justice Boothby's attitude towards the leading members of the profession and his behavior at the May 1866 criminal sittings resulted in another parliamentary inquiry and an address from the Legislative Council to the Queen to remove him.[173] This time the focus was on his behavior in office, especially since 1865. The address to the Queen cited: (a) his persistent failure to administer local parliamentary Acts; (b) his refusal to give effect to the *Validating Act* (as the *Colonial Laws Validity Act* was commonly known at the time); (c) his impugning of the local Court of Appeals; (d) his departure from decisions of the Supreme Court; (e) his want of judicial propriety on the bench; and (f) that his judgments and dicta were not in accordance with the law.[174] The main report by the House of Assembly concentrated on his conduct in office and was backed up by an opinion of barrister H W Parker, who reported to

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169 *The South Australian Register* (Adelaide), 28 June 1867, 5. The formal name of the case was *R v Hughes* (1867) 1 SALR 132 Appendix .

170 See Earl of Carnarvon to Daly, No 5, 1 April 1867 in South Australia, *Despatches On Third Judge and District Courts Act*, Parl Paper No 83 (1868–9) 1. In consequence the Act was repealed by the *Third Judge and District Courts Act* (1868–9) No 6, s 1. The practice of issuing special commissions to determine which judge sat on which class of case was subsequently condemned in the press as 'an alarming invasion of the independence of the judges': *The South Australian Register* (Adelaide), 12 November 1870, 4.

171 State Records of South Australia, GRG 24/63; South Australia, *Minutes of Proceedings Relating to Mr Justice Boothby*, Parl Paper No 22 (1867) v.

172 Though he did dispute the appointment of Hanson as the successor to Cooper CJ on the ground that only a qualified British barrister could be appointed to the post, which Hanson as a locally qualified lawyer was not, the Governor rejected this argument showing that there was no law imposing the British barrister requirement. See South Australia, *Despatches on Appointment of Chief Justice Hanson*, Parl Paper No 86 (1862) 2.

173 South Australia, Legislative Council, *Minutes of the Proceedings*, No 5, 3 July 1866, 9 item 5.

174 Ibid No 4, 27 June 1866, 7–8 item 4.

the Assembly that *Burke's Act* and a recent English decision[175] supported the view that an inquiry into the judge's conduct must precede any amotion.[176] Despite this advice, there was a brief attempt to remove the whole matter directly to the Judicial Committee, but the British authorities rejected this as novel and noted that Boothby J had not even been given a hearing in Adelaide to answer the charges against him. No case for urgency had been made out and the Colonial Secretary rejected what he called 'an ex parte case'.[177]

The view in Adelaide was that the addresses of the local houses of Parliament were sufficient and in late 1866 the Executive Council rejected London's suggestion that the matter be handled by offering Boothby J retirement with a pension. The Executive Council objected to the financial implications of this and thought that it would reward the judge for what they regarded as bad behavior.[178] When London rejected the amotion of Boothby J by the procedure prescribed in the *Constitution Act*, the Executive Council protested at being overridden. In a strongly worded minute, they noted that this was an affront to responsible government and warned that the high handedness in London would loosen the ties between South Australia and Britain.[179] Despite these objections, the advice from London was that the judge could only be removed pursuant to the procedure laid down in *Burke's Act*.[180]

The government in Adelaide complied with the instruction from London and invoked section two of *Burke's Act*, for it guaranteed a hearing to the judge, if he wanted it, before the Governor and the Executive Council. The government also assembled the papers used to amove Willis and Montagu JJ, as an aid in the process.[181] There were, it was said, three methods for removing a judge in the 1860s.[182] First, the Queen could remove a judge by an exercise of the royal prerogative if she or her predecessor had appointed the judge by issuing him with a commission. The power to issue a commission necessarily included a power to withdraw it. As Boothby J had been appointed by the Queen, not the Governor of South Australia, this was a possibility.[183] The problem was that there would have to be a hearing and since all of the evidence and witnesses were in South Australia they would have to go to

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175 *Ex parte Ramshay* (1852) 18 QB 173, 118 ER 65, a case on the removal of a County Court judge by the Chancellor of the Duchy of Lancaster where it was held that a hearing into the charges must be accorded to the judge before his amotion.

176 See South Australia, House of Assembly, *Votes and Proceedings*, No 4, 22 June 1866, 10 item 5.

177 Carnarvon to Daly, No 9, 26 February 1867 in South Australia, *Minutes of Proceedings Relating to Mr Justice Boothby*, Parl Paper No 22 (1867) app vii.

178 Copy of a Minute of the Executive Council, 27 December 1866 in South Australian Records Office, GRG 24/63, 1. In any case, it seemed unlikely that Boothby J would have accepted this : Daly to Carnarvon, No 57, 26 December 1866 in South Australia, Legislative Council, *Minutes of the Proceedings*, No 35, 4 August 1865, 152, app xxxiv.

179 Copy of a Minute of the Executive Council, 25 February 1867 in South Australian Records Office, GRG 24/63.

180 See 'The Address of the Governor' in South Australia, *Opening of Parliament*, Parl Paper No 1 (1867) [2].

181 See South Australia, *Bill of Costs, Re Amotion of Mr Justice Boothby*, Parl Paper No 184 (1868–9) 1. The Willis J papers were published in South Australia: South Australia, *Removal of Mr Justice Willis*, Parl Paper No 186 (1867).

182 See the opening statement by H W Parker in South Australia, *Minutes of Proceedings Relating to Mr Justice Boothby*, Parl Paper No 22 (1867) 2–3. A summary was published in *South Australian Advertiser* (Adelaide), 29 August 1867, 3.

183 *The* South *Australian Advertiser* (Adelaide), 8 October 1861, 2.

London for this purpose.[184] Second, reliance could be had on the provisions of the *Constitution Act*, which provided for removal by the Governor upon an address of both houses of the South Australian Parliament. But that Act neither made provision for a hearing of the judge nor for the grounds of removal. In any case, it was subject to any overriding Imperial legislation and in the peculiar situation of the Boothby case the judge might have challenged the validity of the *Constitution Act* procedure notwithstanding *Burke's Act*. After all, the requirements of section two of *Burke's Act* might have been met in that there was both a colonial law (the *Constitution Act*) and an Imperial Act (*Burke's Act*) and they applied to the same issue, in which case if there was repugnancy *Burke's Act* would prevail. *Burke's Act* had the advantage of both specifying grounds for removal and ensuring both a hearing in the colony and a later appeal to London. Whether the *Constitution Act* provisions were repugnant to *Burke's Act* was never determined at the time. Certainly there were differences between the two Acts. *Burke's Act* specified grounds, while the *Constitution Act* did not, and *Burke's Act* provided for an appeal to the Judicial Committee, while a parliamentary address was silent on further proceedings. Nor was the question of whether *Burke's Act* applied to a colony with responsible government resolved, though there was a view that it was applicable to such colonies.[185] However, later cases from Canada and Victoria did hold that *Burke's Act* applied to colonies under responsible government.[186] The third option, adopted in Boothby J's case, was to rely upon *Burke's Act*. This process cut the local Parliament out of the question of amotion altogether, though it did involve ministers in the Parliament who were also members of the Executive Council. The central ground for the proceeding was misbehavior, under the Act.

