COLONIAL LEGISLATION AND THE LAWS OF ENGLAND

By ENID CAMPBELL*

This year marks the centenary of the Colonial Laws Validity Act 1865.[1] It was passed, the preamble states, to remove doubts 'respecting the validity of divers laws enacted or purporting to be enacted by the legislatures of certain of Her Majesty's colonies and respecting the powers of such legislatures. . . .' After such an introduction, one might have expected that the Act merely would declare and clarify the pre-existing law relative to the law-making competence of colonial legislatures. However, in at least one of its provisions, the statute brought about a fundamental constitutional change. While affirming the supremacy of the British Parliament and the paramountcy of British legislation extending to the colonies by express words or by necessary intendment, the Act abrogated the old rule requiring colonial enactment to conform as near as possible with the fundamental principles of English law. Henceforth, it was declared by s. 3, no colonial legislation should 'be deemed to have been void or inoperative on the ground of repugnancy to the law of England', except of course where repugnant to British legislation extending to the colony by paramount force. The result was that when authority was granted to a colonial legislature, representative or non-representative, to make laws for the peace, order and good government of the colony, that legislature would be taken to possess 'the utmost discretion of enactment for attainment of the objects pointed to', subject only to those limitations on the subject-matter of legislation laid down in the colonial constitution and to overriding Imperial legislation.[2]

The effect of the old repugnancy doctrine on the development of colonial legal systems is not always appreciated, yet in those colonies where the laws of England were incorporated as part of the *lex loci*, the doctrine was just as important a factor in promoting uniformity between English and local law as any disposition on the part of colonial judges to defer to English judicial precedents. In point of fact, comparatively few colonial statutes were disallowed by the King in Council or adjudged by the courts to be void on the ground of repugnancy to

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1 28 & 29 Vic., c. 63.

2 *Riel* v. *Reg.* (1885) 10 App. Cas. 675 at 678.

English law, but the statistics of legislation upheld and legislation vetoed are in themselves of no great significance. What is significant is that colonial governments acquiesced in the restriction on local legislative competence and formulated their policies with reference to it. One only can speculate on the sort of legislative ventures the colonies might have embarked upon if their legislatures had not been encumbered by the repugnancy doctrine, but when it is suggested that colonial legislatures displayed little imagination or originality in thought or too often were inclined to follow English legislative precedents without sufficient regard to their suitability to local conditions, it must be remembered that for a long time, colonial constitutions allowed very limited scope for innovation and experimentation. No colonial government would think it worthwile to initiate legislation which the courts or the Colonial Office could grind into powder with one blow.

I

Why, in the first place, had it been insisted that colonial legislation conform with the laws of England and how did the principle of conformity come to be established as a principle of the Imperial constitution? There is no reason to suppose that the doctrine deliberately was constructed as a means of strengthening Imperial control over the colonies, though indirectly it might have that effect. It was rather one of those principles which Imperial administrators always assumed to be law without really bothering to inquire how or why.

The doctrine first made its appearance in the second Virginia Charter of 1609. The Charter authorised the establishment of a local assembly but stipulated that all statutes and ordinances of such an assembly, so far as circumstances would admit, should 'be agreeable to the laws, statutes, government and policy of our realm'.[3] With slight variations, the Virginia formula was repeated in later colonial Charters and in the Commissions of the Governors of the royal colonies.[4] Why conformity with the laws of England should have been insisted upon with such regularity, the records do not indicate; J. H. Smith points out that the draftsmen of these early colonial charters had no precedents to guide them in the framing of colonial constitutions and for want of precedents probably assumed that wherever the corporate form was used by the Crown to establish a system of government in the colonies, law-making authority could not be granted unless subject to the qualification that legislation be agreeable to English law.[5] In England, it was well recognised that the regulations of corporate bodies should conform with the general law of the land and that any by-laws which were repugnant to

[3] Quoted by E. B. Brown, 'British Statutes in the Emergent Nations of North America: 1606-1949', (1963) 7 *Am. Jo. Legal Hist.* 95 at 97.

[4] See Brown, *op. cit.*, 97-100.

[5] J. H. Smith, *Appeals to the Privy Council from the American Plantations* (1950), 525.

common law or statute law were to the extent of their repugnancy, void *ab initio*.[6] Statutes of the reigns of Henry VI and Henry VII[7] sought to control the lawmaking activities of corporations by instituting special machinery for periodic scrutiny of by-laws, but the fact that by-laws had passed muster by this process did not exclude judicial inquiry into their validity. By-laws which were repugnant to the laws of England were void *ab initio* and nothing short of a confirming Act of Parliament could give them the force of law.[8] Although the corporate form was not always employed in establishing colonial governments, the Crown lawyers apparently assumed that legislatures constituted by Royal Commission stood on precisely the same footing as legislatures in the chartered colonies. The Crown's authority to confer governmental powers by Commission was a limited authority: the sovereign could not, the common law courts of the early 17th century had ruled, in exercise of his prerogative, confer on any person or body power to act in a manner contrary to the common custom of the realm.[9] If, therefore, a colonial Governor, by Royal Commission, was directed to summon a local assembly with whose advice and consent laws might be enacted for the colony, seemingly it was necessary that the grant of legislative power be subject to the qualification that no local law be repugnant to the domestic law of the realm.

Towards the end of the seventeenth century the Charter and Commission restrictions on the competence of the provincial assemblies in America were reinforced by Imperial statute. By s. 9 of the Act for Preventing Frauds, and Regulation of Abuses in the Plantation Trade, 1696,[10] it was enacted—

> that all laws, by-laws, usages or customs, at this time, or which hereafter shall be in practice, or endeavoured or pretended to be in force or practice, in any of the said plantations, which are in any wise repugnant to the before mentioned laws, or any of them so far as they do relate to the said plantations, or any of them, or which are any ways repugnant to this present act, or to any other law hereafter to be made in this Kingdom, so far as such law shall relate to and mention the said plantations, are illegal, null and void, to all intents and purposes whatsoever.

The 'before mentioned' laws were certain statutes dealing with navigation and trade with the plantations.[11] But as will be seen from the

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6 2 *H.E.L.* 400; *Ipswich Tailors' Case* (1604) 11 Co. Rep. 52a.

7 15 Hen. VI, c. 6; 19 Hen. VII, c.7.

8 *Ipswich Tailors' Case* (1604) 11 Co. Rep. 53a at 54B. See also *Stationers in the City of London* v. *Salisbury* (1694) Comb. 221; *Norris* v. *Staps* (1616) Hob. 210.

9 12 Co. Rep. 19, 49.

10 7 & 8 Will. III, c. 22.

11 7 & 8 Will. III, c. 22, s. 9 was repealed by 6 Geo. IV, c. 105 (1825) but its provisions were re-enacted in 3 & 4 Will. IV, c. 59, s. 56 (1833). The 1833 Act provided that 'all laws, by-laws, usages or customs at the time of the passing of the act, or which hereafter shall be in practice, or endeavoured or pretended to be in force or practice, in any of the British possessions in America, which are in any wise repugnant to this act, or to any act of parliament made or hereafter to be made in the United Kingdom so far as such act shall relate to and mention the said possessions, are and shall be null and void to all intents and purposes whatsoever'. See Charles Clark, *Colonial Law* (1834), 40-1.

Privy Council's decision of 1727 in the case of *Winthrop* v. *Lechmere*[12] these were not the only laws of England by which the validity of colonial Acts was to be determined.

In *Winthrop* v. *Lechmere* the Privy Council, on appeal from Connecticut, held void for repugnancy a colonial statute of 1699 under which the property, both real and personal, of persons dying intestate was to be divided into equal shares and then distributed amongst the deceased's children or their personal representatives, but so that the eldest son or his personal representatives received a double share. This measure clearly was inconsistent with the rules of intestate succession then in force in England because at common law, the realty of a person dying intestate always descended upon his heir-at-law. Shortly after the Privy Council had handed down its decision, representations were made by Connecticut's London agents to have Imperial legislation passed or, failing that, approval by the King in Council for a local Act confirming titles obtained under the Intestates Act and continuing it in force.[13] However, the Law Officers, Attorney-General Yorke and Solicitor-General Talbot, advised that although under the colonial Charter the General Assembly of Connecticut had power to make laws respecting property rights, 'it is a necessary qualification to all such laws that they be reasonable in themselves and not contrary to the laws of England, and if any laws have been made repugnant to the laws of England, they are absolutely null and void'.[14]

Appeals to the Privy Council involving repugnancy questions appear to have been few and far between; so far as one may gather, *Winthrop* v. *Lechmere* is the only case heard on appeal in which a colonial statute actually was declared void. Nevertheless, the legislation of the colonies periodically came under scrutiny by the Board of Trade and if any enactment were found not to be in agreement with English law, the King in Council might disallow it. Disallowance really was superfluous if an Act was void *ab initio*, but it was a far more effective means of controlling colonial law-making than judicial scrutiny of legislation which always depended on the accidents of litigation. No one ever questioned that the prerogative power of disallowance might be exercised in relation to invalid enactments as well as to valid ones. In 1747, for example, the Law Officers, Attorney-General Ryder and Solicitor-General Murray, advised that so much of a North Carolina Act 'as postpones the execution of judgments for foreign debts, in the manner therein provided is, contrary to reason, inconsistent with the laws and greatly prejudicial to the interests of this kingdom; and therefore, unwarranted by the Charter, and consequentially void, and we are of opinion that His Majesty may declare the same to be so, and his royal disallowance thereof'.[15]

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12 The following account is based on Smith, *op. cit.* 537-51.