Anxious to ensure that the judge was offered every opportunity to be heard, the proceedings before the Governor-in-Council commenced each day with a sworn statement by a police trooper that he had delivered a notice of the hearing to the judge's home.[187] Despite this, the judge complained that he had been served with a 300 page printed foolscap document on 6 July and given merely seven days to prepare for the hearing, a notice period he described as 'plainly insufficient'.[188] The Governor accepted Boothby J's request for an extension of time until 29 July. Although the judge attended the hearing only four times, accompanied by his son Josiah, who happened to be the South Australian statist (ie statistician), he refused to stay for the submissions or stay to hear the evidence of the witnesses.

On the first occasion, he read out a prepared statement challenging the proceedings and asked to be provided with certain documents, some of which he was denied.[189] The thrust of his

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184 This impracticability was recognised in 1870. See 'Memorandum by Sir Frederick Rogers: The Removal of Colonial Judges' in United Kingdom, *Correspondence on the Removal and Suspension of Colonial Judges*, C 139 (1870) 5.

185 For a view that it did apply see 'Suspension of Judges', *South Australian Advertiser* (Adelaide), 29 May 1866, 2.

186 *Re Squier* (1882) 46 UCQB 474, 491. See also *R v Rogers; Ex parte Lewis* (1876) 4 VLR 334, 341–2 which held that *Burke's Act* applied to County Court judges in Victoria, in an incident after the introduction of responsible government.

187 See Document No 47 in South Australia, *Minutes of Proceedings of the Executive Council Relating to The Conduct of Mr Justice Boothby*, Parl Paper No 22 (1867) app ccxlv.

188 Ibid Document No 44, app ccxxxv.

189 Ibid Document No 45, app ccxxxvi.

argument was that the Governor did not have jurisdiction to proceed under *Burke's Act*. Justice Boothby gave several reasons to support this conclusion. First, *Burke's Act* assumed a different institutional arrangement not contemplated by the current law in South Australia. While somewhat convoluted, his argument was that the Act applied only to colonies with an appointed Legislative Council. As the South Australian Parliament was elected, it followed that the Act did not apply to his case. Second, the judge also challenged the hearing on natural justice grounds, pointing out that the tribunal conducting the hearing also included the parties presenting the evidence.[190] There was considerable force in this claim, for at one point counsel putting the case against the judge took the witness stand to give evidence against Boothby J.[191] The other point was that the Governor had already informed London a year earlier that 'nothing short of his removal from the Bench can meet the requirements of the case'.[192] In short, the tribunal before which Boothby J was to appear had already made up its mind about his removal before the hearing had even started.

The Governor-in-Council proceeded to hear five charges. These were prepared by the Attorney-General, James Penn Boucaut, and consisted of the following heads:[193]

i. Conduct and language contumacious and disrespectful to the Court of Appeals and obstructive of the said Court in the performance of its duties;

ii. A perverse refusal to recognise the authority of Parliament;

iii. Expressions on the bench disparaging and insulting to the legislature, the government and the institutions of the province;

iv. Language on the bench offensive and irritating to the other judges and a public denial of their authority; and

v. Showing private and personal feeling to interfere with the fair and impartial administration of justice.[194]

These matters were then elaborated into 14 pages of particulars,[195] and the Executive Council heard 20 witnesses over eight hearing days, including the other judges, senior lawyers and court officials. The thrust of the case against Boothby J stressed: (1) his bad relations with the other judges by denying the legality of their appointments and therefore their ability to hear

190 Ibid Document No 46, app ccxxxvii, para 2.

191 Two of the three counsel who presented the case against Boothby J also appeared as witnesses.

192 Daly to Colonial Secretary, No 22, 28 May 1866 in South Australia, *Minutes of Proceedings of the Executive Council Relating to The Conduct of Mr Justice Boothby*, Parl Paper No 22 (1867) app xxx.

193 Chief Secretary's letter in State Records of South Australia, GRG 24/63 (6 June 1867); South Australia, *Minutes of Proceedings of the Executive Council Relating to The Conduct of Mr Justice Boothby*, Parl Paper No 22 (1867) 2 app iii–iv; *The South Australian Register* (Adelaide), 17 June 1867, 2.

194 This was a reference to the fact that he was a member of the Full Court that heard the *Moonta Mines* case in which his son George was a shareholder in the company. See South Australia, *Petitions, Correspondence and Documents Relating to the Moonta Mines*, Parl Paper No 77 (1867) 9, 15.

195 Ayers to Boothby J, 6 June 1867 in State Records of South Australia, GRG 2/46 (6 June 1867). The same document includes a printed text of *Burke's Act*.

cases (it followed from this that he regarded himself as the sole judge); (2) his disregard for the Court of Appeals despite the *Colonial Laws Validity Act* permitting local legislation on courts other than the Supreme Court; (3) his refusal to recognise locally appointed Queen's Counsel or the existence of a local Attorney-General; and (4) his bias in the *Moonta Mines* case both because his son George was a party and because of his alleged bias towards Mr Elder.[196] None of the allegations looked at his pre-1865 decisions on the validity of South Australian statutes.

The final decision did not include detailed reasons, though the official notice amoving Boothby J did say that he had 'misbehaved himself in his… office'. In the end, the Governor-in-Council amoved Boothby J on 29 July 1867 by revoking and recalling his appointment as a judge.[197] Although Boothby J gave notice on the very day of his amotion[198] that he would appeal to the Judicial Committee, a week later the Governor appointed Gwynne J as the Second Judge to fill the specific office once held by Boothby J.[199] An attempt in the Legislative Council to ask the Governor to grant Boothby J leave so that he could go to London to prosecute his appeal was withdrawn.[200] As Boothby J died in May 1868 before the appeal could be heard, no decision on his case was made by the Judicial Committee.

VII THE PRIVY COUNCIL MEMORANDUM OF 1870

In 1868 the Legislative Council of Singapore passed new legislation on the Supreme Court permitting the suspension of the judges by the Governor.[201] The Chief Justice, who was a member of the Legislative Council, voted against the Bill to Amend the Supreme Court Ordinance 1868 (Singapore) as did the unofficial members, but the Governor and the official members commanding a majority in the Council prevailed and the Bill passed.[202] A subsequent public meeting in June 1868 condemned the new legislation and a petition from the meeting was sent to London.[203] The Judicial Committee of the Privy Council responded by drawing up a memorandum in April 1870 to govern the removal of colonial judges in

196 See Samuel Way in South Australia, *Minutes of Proceedings of the Executive Council Relating to The Conduct of Mr Justice Boothby*, Parl Paper No 22 (1867) 61–5.

197 South Australia, *South Australian Government Gazette Extraordinary*, No 33, 29 July 1867, 737–9.

198 South Australia, Legislative Council, *Minutes of the Proceedings*, No 18, 18 September 1867, 49 item 5.

199 South Australia, *South Australian Government Gazette*, No 35, 8 August 1867, 786. At the same time, a third judge, William Wearing, previously the Crown Solicitor, was appointed to Gwynne J's post to complete a three-judge court: South Australia, *South Australian Government Gazette*, No 35, 8 August 1867, 786.

200 South Australia, Legislative Council, *Minutes of the Proceedings*, No 19, 19 September 1867, 51 item 2.

201 Continued in later statutes: see *Courts Ordinance*, No 101, s 4(2) in *The Laws of the Straits Settlements* (revised ed, 1920), vol 2, 280, available in digital form at the CJ Koh Law Library site of the National University of Singapore.

202 *Sydney Morning Herald* (Sydney), 10 July 1868, 3.

203 The arguments were summarised in 'Mr Napier's Pamphlet', *The Straits Times* (Singapore), 22 January 1870, 1, available on the National Library of Singapore's digital database. For the petition see United Kingdom, *Parliamentary Debates*, House of Lords, 20 May 1870, cols 1041–9. For a report of the meeting see *The Mercury* (Hobart), 18 August 1868, 3.

cases involving serious breaches with the community.[204] The memorandum made it clear that it should be easier to dismiss colonial judges than those at home, though no reason was assigned for this view. Nevertheless, the memorandum emphasised the need to protect judges against party and personal feelings, 'which sometimes sway colonial legislatures, and to ensure to the accused party a full and fair hearing before an impartial and elevated tribunal'.[205] The presence of these feelings was said to be the reason why they thought that the addresses in South Australia in 1861 to remove Boothby J did not suffice as it would have done in England. A notable feature of the memorandum was that it included, as a ground of removal, a cumulative case of judicial perversity 'tending to lower the dignity of the office, and perhaps to set the community aflame'.[206]

The document was widely disseminated in the colonies and was invoked in Western Australia in 1889 when the Governor and the Executive Council wanted to hand to the Judicial Committee the issue of the suspension of the Chief Justice without holding a hearing themselves or even evincing an opinion on the matter as it was, they said, a purely legal issue. But the memorandum was not intended by London to be a substitute for *Burke's Act* and the Colonial Secretary made it clear that he expected a hearing in Perth before the matter could be referred to the Judicial Committee.[207] One effect of the memorandum was to modify the procedure by which colonial judges were removed by establishing the practice that no colonial judge could be dismissed by the executive in a colony without reference to the Secretary of State for the Colonies and the Judicial Committee of the Privy Council.[208]

VIII ARTHUR ONSLOW IN WESTERN AUSTRALIA, 1887–1888

First appointed the Attorney-General in 1881[209] and quickly appointed the acting Chief Justice during the 10 month absence of Wrenfordsley CJ,[210] Arthur Onslow became the Chief

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204 *Memorandum of the Lords of the Council on the Removal of Colonial Judges*, April 1870, reprinted in 6 Moo PC(NS) 9, app I; 16 ER 827; also published in *The Straits Times* (Singapore), 6 August 1870, 5; summarised in *The Argus* (Melbourne), 5 October 1870, 6 and *The Mercury* (Hobart), 10 October 1870, 2. For the few remaining British colonies the memorandum remains a key document. See *Re Levers J* [2010] 5 LRC 827, 844 [43].

205 *Memorandum of the Lords of the Council on the Removal of Colonial Judges*, April 1870, reprinted in 6 Moo PC (NS) 9, 10.

206 *Memorandum of the Lords of the Council on the Removal of Colonial Judges,* April 1870, 6 Moo PC 9app II; 16 ER 827, 828.

207 For the correspondence see Western Australia, *Administration of Justice in the Supreme Court: Petition from Messrs Harper and Hackett Respecting His Honor the Chief Justice,* Parl Paper No 4 (1889) A3–4.The Privy Council memorandum appears as an appendix to this document. The memorandum was also referred to in the debates on the affair in the Legislative Council. See Western Australia, *Parliamentary Debates*, Legislative Council, 16 April 1889, 315.

208 As explained in United Kingdom, *Parliamentary Debates*, House of Commons, 1 July 1953, col 383.

209 Western Australia, *Government Gazette of Western Australia*, No 1, 11 January 1881, 71. For secondary accounts of these events see Enid Russell, *A History of the Law in Western Australia and Its Development from 1829 to 1979* (University of Western Australia Press, 1980) 209–11; L A Whitfield, *Founders of the Law in Australia* (Butterworths, 1971) 105–11; G Bolton and G Byrne, *May It Please Your Honor: A History of the Supreme Court of Western Australia* (Supreme Court of Western Australia,

Justice of Western Australia in July 1883,[211] aged 41. Later that year a second judge, E A Stone, was appointed to the Supreme Court.[212] There were three crises during the first decade of his Chief Justiceship, none of which terminated his appointment, and he survived until resigning in 1901. The first dispute occurred in 1886 when the judge became entangled in a political argument over the treatment of Aboriginals in the far north-west of the colony. The Reverend J B Gribble had exposed the maltreatment of Aboriginal prisoners, who he said were often tethered to trees for long periods awaiting the arrival of the police. He also argued that Aboriginals had been inveigled into signing employment contracts that they did not understand and that involved terms he likened to a species of slavery.[213] In the subsequent furore, which saw opinion in the colony denounce Gribble, Onslow CJ unwisely took his side in a letter of support and by the payment of £2 to a newspaper sympathetic to Gribble.[214]

None of this hurt the judge, though it did irritate the Canadian-born Governor Broome and set the scene for the next crisis, which had more severe consequences for Onslow CJ as it lasted eight months. The second dispute started as a rather petty matter, which quickly spiralled out of control. In his official capacity, Onslow CJ came into the possession of documents concerning five recently convicted prisoners. The judge had been asked to advise the executive on whether there were circumstances to warrant a remission of the sentences. Previous judges in Western Australia had carried out these duties,[215] as did judges in other colonies. The Chief Justice refused to comment, arguing that an opinion was needed from London, and retained the papers. Chief Justice Onslow took the view that while he would give advice to the Governor as to whether or not a prisoner was guilty, any decisions involving the exercise of the prerogative of mercy were matters for the Governor alone.[216] After repeated requests to return the documents, he did so[217] but leaked copies to the press,

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2005) 78–86; 'An Historic Quarrel: Governor and the Chief Justice', *The West Australian* (Perth), 1 May 1940, 10. For his general career see *Western Mail* (Perth), 31 October 1908, 61.

210 *The Brisbane Courier* (Brisbane), 18 March 1881, 2.

211 Western Australia, *Government Gazette of Western Australia*, No 32, 3 July 1883, 278.

212 See Broome to Derby, No 96, 20 September 1883 in Western Australia, *Correspondence between HE The Governor and the Secretary of State for the Colonies*, Parl Paper No 21 (1884) 65.

213 J B Gribble, *Dark Deeds in a Sunny Land, or, Blacks and Whites in North-West Australia* (University of Western Australia Press, 1987) 35. See also S J Hunt, 'The Gribble Affair: A Study in Colonial Politics' (1984) 8 *Studies in Western Australian History Journal* 42, 42–51; C T Stanage (ed), *A New History of Western Australia* (University of Western Australia Press, 1981) 101–06. The official reply in the Blue Book to Gribble's claims denied these allegations: *The West Australian* (Perth), 25 October 1886, 3; *The West Australian* (Perth), 26 October 1886, 3.

214 The letters were set out in Western Australia, *Parliamentary Debates*, 19 October 1888, 68.

215 Executive Council Minutes, 4 June 1883–15 November 1887, Minutes of the Executive Council, 16 May 1887, para 2 in State Records Office of Western Australia, WAA, Consignment No 1058, item 9. I have cited this and other Western Australian archive material in accordance with the Government of Western Australia, *Information Sheet: Referencing*, Department of Cultural Arts State Records Office of Western Australia ('SROWA'): <http://www.sro.wa.gov.au/sites/default/files/informationsheet-referencing.pdf >. See also J M Bennett, *Sir Archibald Burt: First Chief Justice of Western Australia 1861*–1879 (Federation Press, 2002) 35–9.