13 *Id.*, 557-8.

14 George Chalmers, *Opinions of Eminent Lawyers* (2nd ed., 1858), 341-2.

15 Chalmers, *op. cit.*, 402. See also opinions of Attorney-General Murray (6/5/1775), *id.*, 333-6; Attorney-General Rawlin (n.d.) *id.*, 376.

On some occasions, colonial statutes which the Law Officers or counsel to the Board of Trade had advised were void for repugnancy were simply declared by Order in Council to be a nullity. J. H. Smith in his examination of the Privy Council records relating to the American plantations found three clear cases of this kind. In the first, the King in Council had declared a Pennsylvania Act for preventing frauds and regulating abuses of trade in the colony void for repugnancy to the Imperial Act 7 & 8 Will. III, c. 22 (1696)[16]; in the second case, a Jamaican Act of 1759 prohibiting importation of certain commodities was declared void for repugnancy to 6 Geo. III, c. 13 (1733)[17]; and in the third, a New Hampshire Act relating to assessment of rates of foreign coins was declared void for repugnancy to 6 Anne, c. 30 (1707), one of the statutes extending to the plantations under s. 9 of 7 and 8 Will. III, c. 22.[18]

Declarations of nullity in the course of legislative review were exceptional, and in the second half of the eighteenth century the Lords Committee of the Privy Council made it known that they would not venture any opinion on the validity of a colonial statute unless the question were raised in litigation. On one occasion the Board of Trade referred to them for consideration an Act passed in Massachusetts for general pardon and indemnity. According to the Law Officers, the Act was *ultra vires* the colonial Charter and therefore invalid, but, the Committee said, whatever their views respecting the Act's validity might be, these could not 'prejudice . . . the consideration of any questions touching the nullity of the Act now under consideration, *ab initio*, whenever the same may judicially come into question'. The Committee accordingly recommended only that the Act be disallowed.[19]

If, of course, extra-judicial pronouncements on an Act's validity had no bearing on subsequent judicial determinations of the question, the inference was that even where the Committee had advised royal confirmation of a colonial Act, the mere fact that the Act had been confirmed by Order in Council would not estop the Committee afterwards adjudging it to be null and void. Royal confirmation of colonial legislation had not always been regarded in this light. Attorney-General Northey, for example, stated in 1703 that a confirmed Act had 'the force of an Act of Parliament made in England', by which he meant presumably that it could not be pronounced void for repugnancy to English law.[20] In upholding a Massachusetts Act altering the rules of intestate succession, the Privy Council in 1737 seems to have endorsed Northey's opinion. The Act in question was similar to that which in *Winthrop* v. *Lechmere* the Privy Council had adjudged void, but it had stood unchallenged for a long period and more than

16 Smith, *op.cit.*, 532.
17 *Id.*, 592.
18 *Id.*, 637.
19 *Id.*, 631-5.
20 *Calendar of State Papers, Col. Ser.*, 1702-3, s. 765.

once had been confirmed by Order in Council.[21] It is not clear from the report of the case which appears in the *Acts of the Privy Council* whether the Committee hearing the case considered the fact of royal confirmation was conclusive of the Act's legality, though since it was mentioned as a ground for dismissing the appeal, one must assume it not to have been irrelevant.[22]

Whatever the earlier view on the effect of royal confirmation might have been, by the end of the eighteenth century there was fairly general agreement that confirmation could not validate any colonial statute which had been passed in contravention of the colonial constitution. As Richard Jackson, counsel to the Board of Trade, explained in 1772, the fact that a colonial Act had not been disapproved by the King in Council could not cure any invalidity in the legislation, no matter how long it stood approved.[23]

During the American colonial period, the contribution of the courts to the development of the repugnancy doctrine was slight. J. H. Smith discovered only one case in the records of the courts in America in which the doctrine was canvassed at any length and on this occasion it appears to have been misinterpreted.[24] The Court of Common Pleas in South Carolina held in 1760 that a colonial Act which offended against English law was not void but merely voidable at the election of the Privy Council. 'If a judgment is erroneous', the Chief Justice of the Court reasoned, ''tis not absolutely void but voidable by a writ of error. . . . So our acts of Assembly, if they are repugnant to the laws of England, they are not void, for the King may confirm them. But they continue in force until they are repealed or made void.'[25] It is possible that the Court had been misled by the Privy Council's practice of confirming or disallowing colonial enactments. In England, repugnancy issues came before the courts only on rare occasions. Attorney-General Pratt and Solicitor-General Yorke in an opinion dated 1760 noted 'that in some instances whole acts of assembly have been declared void in the courts of Westminster Hull'.[26] But there is only one case in the reports of cases in English courts in the seventeenth and eighteenth centuries where repugnancy of colonial legislation to English law is so much as mentioned. In *Fisher* v. *Lane*[27] it was stated that the colonies could not 'make a law contrary to the law of England, but they may make any law agreeable thereto, and to the principles of justice, but not contrary to the

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21 3 *A.P.C.* (*Col.*), s. 322.

22 Smith, *op. cit.*, 564, n. 223. The Committee hearing the appeal included Hardwick L.C. and Lee C.J.

23 *Id.*, 636; also 571.

24 *Williams, Administrator de bonis non* v. *Executors of Watson*, Smith, *op. cit.*, 586-92.

25 Smith, *op. cit.*, 591.

26 Quoted *id.*, 628.

27 (1772) 3 Wils. 297.

principles of iustice'.[28] In *Richardson* v. *Hamilton* (1733)[29] King L.C. appears to have held a colonial Act void, not, however, on the grounds of repugnancy to the laws of England.

Potentially, the repugnancy doctrine operated as a severe restriction upon legislative initiative, depending on how the legislative standard was interpreted and the regularity with which it was enforced. Neither the Privy Council nor colonial courts were prepared to go to the length of saying that mere variance between colonial enactments and the laws of England constituted repugnancy.[30] As Chief Justice Mitchie of the South Carolina Court of Common Pleas pointed out in 1760, colonial Acts 'may differ and vary from the laws of England and yet not be repugnant'. Repugnancy meant, he said, 'a direct opposition or contrariety as in pleading'.[31] Examples of colonial Acts which differed from English law but which nevertheless had been assumed by the courts to be valid were a Barbados Act allowing for seizure of freeholds in execution and declaring that for purposes of judgment creditors' remedies, freeholds should be esteemed chattels,[32] and a Jamaican Act making it possible for freehold estates in possession to pass by deed of grant without livery of seisin.[33] But where was the line to be drawn between permissible local variations and wholly repugnant colonial statutes? This problem was complicated by uncertainty as to the content of the legislative standard against which colonial Acts were to be measured. The colonial Charters and gubernatorial Commissions spoke generally of the laws of England, but did this mean all of the laws of England in force for the time being, or the laws of England in force in the plantations, or merely the 'fundamental' laws of England? One American writer, James Dummer, took the view that a colonial enactment was void for repugnancy only if it ran counter to the laws of England actually in force in the plantations, more particularly English statutes expressed to extend there.[34] As we have seen, the Privy Council took a somewhat broader view of the legislative standard with which colonial assemblies had to conform. Furthermore, there is never any suggestion in the Privy Council records that for the purposes of the repugnancy doctrine the 'laws of England' comprehended only those laws actually in force in the colonies. In this connexion it is relevant to bear in mind that when the American colonies were founded, the theory that English subjects settling in uninhabited dependencies of the Crown or dependencies inhabited only by uncivilised tribes, took with them so much of the law of England then in force as was capable of being applied in the colonial environment, was a thing of the future. In

28 *Id.*, 303.
29 The case is referred to in *Roberdeau* v. *Rous* (1738) West temp. Hard. 565; 1 Atk. 544, and is discussed in Smith, *op. cit.*, 629-31.
30 Smith, *op. cit.*, 529-31.
31 Quoted in Smith, *op. cit.*, 589.
32 *Blankard* v. *Galdy* (1694) 4 Mod. 222 at 226.
33 *Goffe* v. *Elkin* (1678) 2 Mod. 23.
34 Smith, *op. cit.*, 230-1.

practice the colonial courts invoked the laws of England as the norm of decision, but according to early seventeenth century legal doctrine, whether English law was to be extended to the colonies was a matter within the discretion of the Crown.