216 See the interview with the Chief Justice, published in 'The Governor and the Chief Justice', *The West Australian* (Perth), 15 September 1887, 3.

217 On 7 September 1887. See *Governor's Despatches* 22 September 1886–31 December 1889, in SROWA, WAA Consignment No 390, item 16, 198.

which promptly published them.[218] The problem was that in one of the letters, Onslow CJ said the Governor had harassed him and acted in a way 'calculated to lower and insult myself and my office and to degrade the administration of justice in this colony'.[219] This made the dispute both public and personal since the judge virtually accused the Governor of deliberately undermining the judiciary. The Governor, on the very day the letters were published, issued a notice that with immediate effect the Chief Justice was interdicted from the powers and duties of his office.[220] The reason assigned for this was that the judge was facing charges for releasing confidential information.[221] Certainly there were specific rules in Western Australia covering these matters. By reg 105 of the *Regulations for the Conduct of Official Business*[222] government officers were enjoined from 'disclosing official documents to any person to whom such communication shall not have been directed'. The judge took the view that the Governor's charges were serious, unprecedented and illegal and also claimed that the Governor was harassing him.[223] He also argued, in a letter to the Governor, that the charges were frivolous and that the interdiction was illegal.[224] The Secretary of State for the Colonies sought to diffuse the situation and advised by telegram that '[i]f Onslow accept leave of absence half salary remove interdiction'.[225] Although leave was offered to him, Onslow CJ refused to budge.

At the time, Western Australia was still a Crown Colony and judges there held office at pleasure.[226] In the event of a vacancy, absence, resignation, death, or if the judge proved to be incapable, the Governor could appoint a replacement.[227] The interdiction of Onslow CJ was followed by the appointment of a temporary replacement as Chief Justice, but the executive botched the appointment of George Leake QC, for there was doubt whether Onslow's CJ interdiction created a vacancy. To remedy this situation, Leake was then issued with a commission appointing him to a puisne judgeship 'at pleasure'.[228] The other problem was that

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218 *The West Australian* (Perth), 15 September 1887, 3. According to Broome, they were first published in the *Inquirer and Commercial News* (Perth), 14 September 1887: see Broome to Colonial Secretary, in *Governor's Despatches* above n 217, 206.

219 Chief Justice Onslow to Broome, 7 September 1887 in *Governor's Despatches* above n 217.

220 Western Australia, *Government Gazette of Western Australia*, No 47, 15 September 1887, 559; *The West Australian* (Perth), 16 September 1887, 3.

221 *Governor's Despatches* above n 217, 23 September 1887, No 207, 196–8.

222 Perth, 1884, 19.

223 The Minutes of the Executive Council, 8 September 1887 in Western Australia, Executive Council Minutes, 4 June 1883–15 November 1887, WAA, Consignment No 1058, item 9. The minutes and volumes are un-paginated but are in chronological order.

224 The Minutes of the Executive Council, 22 September 1887 in Western Australia, Executive Council Minutes, 4 June 1883–15 November 1887, WAA, Consignment No 1058, item 9, includes the text of the letter by Onslow CJ.

225 *The West Australian* (Perth), 20 September 1887, 3.

226 *Instructions to the Governor and Commander-in-Chief of the Colony of Western Australia*, 4 July 1878, cl XXII in Western Australia, *Royal Instructions Under Which the Government of the Colony of Western Australia is Administered*, Parl Paper No A1 (1885) 11.

227 *Supreme Court Ordinance 1861* (WA) s 11. For a discussion of the matter see 'The Tenure of Judges', *The West Australian* (Perth), 24 September 1887, 30.

228 Western Australia, *Government Gazette Extraordinary of Western Australia*, No 10, 26 February 1887, 127. Leake had previously been appointed acting Chief Justice in 1880 upon the death of Sir Archibald Burt CJ: *The West Australian* (Perth), 9 January 1880, 2.

interdiction, though allowed to the Governor by the royal instructions,[229] fell short of a formal suspension. The advantage of interdiction was that it had immediate effect and did not entail a prior hearing of the judge before being imposed. However, suspension of the Chief Justice on half-pay did follow in December 1887.[230] One legal consequence of suspension, unlike interdiction, was that the judge had to be given notice in writing and a hearing before the Governor-in-Council. Following the hearing, a report on the matter was to be sent to the Secretary of State for the Colonies who could either confirm or disallow the suspension.[231] If the suspension was disallowed then the office holder was to receive their salary for the period of the suspension.[232]

Governor Broome wrote to the Colonial Secretary to explain that the three charges against Onslow CJ were that he had: (1) refused to return the confidential papers; (2) untruthfully used the material to the prejudice of Her Majesty's service in that he had accused the Governor of lowering and insulting the Chief Justice; and (3) libelled the Governor.[233] The Chief Justice made his reply to the charges in early December 1887 and expressed the hope that the hearing would be conducted in public, a request the Governor refused.[234]

The printed Judicial Committee papers on the matter show that the Lords were unhappy with the procedure adopted in Perth. As to the first charge of withholding papers, they thought this so flimsy that it 'afforded no sufficient grounds for a formal charge'.[235] The second charge arose, they said, from irritation produced by the first and noted that, had the letter of the Chief Justice not been published, there would have been no basis for the charge. The third charge involved language of great animosity towards the Governor, but was insufficient to justify further action.[236]

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229 *Instructions to the Governor and Commander-in-Chief of the Colony of Western Australia*, above n 225.

230 Western Australia, *Government Gazette of Western Australia* (Perth), 8 December 1887, 738; Governor's Despatches, 22 September 1886–31 December 1889, No 312, 17 December 1887, WAA, Consignment No 390, item 16, 263 with effect from 6 December. See also Minutes of the Executive Council, 9 December 1887, Executive Council Minutes, 23 November 1887–16 December 1891, SROWA, WAA, Consignment No 1058, item No 10, 7. The suspension power specifically invoked was in the *Rules and Regulations of Her Majesty's Colonial Service* (1856) ch 4.

231 *Rules and Regulations of Her Majesty's Colonial Service* (1856) 25–7, CO 78–8. These regulations were held to be directory and did not form part of a contract between a public servant and the Crown. See '*Shenton v Smith'*, *Western Mail* (Perth), 21 January 1893, 4, 6; on appeal [1895] AC 229, 235.

232 A principle affirmed in *Cloete v R* (1854) 8 Moo PC 484, 490; 14 ER 184, 187, a case on the suspension of the recorder of Natal, a judicial post equal to that of a judge.

233 Broome to Secretary of State for the Colonies, 28 December 1887, No 325 in *Governor's Despatches* above n 217, 268–9.

234 Executive Council Minutes, 23 November 1887–16 December 1891Minutes, 5 December 1887, WAA, Consignment No 1058, Item No 10, 1–3.