Although the legislative standard cannot for this reason be held to have been limited to the laws of England actually received into the colonies, the evidence points to the conclusion that when colonial legislation was reviewed for its compatibility with English law, regard was had only to such of the laws of England as had been extended to them by express enactment of the Imperial Parliament or which conveniently could be applied in the colonies. In some colonial Charters and Commissions, it should be added, allowance clearly was made for differentiating local circumstances. If local conditions demanded it, the colonial legislature could enact laws which otherwise would have contravened the laws of the mother country.

II

When in the early 1820s it was decided to establish in the colony of New South Wales a nominative Legislative Council, it was assumed by all concerned with the drafting of the colonial constitution that unless the British Parliament provided otherwise, the local legislature would not be competent to enact legislation which was repugnant to fundamental English law except where local circumstances made departure from that law absolutely necessary. This limitation was written into the British statute of 1823 authorising the establishment of the Legislative Council and was reinforced by a further provision requiring all Bills to be submitted to a judge of the Supreme Court before being laid before the Council. In the event of the judge certifying the measure to be repugnant to English law, the Bill was not to be proceeded with.

To appreciate the reasons for the adoption of so unusual and unprecedented an expedient, it is necessary to bear in mind that when the idea of pre-legislative judicial review was first mooted, the Imperial government had not yet decided to establish a Legislative Council in the colony and that a judicial veto over Bills was conceived primarily as a means of safeguarding against the promulgation of invalid legislation by the colonial Governor. The exercise of legislative authority by the Governors of the colony had brought them into sharp conflict with the judiciary, the latter taking the view that whatever regulations a Governor promulgated, they, like by-laws, should not conflict with the laws of England.[35] This unfortunate state of affairs had not escaped notice by the home government. John Thomas Bigge, the Royal Commissioner who in 1819 had been commissioned to inquire into and report on conditions in the colony, had commented

[35] See the author's 'Prerogative Rule in New South Wales, 1788-1823' (1964) 50 *R.A.H.S. Jo.* 162 at 174-9.

adversely upon it and had suggested as a remedy first, the submission of all existing gubernatorial regulations to the colonial Attorney-General for scrutiny, and secondly, that in the future the Governor be empowered by statute to make regulations approved by a majority of magistrates and that all such regulations be drafted by the Attorney-General.[36]

Following the recommendations of Bigge, the first draft of the New South Wales Act provided for the making of regulations on certain subjects by the Governor upon the recommendation and with the consent of the magistrates, subject to the usual restriction that colonial legislation should not be repugnant to the laws of England. James Stephen, Jnr., then counsel to the Colonial Office, subsequently came forward with the suggestion that all proposed legislation be submitted by the Governor to the Chief Justice. Ideally, he said, those responsible for interpretation of the law should not have a hand in its framing but 'all speculative principles must be controlled by expediency, in their adaptation to practice'.[37] Expediency here required that steps should be taken to achieve unanimity between the Chief Justice and the Governor 'on the lawfulness of every ordinance before it shall be promulgated as law in the Colony, and enforced in the Courts'.[38] To prevent disagreements, he recommended that Instructions should be issued to the Governor requiring him—

> before he should promulgate any local ordinance, to have the same laid before the Chief Justice for his opinion in writing, whether such ordinance is, or is not repugnant to the laws of England, or in other words whether he should feel it to be consistent with his duty to maintain and enforce such ordinance in the Supreme Court if a question of its validity should be argued before him; and that if the Chief Justice should be of opinion that it is repugnant to law, such an opinion should have the effect of a suspending clause, until the ordinance, together with the opinion should be transmitted, under the joint hands of the Governor and the Judge, for the decision of His Majesty in Council, or some other mode in which it may be deemed convenient to take the sense of government.

As regards the legislation previously promulgated by the Governors of New South Wales, Stephen suggested that the Governor be required, again by Instructions, to make a compilation of the same and then to submit it to the Chief Justice for opinion.

> If the Chief Justice should find any existing ordinances so repugnant to the laws of England, he should deliver his objections in writing to the Governor, who, if he should be unwilling to accede to the annulment or alteration of such ordinance with a view to its continuance, must transmit the mutual opinions of the Chief Justice and himself for the decision of the Secretary of State, and in the meantime I apprehend the Judge could not be held to 'deny

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36 'Report of the Commissioner of Enquiry on the Judicial Establishments of New South Wales and Van Diemen's Land' (1822), 82 *et seq.*

37 *H.R.A.* IV/i/434; C.O. 201/146. A.C.V. Melbourne, *Early Constitutional Development in Australia* (2nd ed., 1963), 93-4, states that the memorandum was written by Francis Forbes, principal draftsman of the Bill. Having regard to Forbes' later comments on the scheme (see note 39 *infra*) this seems unlikely. The evidence strongly points to James Stephen as author.

38 *H.R.A.* IV/i/433. See also Earl Bathurst to Sir Thomas Brisbane, 31/3/1823 —*H.R.A.* I/xi/68.

right or justice to any man', if he were avowedly to suspend his opinion upon any case involving such ordinances until the question of its lawfulness or unlawfulness should be decided by the Government.

Francis Forbes, one of the chief draftsmen of the Bill and the first Chief Justice of the colony, had grave reservations about the wisdom of provisions of this kind, the more so when they were written into the Bill and when it was decided that New South Wales should have a Legislative Council of nominated members rather than a legislature composed simply of the Governor and the magistrates; 'I felt', he confided some years later to Under-Secretary Wilmot Horton, 'that the *veto*, with which I was invested, must, sooner or later, bring the chief justice into contact with the governor, or the people, or both'.[39] As we shall see, this is in fact what happened.

Under the Bill as it became law, a Legislative Council was to be established in the colony which, acting in concert with the Governor, was to 'have Power and Authority to make Laws and Ordinances for the Peace, Welfare and good Government of the . . . Colony, such Laws and Ordinances not being repugnant to [the] Act, or to any Charter or Letters Patent or Order in Council which [might] be issued in pursuance [thereof], or to the Laws of England, but consistent with such Laws so far as the Circumstances of the . . . Colony [would] admit. . . .' Only the Governor was authorised to initiate legislation but under s. 29 no proposed law or ordinance was to be placed before the Council or passed as a law unless a copy thereof should have been first laid before the Chief Justice and a certificate under his hand transmitted to the Governor signifying that the measure was not repugnant to the laws of England, but consistent with them as far as the circumstances of the colony would allow. In effect, s. 29 made the Chief Justice the 'controlling authority' and invested him with a power which as Forbes predicted, might 'be considered by the Governor as an encroachment upon his authority. . . .'[40]

In 1827 Chief Justice Forbes received two Bills from the Governor, Sir Ralph Darling, one a Bill to regulate the Press, the other imposing a stamp duty on newspapers. Together these were intended to control a supposedly licentious Press. The evils of allowing too much latitude in public debate and comment had first been brought to the notice of the Colonial Office by Lieutenant-Governor Arthur of Van Diemen's Land who had proposed as a remedy legislation prohibiting publication of newspapers except under licence.[41] Shortly afterwards, Instructions were issued to the then Governor of New South Wales, Sir Thomas

[39] Forbes to Under-Sec. Horton, 27/5/1827—*H.R.A.* IV/i/719. See also Forbes' comments on the amendments proposed to 4 Geo. IV, c. 96 (*id.* 647 *et seq.*). Of s. 29 he observed: 'I stood out against this clause from considerations partly of a personal nature; but as my arguments were overruled upon full consideration I presume it must stand—in practice it may be found a convenient way of preventing the legislature and the Courts from differing upon the legal force of a law'.

[40] Forbes to Under-Sec. Horton, 20/9/1827—*H.R.A.* IV/i/734.

[41] See Bathurst to Arthur, 2/4/1826—*H.R.A.* III/v/130-1; Arthur to Bathurst, 21/4/1826—*H.R.A.* III/v/156; Arthur to Under-Sec. Hay, 27/1/1827—*H.R.A.* III/v/497-8; Arthur to Under-Sec. Hay, 12/3/1827—*H.R.A.* III/v/587-600.

Brisbane, directing that he lay before the Legislative Council a Bill containing clauses similar to those urged by Lieutenant-Governor Arthur and others based on recent British legislation.[42] In December 1826, Governor Darling had shown Forbes a copy of the Van Diemen's Land legislation. Though this had been certified by the Chief Justice of that colony,[43] Forbes intimated that he had serious doubts about the legality of the licensing provisions, but that since the measure had been directed by the Secretary of State, it was advisable before proceeding further in New South Wales, to seek the opinion of the Law Officers.[44] Darling, however, considered that no time was to be lost and consequently when in April 1827, he submitted his Bill to the Chief Justice, would hear nothing of the latter's plea that the matter be shelved until the Law Officers' advice had been received.[45]

Forbes thus had no alternative but to consider the Bill. The first six clauses which dealt with the licensing of newspapers he found objectionable. Publication of any newspaper without license was declared a criminal offence. Annual licences were to be dispensed by the Governor but were revocable at will and liable to forfeiture upon the conviction of the proprietor, publisher or printer for publication in the newspaper of any seditious or blasphemous libel.[46] These provisions, the Chief Justice held, were repugnant to the laws of England. 'By the laws of England', he explained to the Secretary of State, Earl Bathurst[47]—

> every free man has the right of using the common trade of printing and publishing newspapers; by the proposed bill this right is confined to such persons only as the Governor may deem proper. By the laws of England, the liberty of the press is regarded as a constitutional privilege, which liberty consists in exemption from previous restraint; by the proposed bill a preliminary licence is required which is to destroy the freedom of the press and to place it at the discretion of the Government. By the laws of England every man enjoys the right of being heard before he can be condemned either in person or property; [under the proposed bill] the Governor, with the advice of the Executive Council, may revoke the licence granted to any publisher at discretion, and deprive the subject of his trade without his having the means of knowing what may be the charge against him, who may be his accuser, upon what evidence he is to be tried, for what violation of the law he is condemned. The Governor and Council may be both complainants and judges at the same time and in their own cause — that cause one of political opposition to their own measures and consequently their own interests, of all others the most likely to enter into their feelings and influence their judgment.