235 *Governor's Despatches* above n 217, No 23, 11 May 1887, 5 where this printed Privy Council decision is inserted. The passage is on p 1 of the printed document. An extract was also published in Western Australia, *Administration of Justice in the Supreme Court: Petition from Messrs. Harper and Hackett Respecting His Honor the Chief Justice*, Parl Paper No 4 (1889) A29; and in United Kingdom, *Parliamentary Debates*, House of Commons, 21 June 1888, col 803; *Western Mail* (Perth), 23 June 1888, 6.

236 Privy Council decision in *Governor's Despatches* above n 217, No 23, 11 May 1887, 2.

The Colonial Office thought that while the judge had acted unwisely this was not enough to justify his removal from office. The colonial secretary explained in May 1888 that in view of 'the fact that no misconduct of a moral character or connected with judicial duties has been imputed to Onslow, their Lordships humbly recommend to Your Majesty that the suspension be removed'.[237] In a warning to both parties, the Judicial Committee added that 'the relations which have existed between the Governor and the Chief Justice must have been prejudicial to the Colony, and if continued, must lead to deplorable results'.[238] The judge then resumed his seat on the Supreme Court on 15 May,[239] a decision greeted by popular acclaim, for Onslow CJ enjoyed widespread public support, while Governor Broome was reviled by sections of the public for his attack on the judge. Throughout the crisis there had been a series of indignation meetings, as they were called in the 19th century, during one of which a wagon driven by two men in clown costumes brought an effigy of the Governor into the centre of Perth, where it was burned as a mark of public discontent.[240] The Bar also passed resolutions of support for Onslow CJ and in so doing expressed their 'indignation at the unwarrantable action of His Excellency the Governor and to protest against the gross insult levelled at the Supreme Court and the Administration of Justice'.[241]

The third crisis was potentially more serious for Onslow CJ because it involved a conflict with powerful press and political figures in the Legislative Council. The matter grew out of a libel action in which Onslow CJ awarded the then huge sum of £6000 in damages against the *West Australian* newspaper.[242] The proprietors of the newspaper, Charles Harper and John Hackett, happened to be members of the Legislative Council, as well as Justices of the Peace. They sent a petition to the Council asking for an inquiry into the judge's conduct, alleging that he had been biased against them in several previous cases and that therefore they could not obtain justice in cases heard before him.[243] Their principal demand was for the appointment of a third judge to break the stranglehold, as they saw it, of the Chief Justice on judicial decisions.[244] The debate on the petition was led by Mr Parker who argued that the

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237 *Governor's Despatches* above n 217, 341–2 noting that the Colonial Secretary had sent a telegram received in Perth at 6.30 pm on 11 May, reversing the suspension. The decision was formally published in Western Australia, *Government Gazette of Western Australia* (Perth), 14 June 1888, 304; *Western Mail*, 23 June 1888, 6. The decision in London included an order to pay his full salary for the period of the suspension: *Governor's Despatches* above n 217, No 32, 11 May 1887, 3–4.

238 *Governor's Despatches* above n 217, No 32, 11 May 1887, 3.

239 'The Reinstatement of the Chief Justice: Congratulations in Court', *The West Australian* (Perth), 16 May 1888, 3.

240 *Governor's Despatches* above n 217, No 208, 23 September 1887, 210 where the Governor describes the demonstrators as 'honest if hasty'. See also 'The Governor and The Chief Justice: Grand Torchlight Procession', *The West Australian* (Perth), 14 May 1888, 11. For more material showing the extent of Onslow's CJ support see Western Australia, *The Interdiction of the Chief Justice*, a collection of press reports in *Administration of Justice in the Supreme Court: Petition from Messrs. Harper and Hackett Respecting His Honor The Chief Justice*, Parl Paper No 4 (1889) clxxxvi–cciii.

241 *Western Mail* (Perth), 24 September 1887, 10.

242 *'Hensman v The West Australian', The West Australian* (Perth), 29 August 1888, 3.

243 See *Governor's Despatches* above n 217, No 296, 30 October 1888, 451-461; Western Australia, *Petition by Charles Harper and John Winthrop Hackett*, Parl Paper No A1 (1888). At para 3 they described the Chief Justice's behavior towards them as 'persecution'. The petition was presented to the Council on 15 October 1888: Western Australia, Legislative Council, *Minutes of the Proceedings*, No 3, 15 October 1888, 12.

244 Western Australia, *Petition by Charles Harper and John Winthrop Hackett*, Parl Paper No A1

Governor should appoint a third judge,[245] a common tactic in 19th century disputes with the judges to dilute the power of those already on the bench.[246] The problem with a two judge bench was that if the judges disagreed, the opinion of the Chief Justice as the senior judge prevailed.[247] If the trial had been conducted by the Chief Justice, an appeal to the Full Court entailed an appeal to the Chief Justice as a member of the Full Court. After the speaker ruled that the petition was in accordance with the Standing Orders,[248] the Legislative Council voted by a vote of 19 to 4 to send a copy to the Chief Justice.[249]

In their memorial to the Colonial Secretary the petitioners cited remarks made by Onslow CJ, who referred to the editor of the *West Australian* as 'an utter quack and charlatan'.[250] In the event, the Colonial Secretary directed that an inquiry on the petition be held in Perth.[251] The inquiry ran for only two days (creating a transcript of 51 pages) but considered numerous printed documents mostly drawn from the press. The judge objected to the inquiry, describing it as novel and unconstitutional.[252] As to the substantive charge, which alleged bias against the petitioners in libel cases, the judge pointed out that he had not insisted on taking the cases away from Stone J and that in the cases in question, liability for libel had been found by a special jury. In the main case, *Gribble v Harper and Hackett*, both judges had presided and agreed on a verdict for the defendants.[253] Chief Justice Onslow also showed that in conversation with John Forest, a member of the Executive Council, Hackett had expressed confidence in the Chief Justice, contrary to the claim in the petition. The judge also made bias claims of his own against Governor Broome and his main supporter in the colony, the *West Australian*.

At the end of the inquiry Onslow CJ sought leave, which was granted,[254] while the Legislative Council moved an address to the Governor asking him to forward the papers to London.[255] The Governor, in fact, had already done this and, without suspending the judge or expressing an opinion on the matter, he asked that the papers be sent to the Privy Council. The Colonial Secretary rejected this request, writing that the Executive Council should suspend the Chief Justice or acquit him.[256] In the end, the government in Perth refused to suspend the judge or arrange for a petition from the Legislative Council in favour of his

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(1888) 9.

245 Western Australia, *Parliamentary Debates*, 19 October 1888, 59–60.

246 See the arguments on the Supreme Court Act (Judges) Amendment Bill in Western Australia, *Parliamentary Debates*, Legislative Council, 27 November 1889, 229–30.

247 *Supreme Court Amendment Act 1880* (WA) s 19.

248 Western Australia, Legislative Council, *Minutes of the Proceedings*, No 6, 19 October 1888, 22.

249 Ibid.

250 *Petition by Charles Harper and John Winthrop Hackett* above n 244, 2[4].

251 Western Australia, Legislative Council, *Minutes of the Proceedings*, No 12, 29 March 1889, 50.

252 Western Australia, *Administration of Justice in the Supreme Court: Petition from Messrs Harper and Hackett Respecting His Honor the Chief Justice*, Parl Paper No 4 (1889) 75, 124.

253 Ibid, 125.

254 *The West Australian* (Perth), 17 March 1890, 3.

255 Western Australia, Legislative Council, *Minutes of the Proceedings*, No 16, 4 April 1889, 67.

256 Broome to Colonial Secretary, 13 March 1889 and Colonial Secretary to Broome, 15 March 1889 in Western Australia, *Administration of Justice in the Supreme Court: Petition from Messrs Harper and Hackett Respecting His Honor the Chief Justice*, Parl Paper No 4 (1889) 204, A3.

removal, and the matter lapsed.[257] In his dispatch, Lord Knutsford promised to lessen the friction between the judge and others in Perth by agreeing to find Onslow CJ an appointment elsewhere.[258]

While the inquiry did not remove Onslow CJ, it did accomplish the main demand of the petition. An amendment to the *Supreme Court Act 1861* (WA) was passed that authorised the appointment of a third judge and introduced a rule whereby in the event of a division of opinion the majority should prevail.[259] Since this was the principal demand in the original petition, and since no steps were taken in the Legislative Council to petition for Onslow CJ's removal, other efforts were made to replace him. He was offered a post in Gibraltar and for a time it seemed that the Chief Justice of Cyprus had agreed to take the post in Western Australia, before changing his mind.[260] In his place, Sir Henry Wrenfordsley was appointed temporarily to the Chief Justiceship, though this was a highly unpopular move, and when Onslow CJ refused to go to Gibraltar he resumed his office.[261] The personal irritation between the Chief Justice and the Governor was removed when Governor Broome left in October 1890 following the inauguration of responsible government.[262] The new constitution brought in the usual protections for judicial tenure and thus brought Western Australian constitutional protection of judicial tenure into line with the other Australian colonies.[263]

IX THE INSTITUTIONAL CHANGES IN THE ROLE OF THE JUDGES

Aside from formal changes in the tenure of judges brought in by responsible government, other changes in the judicial function removed some of the duties that had tied the judges to the other branches of government. These changes show that the formal legal position set down in the Constitution Act does not fully explain the rise of judicial independence in the 19th century. In short, judicial independence has to be understood against a background of other institutional changes that occurred during this period. Some of the changes were a necessary consequence of the introduction of responsible government, while others arose from the legal and political environment of the time. However, not all of the changes reinforced judicial independence and some actually brought the judges into conflict with the executive.

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257 *Administration of Justice in the Supreme Court: Petition from Messrs Harper and Hackett Respecting His Honor the Chief Justice* above n 252, A4.

258 *The Inquirer and Commercial News* (Perth), 21 August 1889, 5.

259 *Supreme Court Amendment Act 1889* (WA) s 2. There was support for the measure. See 'A Third Judge', *Western Mail* (Perth), 18 January 1890, 22. For the discussion in the Legislative Council see Western Australia, *Parliamentary Debates*, 27 November 1889, 229–30.

260 *The West Australian* (Perth), 10 February 1890, 3; *The Mercury* (Hobart), 17 February 1890, 3. Cf *The Inquirer and Commercial News* (Perth), 12 February 1890, 5 suggested a straight swap with the Chief Justice of Cyprus had been agreed to, but this fell through.

261 This manouvering is set out in J M Bennett, *Sir Henry Wrenfordsley: Second Chief Justice of Western Australia 1880*–1883 (Federation Press, 2004) 104–08.

262 Western Australia, *The Inauguration of Responsible Government in Western Australia,* Parl Paper No 31 (1891) 3.

263 *Constitution Act 1889* (WA) ss 54–5.

A *Judges Ceased to be Members of the Legislative Council*

During the Crown Colony period the Governor could appoint anyone to the Legislative Council. It was common practice to appoint the Chief Justice to the Council as well as to the Executive Council. One reason for these appointments was to provide the Governor with expertise in what was in the beginning a very small administration. In early New South Wales, for example, the Chief Justice was a member of both the Legislative and Executive Councils.[264] In South Australia, Edward Castries Gwynne J, an elected member of the Legislative Council since 9 March 1857,[265] was appointed to the bench in 1859,[266] but remained a member of the Council for three months after his judicial appointment, though he did not act as a councillor during that time.[267] Remarkably, in the Tasmanian case Horne J was a member of the upper house, and special legislation was passed to anticipate his election as the president of the Legislative Council.[268] It was only after petitions were submitted objecting to his membership of Parliament that he relinquished his parliamentary seat in 1860.[269] This practice disappeared with the introduction of responsible government, as a number of Constitution Acts specifically made judges ineligible for election to Parliament and, with this, judges no longer sat in the legislature.[270] Occasionally there were bungles, as in 1888 when legislation had to be passed by the Queensland Parliament to validate the appointment and decisions of Mein J after it was discovered, four years after his appointment, that he had held incompatible offices after his appointment to the bench.[271] Justice Mein had had a distinguished career in Parliament[272] and was, at the time of his appointment to the court, a Lieutenant-Colonel in the Land Defence Forces of Queensland, as well as a local director of the National Mutual Life Assurance Association Ltd. Section 12 of the *Supreme Court Act 1861* (Qld) provided that where a judge held any other office of profit, the office of judge was to be avoided, ie deemed vacated.[273] Sir Samuel Griffith, then Premier and a former school friend of the judge, criticised the Mein Validating Bill, arguing that the offices held were not within the statute, but nevertheless agreed to the legislation.[274]

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264 New South Wales, Legislative Council, *Votes and Proceedings*, 1824–31, pt 1; G W Rusden, *History of Australia* (Melville, Mullen and Slade, 2nd ed, 1897) vol 1, 553; P R Eldershaw, 'The Governor's Office' (1968) 15(3) *Tasmanian Historical Research Association: Papers and Proceedings* 86, 94. A phenomenon found elsewhere in the British Empire: see W R Riddell, 'Judges in the Parliament of Upper Canada' (1918–19) 3 *Minnesota Law Review* 244–56.

265 South Australia, *Minutes of the Proceedings of the Legislative Council*, Parl Paper No 1 (1857) 2 item 5; South Australia, *Members of Parliament Elected under Constitution Act*, Parl Paper No 246 (1862) 1.

266 South Australia, *South Australian Government Gazette*, No 9, 3 March 1859, 191.

267 South Australia, Legislative Council, *Minutes of the Proceedings*, No 29, 26 August 1859, 83 item 1 and No 30, 30 August 1859, 85 item 2.

268 *Supreme Court Act 1856–7* (Tas) 15 Vict, No 6.

269 See Tasmania, Parl Paper No 24, 38 (1859) inveighing against a judge being a member of the legislature.

270 *Constitution Act 1856* (SA) s 36.

271 *The Judges' Validating Act 1888* (Qld) preamble.

272 See 'The New Puisne Judge', *The Brisbane Courier* (Brisbane), 11 April 1885, 5.

273 *Supreme Court Act 1861* (Qld); see also *Sydney Morning Herald* (Sydney), 27 September 1888, 8.

274 *The Brisbane Courier*, 27 September 1888, 4, 5.