Forbes, it should be emphasised, did not consider every proposed measure which departed from the laws of England one which ought to be vetoed. His duty it was, he wrote to the Governor, 'to take care that any proposed Law is not repugnant to the law of England *in pari*

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42 Earl Bathurst to Brisbane, 12/7/1825—*H.R.A.* I/xii/16, 17.
43 *H.R.A.* III/v/587; *H.R.A.* III/vi/249.
44 Darling to Under-Sec. Horton 6/2/1827—*H.R.A.* I/xiii/79 *et seq*; Darling to Hay, 21/9/1827—*H.R.A.* I/xiii/188; Forbes to Darling, 12/4/1827—*H.R.A.* I/xiii/280-1; Forbes to Under-Sec. Horton, 27/5/1827—*H.R.A.* IV/i/719.
45 Darling to Earl Bathurst, 8/5/1827—*H.R.A.* I/xiii/277 *et seq.*
46 The disallowed clauses are set out in *H.R.A.* I/xiii/285-7.
47 1/5/1827—*H.R.A.* I/xiii/293-4.

materia and then to see that it is nearly consistent with or conformable to such Law, as the local differences of the parent State and Colony may admit'.[48] Differentiating local circumstances in short, would justify divergence from the English standard. But was it for the Chief Justice to satisfy himself that local conditions did in fact differ and that they justified differences in local legislation? Governor Darling had stated that censorship of the Press was imperative because the newspapers had 'succeeded in exciting a strong spirit of discontent among the Prisoners' and that as a result, the safety of the colony had been imperilled. In a letter written to the Under-Secretary of State for the Colonies, Wilmot Horton,[49] Forbes questioned whether the convict population had in fact been inflamed in the manner the Governor suggested, but he hastened to add, 'according to my interpretation of the discretion placed in me by Parliament, it was neither allowable nor strictly correct' to assume the Governor's assessment of the situation as one upon which the Chief Justice's 'judgment should be formed . . .'[50] If, however, the Governor and the Executive Council should publicly declare 'that they believe the safety of the Colony, or its peace (in the legal sense) disturbed or hazarded by the licentiousness of the press', then he would 'certify that, assuming such to be the true state of the colony, a bill for suspending the press altogether, until such danger shall have passed away, is not repugnant to, but is consistent with, the spirit of the English law'.[51]

In the circumstances, he felt that the drastic measures proposed by the Governor were not warranted. Existing English law, he maintained, had not been proved inadequate to correct the mischief which Darling alleged had resulted from freedom of the press. Not once had the Attorney-General instituted prosecution for criminal libel, so how could it be said that English law had been tried and found wanting?[52]

It is not necessary here to detail the events leading up to the quarrel between Darling and Forbes over the Stamp Bill.[53] For present purposes the chief interest of the case resides in the Chief Justice's application of the repugnancy doctrine to a taxing measure. Under s. 27 of 4 Geo. IV, c. 96 the Governor and Council had been empowered to impose taxes and duties for local purposes subject to the further restriction that the purpose of the tax, and to which the revenue derived therefrom was to be appropriated, should be stated 'distinctly and particularly' in the body of the legislation. The Bill for levy of a stamp duty on newspapers stated that the proceeds

48 16/4/1827—*H.R.A.* I/xiii/284.
49 27/5/1827—*H.R.A.* IV/i/718 *et seq.*
50 *Id.*, 722.
51 *Id.*, 727. See also *H.R.A.* I/xiv/276, 356 *et seq.*
52 Forbes' opinion subsequently was considered by the Law Officers who agreed with him—*H.R.A.* I/xiv/356.
53 See Darling to Earl Bathurst 29/5/1827—*H.R.A.* I/xiii/374 *et seq.*; Forbes to Under-Sec. Horton, 27/5/1827—*H.R.A.* IV/i/725-8.

of the tax were to be appropriated to defray the cost of printing public Acts, ordinances and regulations, the surplus going to defray the expense of the Police Establishment. Forbes apparently did not question that these were local purposes, but, in his view, the legality of such a measure depended on whether the rate of tax was so adjusted as to yield the amount reasonably required for the purposes specified. In this instance, he found the rate of duty disproportionately high, and for that reason the legislation could not be characterised as a genuine taxing measure. Rather, it represented an indirect attempt to deprive newspaper publishers of their trade, something which the Chief Justice already had held *ultra vires*.[54]

A. C. V. Melbourne was extremely critical of Forbes' use of the judicial veto.[55] In the scrutiny of legislative proposals he said Forbes 'was prone to give a rigid interpretation to his duty, was disposed to resist any deviation from the laws of England' and 'failed to realise that . . . the Act of 1823 had conferred on him a political rather than a judicial obligation'. To censure the Chief Justice in this way seems a little unfair. There is nothing in Forbes' comments on the Press Censorship Bills or his comments on other legislation[56] to suggest that he interpreted the requirements of conformity with English law more strictly than any other colonial judge or that he failed to appreciate the nature of the power which the Act of 1823 had reposed in him. Forbes recognised that if local legislation conflicted with fundamental English law, *prima facie* it was void for repugnancy, but that if local circumstances urgently required departure from the ordinary legislative standard, the colonial legislature was at liberty to enact such measures as were necessary. In the case of the press censorship Bills, Forbes drew issue with Governor Darling on the necessity of the legislation, but in doing so, he was acting wholly within the scope of his authority. The law did not oblige him to acquiesce in the government's assessment of the exigencies of a particular situation; indeed, it envisaged that he form an independent judgment on the matter. To this extent it could be said that the Chief Justice had a political as well as a judicial function to perform and that on political questions, the Chief Justice's opinion was paramount. Forbes realised this only too well; indeed, it was mainly on this ground that he had opposed the judicial veto from the outset.

Having regard to Forbes' close associations with both James Stephen, Jnr., and Wilmot Horton and the fact that he had worked with them on the preparation of the New South Wales Act, one might have expected that his views on the dangers of investing a Chief Justice with both judicial and political functions would have received

54 Forbes to Darling, 28/5/1827—*H.R.A.* I/xiii/378; 31/5/1827 *id.*, 392-7; Forbes to Under-Sec. Horton, 27/5/1827—*H.R.A.* IV/i/725-8. Governor Darling took the view that it was not for the Chief Justice to question the amount of the duty or to judge its necessity—*H.R.A.* I/xiii/397.

55 Melbourne, *op. cit.*, 116.

56 *Infra.*

more sympathetic consideration than they did. Since the New South Wales Act was due to expire in 1828, the opportunity was ripe for a searching re-examination not only of the machinery for judicial scrutiny of Bills provided for in the Act, but also of the repugnancy doctrine itself. James Stephen recognised as clearly as anyone did that in determining whether colonial legislation which was at odds with English law could be justified on the basis of necessity, the Chief Justice was called on to make a policy decision. But in this he did not see anything amiss. The Chief Justice, he said, should 'know enough of its [the colony's] conditions and interests to judge whether the welfare of the colony requires any supposed deviation from the principles of English law'.[57] If sensibly administered, he felt that the repugnancy doctrine would not fetter legislative action unduly. Some idea of how he thought the doctrine ought to be applied may be gathered from the comments he made years later 'to a near relative, a judge in New South Wales'.[58]

> Whatever is tyrannical or very foolish you may safely call 'repugnant', etc. But whatever is necessary for the comfort and good government of the colony you may very safely assume to be in perfect harmony with English law. . . . Take a new code whenever the old one won't suit you. Keep up the family resemblance between your law as well as ours as well you can, and never think it worth while to go mad over a difficulty which an act of His Excellency in Council can grind into powder with a blow.

Though generally unsympathetic to Forbes' complaints regarding the combination of judicial with political functions, Stephen did attempt to meet some of the difficulties which had arisen under the 1823 Act and proposed that when that Act expired, the new constitution for the colony instead of continuing the system of judicial scrutiny of Bills, should make provision for review of Acts of Council after they had been passed. He suggested that after the enactment of legislation, Acts should be enrolled in the Supreme Court and within a week thereof, the judges of the Court should have the opportunity of reviewing them. If they unanimously agreed that an Act was 'at variance with the law of England' they should represent their opinion to the Governor and the Act should be submitted for reconsideration by the Council. If upon reconsideration two or more members of the Council opposed it, it should not be promulgated; even if promulgated it should not become binding until His Majesty's pleasure be made known.[59]

III

Stephen's proposal was incorporated with slight modifications in s. 22 of the Act, 9 Geo. IV, c. 83, or as it later was entitled, the Australian Courts Act 1828. Sec. 22 provided that within fourteeen

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57 Memorandum of 3/12/1827—C.O. 201/185.

58 Quoted in R. Therry, *Reminiscences of Thirty Years' Residence in New South Wales and Victoria* (1863), 318. The letter presumably was to Alfred Stephen, a puisne judge of the Supreme Court of New South Wales between 1839 and 1844, and Chief Justice of the colony between 1844 and 1873.

59 Memorandum of 4/3/1828—C.O. 201/195; Melbourne, *op. cit.*, 147-8.

days after the enrolment of any Act of Council in the Supreme Court, the judges might represent to the Governor that the Act was repugnant to the Australian Courts Act or any charter, letters patent or order in council made thereunder, or to the laws of England. If any such objection were made, the judges were required to 'state fully and at length the grounds of their opinions . . .',[60] the Governor for his part being required to suspend the operation of the enactment until the judges' views be brought before the Legislative Council. The Council, however, was under no duty to accept the judges' assessment, and if they decided that the legislation should be adhered to, the Act was to 'take effect and be binding . . . until His Majesty's pleasure shall be known, any repugnancy or supposed repugnancy . . . notwithstanding'.

In forwarding a copy of the Australian Courts Act to the Governor of New South Wales, the Secretary of State, Sir George Murray, emphasised that 'nothing but the most urgent necessity should induce the enactment of a law which they [the Supreme Court judges] have unanimously declared repugnant to the laws of England'.[61] It nevertheless was clear that if the judges did hold an Act to be repugnant to English law and the Legislative Council chose to disregard the judges' opinions, the enactment in question would have to be enforced in the courts until disallowed by His Majesty in Council. The Act, in short, could not be treated as if it were void *ab initio*, but had to be applied in the courts of the colony as if it were a valid Act subject to disallowance by the King in Council. But if the judges did not challenge the validity of the legislation within the period prescribed by s. 22, or if their representations should be overridden by the Legislative Council and the Act later confirmed by His Majesty in Council, was it open thereafter to the judges in the course of litigation to hold the Act void *ab initio* for repugnancy? Whether s. 22 would curtail the jurisdiction of the courts to review legislative enactments appears not to have been considered by the draftsmen.

In 1848, the question was raised squarely for decision by the Supreme Court of Van Diemen's Land. Formerly a dependency of New South Wales, Van Diemen's Land had been erected in 1825 into a separate colony and under the Australian Courts Act 1828, provision for its government was made in substantially the same terms as for the government of the parent colony. The sections dealing with the powers of the legislature and judicial scrutiny of legislative Acts were

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60 Under s. 29 of 4 Geo. IV, c. 96, no reasons had to be given. When asked by Governor Darling to state his reasons for objecting to the first six clauses of the Press Regulation Bill, Forbes C.J. had replied: 'I cannot perceive how the grounds of my opinion upon a rude point of Law can touch the subject of Your Excellency's responsibility. It appears to me that Your Excellency is under a Misapprehension of the duty imposed upon me from observing the particular Words' in s. 29 (Forbes to Darling 16/4/1827—*H.R.A.* I/xiii/283).

61 Sir George Murray to Darling, 31/7/1828—*H.R.A.* I/xiv/267-8.

identical. In *Symons* v. *Morgan*,[62] the Chief Justice, Sir John Pedder, and Montagu J. held invalid for repugnancy to s. 25 of the Australian Courts Act, a local enactment which only a few years before they had scrutinised under s. 22 and found unimpeachable. The local Act, 10 Vic., No. 5 (1846), had forbidden the keeping of dogs more than six months old except under licence. Moneys received from the licence fees were to 'be applied in aid of the Ordinary Revenue' of the colony. Sec. 25 of the Australian Courts Act had authorised the Council to levy taxes for local purposes, but required that the purpose of the tax and the amount which was to be appropriated thereof to be stated in the body of the taxing Act. The Act being to restrain the increase of dogs failed to do this and for that reason, the Supreme Court held, it was void for repugnancy. In argument, the Attorney-General, Thomas Horne, contended that since the judges had not certified the Act to be repugnant when it had been transmitted to them in accordance with s. 22 of the Australian Courts Act, it was not now open to them to call its validity into question. But, the judges replied, if the Imperial Parliament had intended to curtail the Court's inherent jurisdiction to review legislative Acts, it should have said so explicitly.

The Court's ruling not unexpectedly caused some consternation in government circles. The Chief Justice was charged with dereliction of duty for not having declared the Act to be repugnant when the opportunity first presented itself and was called on by the Executive Council to show cause why he should not be removed from office. In a lengthy memorandum, Pedder explained that when he first had examined the Act, he had no reason to doubt its validity but that after hearing counsels' arguments in *Symons* v. *Morgan*, his opinion had changed. A revision of opinion, after more mature consideration of the problem, did not, he submitted, constitute neglect of duty. Though the Chief Justice's explanation was accepted, the government attempted to prevent recurrence of the events of *Symons* v. *Morgan* by stripping the Supreme Court of its inherent jurisdiction to declare colonial Acts invalid. By the Act of Council, 11 Vic., No. 1 (1847), it was provided that where a local Act had been enrolled in the Supreme Court and had not been certified under s. 22 to be repugnant or disallowed by Her Majesty, it was to be deemed valid for all purposes.

Assuming the judges were right in their view that the Australian Courts Act had not deprived the Supreme Court of its inherent jurisdiction to review Acts of Council, it is doubtful whether 11 Vic., No. 1 would have achieved the result the Van Diemen's Land government intended. The Australian Courts Act had granted law-making power to the Legislative Council subject to the restriction that the

62 The following account is based on Governor Denison's despatches to Earl Grey of Feb. 18th, 1848 (No. 36), and March 18th, 1848 (No. 75), and Earl Grey's despatches to Denison of June 3rd, 1850, and September 7th, 1850. Copies of these documents are held in the Archives Section of the State Library of Tasmania.

Council's enactments should conform as near as possible with the laws of England and should not be repugnant to them. Repugnant legislation therefore would be invalid regardless of the provisions of 11 Vic., No. 1. For the colonial legislature to have passed legislation depriving the Supreme Court of its inherent jurisdiction to determine the validity of colonial Acts might itself have been held to be contrary to fundamental English legal doctrine and therefore *ultra vires.*

As events turned out, the British government was saved from the necessity of having to advise Her Majesty whether the Act be disallowed or confirmed. In August 1850, legislation was passed by the Imperial Parliament 'for the better government of the Australian colonies' (13 & 14 Vic., c. 59) in which provision was made for the reconstitution of the Legislative Council in Van Diemen's Land. Although there was nothing in the Act which could have been construed as conferring on the new Council power to make laws repugnant to the laws of England or Imperial statutes extending to the colony, no provision at all was made for judicial certification of Acts of Council. Further, the provision in the Australian Courts Act 1828, which had led the judges in *Symons* v. *Morgan* to rule the Act of Council 10 Vic. No. 5 invalid, was repealed. Sec. 26 of 13 & 14 Vic., c. 59, concluded by enacting that no law or ordinance imposing a tax or duty made or to be made by the Van Diemen's Land legislature 'and enrolled and recorded in the Supreme Court of the said colony, shall be or be deemed to have been invalid by reason of' the purposes of the tax or duty or the purposes to which it was to be appropriated not being stated in the body of the enactment.

IV

One of the most serious shortcomings of the repugnancy doctrine was that it admitted of both wide and narrow interpretations and placed in the judiciary so wide a discretion that in practice it was extremely difficult to predict whether legislation would pass muster or not. Judicial precedents were not a reliable guide because an Act which under certain conditions might be held necessary for the welfare of the colony, under different conditions might be held void for repugnancy. Then there was the question which of the laws of England were to be regarded as fundamental and which non-fundamental. This was a matter on which opinions were apt to differ.