B *Judges Ceased to Have to Certify Draft Laws*

The judges were also expected to examine proposed legislation and certify whether it conflicted with the laws of England.[275] In one spectacular case, a serious crisis arose in Van Diemen's Land in 1847 when the judges certified the *Act to Restrain the Increase of Dogs 1846*[276] as not being repugnant to the laws of England. The *Dogs Act* imposed a tax on dogs, but the revenue was used for general purposes. When the matter came before the court, because a taxpayer refused to pay the tax on the grounds that it was illegal, the court held that the *Dogs Act* was invalid on the ground that it conflicted with the Letters Patent, which required that all taxes be applied for a particular purpose and not be used for general government purposes.[277] This provoked a major financial crisis, since it was then discovered that many other acts of the colony that collectively provided a large proportion of the government's revenue were also likely to be invalid on the same ground.[278] The administration was furious and attacked both judges, leading to the amotion of Montagu J.[279] With responsible government, this function ceased and thereafter the local law officers provided advice on the legality of measures placed before the Parliament.

C *Judges Ceased to be Members of the Public Service*

Judges were no longer treated as part of the public service, as they had been during the Crown Colony period before 1889 in Western Australia,[280] with the emergence of public service legislation in the late 19th century. By treating judges as ordinary members of the public service they were, in effect, no better off than the lowliest messenger. In 1900 the law governing the public service in Western Australia, for example, explicitly excluded judges from its operation.[281] The adoption of these arrangements followed the precedents set in the eastern colonies that had, from the 1860s, only applied civil or public service legislation to public officers other than judges.[282] The only exception to the separation of the judiciary from the executive was the case of the judge of the Supreme Court of the Northern Territory, who was also a Magistrate and the Coroner, as well as being a member of the executive as the Government Resident.[283]

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275 For an example from New South Wales from the 1830s see *A-G v Eagar* [1884] SCR 234, 273–4.

276 10 Vic No 5 (VDL) ('*Dogs Act*').

277 For the case see '*Symonds v Morgan'*, *The Courier* (Hobart), 19 January 1848, 2–4. For the background see Peter Bolger, 'Lieutenant John Morgan: The Dog Tax Martyr' (1969) 55 *Journal of the Royal Australian Historical Society* 272, 272–81.

278 For the full background see *Despatches Relating to the Government and Affairs of the Colony 1847–1848*, as 10 BPP (Australia) 275.

279 See above n 54.

280 'The Tenure of Judges', *The West Australian* (Perth), 24 September 1887, 30.

281 *Public Service Act 1900* (WA) s 5(c).

282 *Civil Service Act 1862* (Vic) s 1; *Civil Service Amendment Act 1865–66*(SA) s 3; *Civil Service Act 1884* (NSW) s 2; *Civil Service Act 1900* (Tas) s 4.

283 South Australia, *Parliamentary Debates*, House of Assembly, 3 September 1902, 358–63; South Australia, *Parliamentary Debates*, House of Assembly, 1 October 1902, 564; South Australia, *Parliamentary Debates*, House of Assembly, 5 November 1902, 891.

D *Judges Still Obliged to Advise the Executive on the Exercise of the Prerogative*

Even when not performing executive functions, the judges would be expected to attend the Executive Council to advise on the grant of pardons and the remission of sentences, or at least to prepare reports for the executive on these matters.[284] As we saw, this function was at the root of a major dispute in Western Australia in 1887.[285] In a case in 1898, a Russian Finn named Andersen, along with another accused named Pedro, had been convicted of manslaughter in South Australia and sentenced to 10 years' imprisonment. The Russian consul in Melbourne took up their case and asked the Governor to remit their sentence. When he refused, pressure was put on the Governor by the Colonial Office, which was in turn responding to pressure from the Russian Foreign Ministry. The sentencing judge was asked for his opinion but did not recommend clemency,[286] while the South Australian Parliament was bitterly opposed to any interference with the exercise of the prerogative of mercy by the British authorities. It was then decided to seek a second judicial opinion, this time from Way CJ, who came to a different conclusion than the trial judge and thought that the conviction of Andersen was wrong.[287] The official excuse for the intervention of the Chief Justice, who had not presided at the trial, was that Bundey J was too ill to act.[288] Chief Justice Way also asserted that Bundey J had agreed with this re-assessment of the matter, which conveniently coincided with the wishes of the Governor to release the prisoner and to get the Colonial Office off his back. Eventually all of this pressure prevailed and Andersen was released. It was thought at the time highly irregular to seek a second opinion, especially from a judge who had not conducted the original trial.[289]

E *Judges Still Advised on the Operation of Laws and Chaired Commissions on Legal Matters*

From an early date the judges were asked to act as legal consultants to the executive.[290] They were also expected to give evidence to parliamentary committees on the status and working of existing laws.[291] As the century progressed, this function diminished with the increase in

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284 See, eg, Letter No 67, 3 July 1841 cited in A G L Shaw (ed), *Gipps-La Trobe Correspondence 1839–1846* (Melbourne University Press, 1989) 87; South Australia, *Remission of Sentence of G M Allen*, Parl Paper No 145 (1868); Tasmania, *James Connolly: Judge's Report and other papers,* Parl Paper No 98 (1883); South Australia, *Report Re Anderson and Pedro's Case,* Parl Paper No 54 (1901).

285 See text at above n 214. For a review of several of the other 19th century disputes concerning the prerogative see J M Bennett, 'The Royal Prerogative of Mercy — Putting in the Boots' (2007) 81 *Australian Law Journal* 35, 35–47.

286 See South Australia, *Report Re Andersen and Pedro's Case,* Parl Paper No 54 (1901).

287 South Australia, *Memorandum by the Chief Justice Re the Case of Andersen and Pedro*, Parl Paper No 77 (1901); South Australia, *Correspondence Re Release of Prisoner Andersen*, Parl Paper No 54A (1901) 6–7 for Way's report; South Australia, *Parliamentary Debates*, Legislative Council, 15 November 1900, 416.

288 Justice Bundey fell ill in late 1898 and left the Bench on leave from 1 March 1899. He returned from leave on 6 March 1900.

289 'Judges at Variance', *The Advertiser* (Adelaide), 13 August 1901, 4.

290 See the letter from the judges to the governor of New South Wales, 8 August 1831 reprinted in *A-G v Eagar* [1884] SCR 234, 273–4.

291 Justice Boothby and the other judges gave evidence in the South Australia, *Report of the Select*

the legal establishment and the enhanced role of the law officers of the Crown in each colony. Nevertheless, the appointment of judges to commissions of inquiry remains a feature of the state judicial function, though increasingly, the appointment is given to a retired judge rather than to a sitting judge, as was common in the 19th century.

F *Judges Acquired a New Role as Acting Governor*

When the British army was withdrawn from Australia after 1870, a new role for the judges emerged.[292] Hitherto, whenever the Governor was absent, his place would be taken by the senior British army officer, a person usually of high rank.[293] But with the running down of British military units, now under junior officers, it was decided that the Chief Justice or the most senior judge should act in the Governor's place.[294] The appointment of a judge during the absence of the Governor entailed the exercise of both judicial and executive functions and, in some cases, judges spent long periods in the gubernatorial role. Chief Justice Sir Samuel Way, for example, was formally appointed the Lieutenant-Governor of South Australia in 1891[295] and served 23 times as Governor for a total of six years and 117 days,[296] while Sir Arthur Onslow CJ of Western Australia acted as administrator to the government on four occasions in the 1890s.[297] At the time of the appointment of Samuel Way CJ as the Lieutenant-Governor, objections were raised on constitutional grounds. Meanwhile, Bundey J claimed that the effect of appointing the Chief Justice as the Lieutenant-Governor of the colony was to throw a major burden on him and he entered into a dispute with the Crown about his salary.[298] In theory, a judge might preside over a murder case and upon conviction sentence the accused to death and then, as acting Governor, be asked to exercise the royal prerogative of pardon. This constitutionally suspect situation so concerned the founders of Australia in the 1890s that they decided, after taking note of the practice in the Australia

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Committee of the House of Assembly on the Amendment of Insolvency Law, Parl Paper No 132 (1859) 46ff; and Cooper CJ chaired the *Real Property Law Commission* in South Australia, Parl Paper No 192 (1860) 1 where the warrant of appointment appears as it does in South Australia, *Appointment of Real Property Law Commission,* Parl Paper No 34 (1861) 1. Justice Boothby was also appointed a commissioner in a compensation matter in 1854: *The South Australian Register* (Adelaide), 15 August 1854, 3.