The susceptibility of the repugnancy doctrine to divergent interpretations is particularly well illustrated by the views expressed by different judges of the Supreme Court of New South Wales on the Act of Council 5 Will. IV, No. 9. The Act had been passed in 1834 for the purpose of suppressing bushranging in the colony.[63] Section 1

[63] The Act continued, with amendments, an earlier Act, 2 Geo. IV, No. 10. The Governor, Sir Richard Bourke, had felt this Act to be no longer vital and 'contrary to the spirit of English law', but he had sought the views of the magistrates on the desirability of continuing the Act. The magistrates reported in favour of continuations and a committee of the legislature appointed to consider their replies advised likewise. See Bourke to Stanley, 15/9/1834—*H.R.A.* I/xvii/520.

empowered police constables and free persons to arrest without warrant any person whom they had reasonable cause to believe was a transported felon or offender illegally at large. An earlier Act, 3 Will. IV, No. 3 (1831) had made it a misdemeanour for a transported felon or offender to be illegally at large, hence the effect of s. 1 of 5 Will. IV, No. 9, was to confer authority to arrest 'without warrant upon the mere suspicion of having committed a misdemeanour without violence', something which the common law of England did not permit. The following section provided that every person arrested under s. 1 and taken before a magistrate should 'be obliged to prove to the reasonable satisfaction of such justice that he [was] not a felon or offender under sentence of transportation'; upon default of proof the magistrate might cause the prisoner to be detained in custody till proof that he was not under sentence of transportation was forthcoming, but again the onus of proof was on the prisoner. Both of these provisions, Burton J. thought,[64] were void for repugnancy to the laws of England: s. 1 because it went further than English common law or statute law; s. 2 (and also other sections requiring the accused to establish his innocence) because it offended against the fundamental rule of English law regarding burden of proof. Necessity, the judge agreed, justified a colonial legislature passing laws which deviated from the laws of England, but in this case he felt that the objects which the legislature had in mind could have been 'attained by a less sacrifice of the fundamental principles of the law'.[65] He could see no absolute necessity for investing private individuals with the wide powers given under the Act or for throwing the burden of proof on the accused.

For his part Chief Justice Forbes could see no repugnancy.[66] Mere difference between English and local law, he emphasised, did not, nor ever had, constituted repugnancy.

> Forming my opinion on what appears to have been the usual interpretation of the word *repugnant*, as put upon it by the Legislatures and Courts of the elder Colonies, and the Crown Lawyers to whom their enactments have been submitted, and applying my own mind to discover what the Imperial Parliament must have intended by the use of it in the Act which creates a Legislative power to meet and provide for the unforeseen exigencies and wants of this remote Colony, I conceive that the word was intended to convey a meaning to this effect; that, in making laws 'for the peace, welfare, and good Government of the Colony', the Governor and Council shall take into their consideration the circumstances of the particular matter which requires Legislative provision, and make such a Law as may remedy any particular mischief, consistently with the general principles of the laws of England. . . . In the particular local law now under consideration, the mischief which is intended to be remedied is recited; it presents a State of Society so widely differing from that of the parent State, as obviously to require a corresponding difference in the Law.[67]

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64 *H.R.A.* I/xvii/524 *et seq.*

65 *Id.*, 530.

66 Dowling J. agreed wholly with the Chief Justice.

67 *H.R.A.* I/xvii/534.

It is of interest to note that on this occasion the Chief Justice, in determining whether local circumstances justified divergence from English law, was prepared to accept the recitals in the preamble of the Act as conclusive. 'The facts set out by the local legislature, we are', he said, 'bound to assume to be true . . .'[68] The crucial question was whether assuming those facts to be true, was English law sufficient to curb the mischief? The legislature had said it was not, and from his own knowledge, the Chief Justice was inclined to agree with them. As to Burton J.'s objections to the supposed novelty of the local provisions, he pointed out that in certain particulars they were not dissimilar to the English Vagrancy Act 1822.[69]

In the same session of the Legislative Council, yet another Act was passed to which Burton J. took objection but to which the Council resolved to adhere. This was the Act 5 Will. IV, No. 10, entitled 'an Act for removing doubts respecting the application to New South Wales of the Laws and Statutes of England relating to Usury, and to limit and define the rate of interest which may be recovered in cases where it hath not been previously agreed on between the Parties'. Under English statute law[70] the maximum rate of interest had been fixed at five per cent. 'From the earliest period of the Colony', Governor Bourke explained,[71] 'money had been borrowed at various rates of interest without reference to the English usury law; but until the year 1833, the validity of agreements for payment of more than five per cent. interest had never been distinctly determined by the Supreme Court'. In that year Chief Justice Forbes and Dowling J. (Burton J. dissenting) had ruled that agreements fixing rates of interest in excess of five per cent. were valid and binding and that the English usury laws being unsuitable to the conditions of the colony were not applicable there.[72] Numerous contracts had been entered with, the Chief Justice pointed out, fixing higher rates of interest, and now to hold the English laws applicable would greatly disturb the expectations of the business world. The legislation subsequently passed by the Legislative Council provided that in cases where no rate of interest had been fixed by the parties, a rate of no more than eight per cent. was recoverable as interest. Nothing was said about agreements providing for higher rates.

According to Burton J. the local Act was void not only for repugnancy to 12 Anne st. 2, c. 16, but also for repugnancy to s. 24 of 9 Geo. IV, c. 83 under which English laws in force on July 25th 1828 had been declared to be in force in the colony so far as the same could be applied. From this one gains the impression that Burton J. would

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68 *Ibid.*

69 *Id.*, 535-6. In 1835 the Governor was advised that His Majesty had been pleased to allow and confirm the Act (Glenelg to Bourke, 5/9/1835 — *H.R.A.* I/xviii/94).

70 12 Anne st. 2, c. 16.

71 Bourke to Stanley, 15/9/1834—*H.R.A.* I/xvii, 521-2.

72 *Macdonald* v. *Levy* (1833), Legge 51.

have held the local Act void even if he had not believed the English usury laws to have been applicable to the colony. Neither the Chief Justice nor Dowling J. offered any comment on Burton J.'s opinion, so it is difficult to say how they interpreted the legislative standard, that is to say, whether it related only to such English laws as were in force in the colony, or to all the laws of England in force at the date of enactment of the local Act. It is material to add that their assessment of the local Act agreed substantially with the position taken in the English case, *Ellis* v. *Lloyd.*[73] There, a colonial Act allowing a higher rate of interest than was then permitted in England was treated as the proper law governing contracts of loan entered into in that colony. No objection appears to have been taken to the colonial Act on the grounds of repugnancy.

Burton J.'s reaction to the Usury Act raises a point apparently overlooked by the draftsmen of the Australian Courts Act, the relationship between ss. 22 and 24. Sec. 24 stated that the laws in force in England on July 25th 1828 were to apply in New South Wales and Van Diemen's Land, so far as they could be applied there, and provided further that if and when doubts arose as to the applicability of the laws of England in the colony, it should be lawful for the Governor with the advice of the Legislative Council to declare by ordinance 'whether such laws and statutes shall be deemed to extend to such colonies [New South Wales and Van Diemen's Land] and to be in force within the same, or to make and establish such limitations and modifications of any such laws . . . as may be deemed expedient in that behalf'. The New South Wales Usury Act, as we have seen, was first and foremost a declaratory enactment. But could the Legislative Councils of New South Wales and Van Diemen's Land in exercise of a declaratory power conferred by s. 24 declare inapplicable rules of English law which the judges already had held applicable, or rules of English law which the judges already had declared were rules against which the validity of local legislation was to be measured? If, for example, the Legislative Council had declared the Habeas Corpus Act 1679 inapplicable and had gone on to enact provisions repugnant to it, would it have been incumbent on the judges to accept the Act as a good and valid one?

A. I. Clark and A. B. Keith[74] maintained that s. 24 of 9 Geo. IV, c. 83, gave the Legislative Councils in New South Wales and Van Diemen's Land power to repeal or modify English law extending to the two colonies by virtue of that section. It cannot, however, be supposed that in exercise of their declaratory powers under this section the Legislative Councils could have circumvented the restriction on their powers in s. 21 or that declaratory Acts passed under s. 24 were not amenable to judicial review under s. 22. If so drastic an effect

[73] (1701) 1 Eq. Cas. Abr. 289.

[74] A. I. Clark, *Studies in Australian Constitutional Law* (1901), 301; A. B. Keith, *Responsible Government in the Dominions* (1928), vol. II, 342.

were to be imputed to s. 24, express words, it is submitted, would have been necessary to exempt Acts passed under that section from the operation of the repugnancy doctrine. It should be added that although s. 24 further provided that until such time as the Legislative Councils should exercise their powers under the section, it should be the duty of the Supreme Court judges to determine questions of applicability of English laws, there was nothing to suggest that once the Council had passed a declaratory Act, the Supreme Court had to accept the Council's Act as a valid one. In exercise of their powers under s. 22, the judges presumably were to scrutinise Acts passed under s. 24 to determine whether they came within the four corners of that section and did not conflict with those fundamental laws of England which were the standard of validity for all colonial enactments.

As a general rule, the judges of the Supreme Court of New South Wales acted with good sense and moderation in the scrutiny of Acts of Council and managed to steer clear of collision with the government over politically sensitive issues. Only once did they threaten to wreck vital legislation and on this occasion conflict was averted by the judges retracting their opposition. The Act in question, 2 Vic., No. 19 (1839) was one of a series passed to deal with the problem of squatting on Crown lands. It had been recognised some years before that it virtually was impossible to prevent stock owners depasturing sheep and cattle on the waste lands beyond the so-called limits of location, indeed, that a rigid policy of exclusion from these Crown lands could be detrimental to the colony's welfare. By way of compromise, the Governor, Sir Richard Bourke, in consultation with Burton J.,[75] had worked out a scheme whereby Crown lands would be made available for grazing purposes by the issue of annual licences. At the same time, it had been envisaged that more stringent measures would be taken to penalise trespassing on the lands of the Crown. Temporary legislation to give effect to the plan was first passed in 1836 and this was continued with some modifications in 1838 and 1839. The third Act, 2 Vic., No. 19 (1839) was objected to by Burton and Willis JJ., though on extremely flimsy grounds. Burton J. thought that the licence fee was an unlawful tax and the Act as a whole was repugnant to the British statute, 1 Anne, st. 1, c. 7 (1701); Willis J. challenged it on the ground that under the British Civil List Acts, all territorial revenues of the Crown had been surrendered to the British consolidated revenue fund and were subject to appropriation only by the British Parliament. It is difficult to see how the fee exacted for the issue of a licence to occupy Crown lands could have been characterised as a tax; it was rather in the nature of consideration for the use of land. The statute of Anne prohibited the alienation of Crown lands in England, Wales or Berwick-on-Tweed for terms longer than

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75 Bourke to Glenelg, 18/12/1835—*H.R.A.* I/xviii/230-1.

thirty-one years or three lives. It clearly was a law of local application and had not been received into New South Wales. Moreover, even if it had been recognised as one of those fundamental English laws against which colonial Acts had to be measured, there was nothing in 2 Vic., No. 19, which conceivably could have been held to be incompatible with it. Whether a Crown licence conferred an interest in land or not, it gave a right to occupy for one year only.

The Chief Justice declined to support the puisne judges as also did the colonial Law Officers. When the latters' opinion was made known to them, both Burton and Willis JJ. agreed to withdraw their remonstrances.[76]

Where there was genuine doubt about the compatibility of local legislation with the fundamental principles of English law, rather than ruling an Act invalid, the judges might allow it to go forward for consideration by the Colonial Office as a possible case for the exercise of the prerogative power of disallowance. This course was adopted in the case of the Act 3 Vic., No. 16 (1839) the object of which was to make it possible for aborigines to give testimony in criminal cases. The incompetence of aborigines to testify on oath—by reason of their supposed inability to appreciate the nature of the oath—had created some difficulties in criminal cases in which aborigines were involved either as victims, offenders or witnesses of the crime. The Act sought to overcome these problems by allowing unsworn testimony to be given on affirmation or declaration to tell the truth. Chief Justice Dowling informally expressed the opinion to the Governor that the legislation probably was *ultra vires* and at his suggestion the Council added a clause suspending operation of the Act until it should be approved by Her Majesty. Without this suspension, the Governor explained to the Secretary of State, the Chief Justice 'would otherwise have felt himself, as probably would also have his brother judges, compelled to remonstrate against the Act as repugnant to the laws of England'.[77] On the advice of the British Law Officers, Attorney-General Campbell and Solicitor-General Wilde, the Act was disallowed. 'To admit in a Criminal case the evidence of a witness acknowledged to be ignorant of the existence of a God or a future state would be', the Law Officers said, 'contrary to the principles of British jurisprudence . . .'[78] They saw no necessity for such legislation and could see no reason why with suitable instruction on the nature of sworn testimony, aborigines could not be admitted as witnesses on the same footing as Europeans.

The only other case in which the Supreme Court objected to an Act of Council concerned legislation for taking a census in the colony.

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76 Gipps to Glenelg, 7/11/1838—*H.R.A.* I/xix/649-50.

77 Gipps to Normanby, 14/10/1839—*H.R.A.* I/xx/368. In the previous year Burton J. had submitted a draft Bill to Governor Gipps on much the same lines (Burton to Under-Sec. Labouchere, 17/8/1839—*H.R.A.* I/xx/304-5.

78 Enclosure in Russell to Gipps, 11/8/1840—*H.R.A.* I/xx/756.

79 Gipps to Russell, 1/1/1841—*H.R.A.* I/xxi/154-5.

The point at issue was a relatively minor one and was resolved by amendment. Chief Justice Dowling and Stephens J. (Willis J. dissenting) construed the Act—4 Vic., No. 26 (1840)—as authorising census collectors to ask questions which not even a witness in a court of law could be compelled to answer, namely, whether he had suffered previous convictions for which he had been transported. The Legislative Council disclaimed such an interpretation of the Act, but to satisfy the judges added a clause expressly stating that no such question could be put to anyone in the course of a census.[79]

Conscious no doubt of the embarrassment Burton and Willis JJ. had occasioned him over the 'Squatting' Act, Governor Gipps recommended to the Imperial Government early in 1839 that the judicial 'veto' of Acts of the Legislative Council be removed entirely. Chief Justice Dowling and Willis J., he told the Secretary of State, already had expressed their views on the matter and when Burton J. had declared his opinion, copies of the judges' opinions would be sent.[80] Unfortunately, no trace of this promised despatch has been found, but when in 1842 Imperial legislation was passed to reconstitute the New South Wales Legislative Council, the veto clause was dropped altogether. Under 5 & 6 Vic., c 76, s. 29, the new Council, like the old, had power to make laws for the peace, welfare and good government of the colony subject to the restriction that no such laws should be repugnant to the laws of England. Sec. 53 repealed so much of the Australian Courts Act 1828 (and the Imperial Acts continuing it in force) as related 'to the constitution, appointment and powers of a Legislative Council' as from the issue of writs for elections for the new Legislative Council; but the other parts of the Australian Courts Act were made permanent. Whether s. 22 of the Australian Courts Act fairly could have been described as a provision relating to the powers of the Legislative Council is debatable. Boothby J. of the South Australian Supreme Court held[81] in 1861 that neither the Act of 1842 nor the Australian Constitutions Act 1850[82] had affected s. 22 in any way; other judges apparently took a contrary view, for after the passing of the 1842 and 1850 Acts, the Supreme Courts in the

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80 Gipps to Glenelg, 1/1/1839—*H.R.A.* I/xix/722.

81 *McEllister* v. *Fenn.* See despatch of the Governor of South Australia (Sir Richard Graves MacDonnell) to the Secretary of State (the Duke of Newcastle), 17/8/1861 in 'Correspondence between the Governor of South Australia and the Secretary of State relative to Mr. Justice Boothby'—*U.K. Parl. Pap., 1862,* v. 37, p. 113.

82 13 & 14 Vic. c. 59. This Act erected the Port Phillip District of New South Wales into the separate colony of Victoria and gave the nominated Legislative Councils in Van Diemen's Land and South Australia (the Council in the latter colony having been established under 6 & 7 Vic. c. 61 (1842) power to reconstitute themselves as elective Councils. In addition authority was given for the establishment of a Legislative Council in Western Australia. All of these Councils were to have power to make laws for the peace, welfare and good government of the colony, subject to the repugnancy restriction, and a number of provisions of 5 & 6 Vic. c. 76 (1842) were declared applicable to them (s. 12).

colonies affected confined their review of legislative Acts to cases *inter partes*. Under the Statute Law Revision Act 1874,[83] s. 22 was formally expunged from the statute books.

V

The virtual disappearance of the local machinery for regular review of legislative Acts threw the major burden of enforcement of repugnancy doctrine on the Imperial government. Although a fair measure of latitude had been allowed to colonial enactments, repugnancy to the fundamental principles of English law was still a ground for disallowance. One of the most important colonial statutes disallowed on this basis was the New South Wales Lien on Wool Act 1843.[84] This had been passed primarily as a depression relief measure and enabled stock-holders to give preferable liens on wool clips from season to season and made mortgages of stock valid without delivery of the same to the mortgagee. This entailed some rather important changes in the existing law of the colony. At common law, a mortgage of chattels was valid only if at the time it was executed, the chattels were specific.[85] It would therefore have been impossible for a grazier to give a valid security over wool or stock not in existence at the time of the mortgage. The position with respect to stock mortgages was a little different. It was permissible at common law to take a security on chattels without taking possession of them, but the creditor in such cases exposed himself to certain risks. By allowing the mortgagor to remain in possession, the mortgagee in effect allowed the mortgagor to hold himself out to the rest of the world as the absolute owner of the goods, and a *bona fide* purchaser for valuable consideration from him could obtain a good title. There was also a danger that as against other creditors, *e.g.*, a judgment creditor, the transaction might be adjudged fraudulent and under the Act 13 Eliz., c. 5 (1571), void. This statute declared void any alienation of property, real or personal, to defraud creditors. Although the fact that a mortgagor remained in possession was not conclusive proof of fraud, it was evidence of it, with the result that even where the transaction was a truly honest one, there 'was apt to be much perjury and great expense before it was decided'.[86] The framers of the New South Wales Act of 1843 apparently felt that the existing rules regarding security transactions were not calculated either to provide adequate credit facilities for the graziers or to give adequate protection to their financiers.[87] Under s. 1 of the Act, where a person should make a *bona fide* advance of money or goods to any proprietor of sheep on condition of receiving in payment, or as security for the advance,

[83] Sec. 35.
[84] 7 Vic., No. 3.
[85] *Halsbury's Laws of England* (3rd ed.), 389-90.
[86] *Cookson* v. *Swire* (1884) 9 App. Cas. 664, see also *Twyne's Case* (1601) 3 Co. Rep. 80b.
[87] See *A.-G.* v. *Hill and Halls Ltd.* (1923) 23 S.R. (N.S.W.), 100 at 102-4; (1923) 32 C.L.R. 112 at 125-9.

the wool of the forthcoming clip, then providing the agreement was in the prescribed form and was registered, the creditor was to be entitled to the wool clip and the proprietor's possession of the wool was to be deemed the possession of the creditor. When the advance was repaid, possession and property in the wool were to revert to the proprietor. Sec. 3 stipulated that all mortgages of sheep, cattle, horses and their progeny, *bona fide* and for valuable consideration should be valid to all intents and purposes whether the mortgagor should deliver possession to the mortgagee or not and although the mortgagor should become bankrupt and insolvent.