292 See South Australia, *Withdrawal of Troops from Australia*, Parl Paper No 58 (1870).

293 See, eg, Victoria, *Brigadier-General Carey-Assumption of Office as Officer Administering the Government of Victoria,* Parl Paper No B10 (1866).

294 See the dormant commission providing that the Chief Justice of Western Australia would act in the Governor's place: Western Australia, *Government Gazette of Western Australia*, 23 January 1900, 7, also reprinted in *The West Australian*, 24 March 1900. 3. For an early example see South Australia, *Provisional Administration of the Government,* Parl Paper No 139 (1860) for the text of a commission to Sir Charles Cooper CJ. For other Australian precedents see 'Governor and Chief Justice', *The South Australian Register* (Adelaide), 14 June 1877, 1.

295 South Australia, *Commission of the Honorable Samuel James Way, Chief Justice, as Lieutenant-Governor of South Australia*, Parl Paper No 37 (1891).

296 South Australia, *Statistical Register of South Australia 1933–34*, Parl Paper No 3 (1933–4) 3. A later Chief Justice in South Australia, Sir George Murray, served three years and 101 days as Lieutenant Governor: *The Advertiser* (Adelaide), 24 November 1932, 8.

297 *Official Year Book of Western Australia 1957* (1958) 65.

298 See South Australia, *Correspondence Re Appointment of Chief Justice as Acting Governor*, Parl Paper No 71 (1893); *The Advertiser* (Adelaide), 28 July 1893, 6.

colonies, to ensure that it did not become part of the forthcoming *Australian Constitution*.[299] The dual role of the judges was discussed in the Victorian Parliament in 1919 and it was decided that where the Chief Justice acted as the Governor, he would not hear criminal matters for the duration of the temporary commission.[300] Despite these misgivings, the practice of appointing the Chief Justice or the Senior Puisne Judge as the acting Governor of an Australian state continued well into the late 20th century.

And what of *Burke's Act* which overrode the Constitution Act process of judicial amotion in South Australia in 1867? The Act was later removed from the laws of the Australian Capital Territory, Queensland, New South Wales and Victoria by the passage of Imperial legislation.[301] In the only instance of amotion in the 20th century, that of Vasta J in Queensland in 1986, *Burke's Act* was not an issue because it had been removed from Queensland law in 1984. This is also the position in the rest of the country, for although no statutes in the other Australian jurisdictions, ie Tasmania, South Australia and Western Australia, have removed *Burke's Act* from their law, it is arguable that since they are no longer colonies the Act cannot now apply to them.[302] A second argument against the continued use of the Act would be that it contemplates a colonial constitutional system that simply does not exist in modern Australia. Specifically, as interpreted by the memorandum of 1870,[303] under *Burke's Act* there is allowance for an appeal to the Privy Council, but no such appeals are permitted from Australia since their final abolition by section 11 of the *Australia Act 1986* (Cth).

X CONCLUSION

The relationship between the judges and the other branches of Government in 19th century Australia was influenced by a mixture of colonial law, British policy and the emerging system of responsible government whereby the local legislature claimed a greater role in judicial complaints. At the beginning of the period, executive control over the judiciary was near absolute, with the local legislature reduced to making complaints to London in the absence of any power to amove a judge. Even after the introduction of responsible government, the British insisted that *Burke's Act* applied to these matters. The Act provided grounds for removal, an improvement on the old position that equated the judges with civil servants who were removable at pleasure. But the Act still placed the power of removal in the hands of the local executive, which acted as both judge and jury in these matters. It was the colonial legislatures and the local population that sought to secure judicial independence by the adoption in the Australian colonies of the safeguards established in Britain at the

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299 See *Official Report of the National Australasian Convention Debates*, Adelaide, 22 March to 5 May 1897, 634 (Mr Symon).

300 Victoria, *Parliamentary Debates*, Legislative Assembly, 4 December 1919, 2922–3.

301 By not being retained. See *Imperial Acts Application Act 1969* (NSW) s 8(1); *Imperial Acts Application Act 1980* (Vic); *Imperial Acts Application Act 1984* (Qld) s 7; *Legislation Act 2001* (ACT) s 17(2) and schedule 1, pt 1.1; Western Australia Law Reform Commission, *Report on United Kingdom Statutes in Force in Western Australia*, Project No 75 (1994) 73.

302 *West Lakes Ltd v South Australia* (1980) 25 SASR 389, 392 (King CJ): 'South Australia is no longer a British colony. It is part of an independent sovereign nation'.

303 See above n 204.

beginning of the 18th century. The motives for these changes were mixed. In part, there was a genuine belief in the importance of judicial independence, but there was also a view that, since the legislature paid for the judges, it should have the ability to amove them if need be. While some judges were amoved or suspended, and while colonial judges were removed for 'setting the community aflame,' this happened in rare and extreme cases (eg Willis, Montagu, and Boothby JJ) where the judge's actions threatened to bring the legal system to a halt. Where the matter was trivial but blown out of proportion by touchy local personalities, the British usually imposed a restraining hand on colonial legislative excesses (as in South Australia in 1861 in the Boothby case), or to check the action by the executive (as in Western Australia in the Onslow affair in 1888).

Although British suspicions of the local legislatures were strongest in the first half of the 19th century, this ebbed, but did not completely disappear, with the onset of responsible government. Nevertheless, self-government brought in security of judicial tenure on the English model since it was written into local legislation. However, it did not have an immediate impact in the South Australian case because *Burke's Act* still operated to override local constitutional protections. The keen awareness by the local population of the importance of judicial independence explains the fierce reaction by the public in favor of judges thought to have been bullied by Governors in Van Diemen's Land in 1848 and Western Australia in 1888. As the century progressed, judges ceased to be members of the other branches of government and the question of the validity of local legislation, once a source of conflict, was clarified by 1865, though validity matters still arose but with less impact than in South Australia.[304] These changes, along with a diminished power of the Governor over judges and a greater respect by Governors for the other branches of government, made conflicts with the judiciary less likely.[305]

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[304] *Colonial Acts Confirmation Act 1894* (Imp) 56 & 57 Vict, c 72 as explained in South Australia, Parl Paper No 140 (1895), which validated a New South Wales electoral Act that had not been reserved for the royal assent in London. The first South Australian case where the issue was raised and decided a few months after Boothby J's amotion upheld local legislation as not repugnant: *In re William King* (1867) 1 SALR 86, 89.

[305] For a review of 20th century disputes over judges see Enid Campbell and H P Lee, *The Australian Judiciary* (Cambridge University Press, 2001) 101–31.