Although sympathetic towards the aims of the colonial legislators, the home government signified that except as an emergency measure the Act could not be suffered to remain in operation. It was, the Secretary of State explained, 'so irreconcilably opposed to the principles of Legislation immemorially recognized in this Country respecting the alienation or pledging of things movable that, under any other circumstances it would have been disallowed'.[88] The non-delivery of mortgaged chattels to the mortgagee was, he added, taken 'as affording the conclusive indication of fraud'.[89] This perhaps was attributing greater legal significance to the retention of possession by the mortgagor than the English cases warranted; nevertheless, it did not diminish the force of the principal objection. The Secretary of State intimated that unless information were received before July 22nd 1846—the date on which the period for disallowance expired—that the Act had been repealed, Her Majesty would be advised to disallow the measure.

In 1845 two further Acts were passed by the Legislative Council in New South Wales, one on preferential wool liens, the other on stock mortgages, the object of each being to sanction until the end of 1848 a modified system of mortgaging wool and livestock.[90] Although the Imperial government was willing to accept these Acts on the basis that they were merely temporary, it was felt that the necessity for disallowance of the original Act of 1843 had not disappeared. On the expiration of the temporary Acts, the permanent Act of 1843 which in the interim had been repealed, would revive.[91] Curiously, a further series of temporary Acts was allowed to pass without adverse comment[92] and in 1862, on the eve of the Colonial Laws Validity Act, permanent legislation was passed,[93] again without any censure from the home government.

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88 Stanley to Gipps, 28/10/1844—*H.R.A.* I/xxiv/57-8.
89 *Ibid.*
90 9 Vic., Nos. 28 and 30.
91 Gladstone to Fitzroy, 4/7/1846—*H.R.A.* I/xxv/129-30. The rule that the repeal of a repealing statute revives the statute first repealed was not abolished until some years later. For the Order in Council of 6/7/1846 disallowing Act No. 3 of 1843, see *H.R.A.* I/xxv/144-5.
92 11 Vic., No. 4 (1847); 1 Vic., No. 58 (1848); 14 Vic., No. 24 (1850); 16 Vic., No. 11 (1852); 19 Vic., No. 4 (1855).
93 23 Vic., No. 9 (1860).

VI

The first decade of parliamentary government in South Australia was marred by one of the most bitter feuds between the Bench and Parliament ever experienced in Australian constitutional history. There was a time when the legislators so despaired at the prospect of producing any Act which would not be condemned as unconstitutional by the Supreme Court that they took steps to have the chief censor of their enactments, Benjamin Boothby, removed from office.[94] Boothby J., a puisne judge of the Supreme Court, had conceded to the legislature little latitude of enactment and on repugnancy questions adopted so uncompromising a position that almost any local Act for which there was no exact British counterpart stood in danger of being adjudged void. In his view, the colonial Parliament could not abolish or limit the operation of the grand jury system, nor could it invest the Local Courts with jurisdiction to try felonies or misdemeanours summarily. He questioned also the validity of the Real Property Act which had introduced the Torrens system of registration of land titles.[95] One of the central principles of this legislation was that in the absence of fraud a certificate of title issued by the Registrar-General should be indefeasible. But in giving that officer authority to determine questions of title preparatory to the issue of a certicate of title, the legislature, Boothby J. argued, had sought to remove 'trial by jury in matters relating to the ownership of land, as provided by Magna Carta and the Bill of Rights'. Moreover, since registered titles were declared indefeasible, the Act also sought 'to destroy the prerogative of Her Majesty to review the decision of every Court in Empire as to the true ownership of land' on appeal to the Judicial Committee of the Privy Council.[96]

Select Committees were appointed by both Houses of the South Australian Parliament to inquire into the problems raised by Boothby J.'s pronouncements. After hearing both from the other judges of the Supreme Court, Hanson C.J. and Gwynne J., and from Boothby J. himself, the House of Assembly Committee reported that according to the views expressed by Boothby J. 'a valid Act among those assumed to be in force at the present time would be the

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94 The following account is based principally on *U.K. Parl. Pap., 1862*, v. 37, p. 113.

95 *McEllister* v. *Fenn, id.*, 113, *et seq.*

96 It should be noted that Boothby J.'s opinions were not shared by his colleagues on the Supreme Court Bench. In *Dawes* v. *Quarrell* (1865-6) S.A.L.R. 1, Hanson C.J., for example, held that the Local Courts Act was not void for repugnancy. 'I am inclined to think', he said (11-12), 'that the term repugnant should be construed in the strict legal sense, and that in order to make one law repugnant to another, the two must, so to speak, meet upon the same ground—*i.e.*, refer to the same subject-matter'. His Honour then, however, went on to say (p. 12) that 'in the absence of any decision upon the subject . . . the question of repugnancy could only properly arise in cases in which the English law provided for something within a colony'.

exception and not the rule; and that the intended boon of self-government has been, in its results, but the means of introducing elements of uncertainty and confusion in the laws and constitution of the colony'. In their opinion, the judge had wholly misinterpreted the nature and scope of the repugnancy doctrine.[97] The Legislative Council Committee's assessment was more extreme. The Supreme Court, it was said, did not even have jurisdiction to determine the validity of Acts of the colonial Parliament but stood in exactly the same relationship to the colonial legislature as did British courts to the Imperial Parliament.

When apprised of the events in the colony, the Secretary of State, the Duke of Newcastle, asked the Law Officers, Attorney-General Atherton and Solicitor-General Palmer, for their opinion. In their reply of April 1862[98] the Law Officers pointed out that mere variance from the laws of England did not make a colonial statute void for repugnancy. Colonial enactments were void for repugnancy only if they offended against fundamental rules such as those forbidding slavery, polygamy and punishment without trial. Colonial laws which altered the number of jurors to be empanelled, or which dispensed with jury trial, or which abolished the common law rule of primogeniture or which altered English rules regarding transfer of real property, were not, on this test, invalid. 'We are,' the Law Officers hastened to add, 'unable to lay down any rule to fix the dividing line between fundamental and non-fundamental rules of English law. . . . It may safely, however, be stated that no laws which do not rest upon principles equally applicable in the nature of things, to all Her Majesty's Christian subjects in every part of the British dominions, can be deemed such as would make a departure from them, by a Colonial Legislature, void on the ground of repugnancy to the principles of English law'. His Lordship endorsed the advice of the Law Officers. Even if a colonial Act had not been disallowed, it was nevertheless void, he said, if it were repugnant to an Imperial Act extending to the colony or—

> if contrary to any of those essential principles of what may be called natural jurisprudence, which, as modified by the ideas and institutions of Christianity, have been adopted as the foundation of the existing law of England, but . . . it would not be void in consequence of any divergence from the provisions of the English Law, which having no necessary connexion with any such fundamental principle, are or might have been dictated by mere national peculiarity or considerations of local or temporary convenience.[99]

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97 The Committee did not question that the doctrine still operated upon the South Australian Parliament. Reference was made to two recent cases in which the Court of Queen's Bench and the Judicial Committee of the Privy Council respectively had mentioned the principle (*Bank of Australasia* v. *Nias* (1851) 16 Q.B. 717 at 733-4; *Devine* v. *Holloway* (1861) 14 Moo. P.C. 290).

98 *U.K. Parl. Pap., 1862,* v. 37, 181-4.

99 *Id.,* 179 *et seq.*

Although on this occasion the home government did not consider that Boothby J.'s conduct warranted his removal from office,[100] it soon became apparent that if the legislature was to function at all, something would need to be done to clarify the limits of legislative authority and the scope to be allowed to judicial review.[101] In 1864 the British Law Officers were requested by the Secretary of State to consider a proposal made by the Chief Justice of South Australia that the British Parliament pass legislation along the lines of the Act 3 & 4 Vic. c. 35, s. 4 (1840). This Act had provided that the Canadian Parliament should have power to make laws for the peace, welfare and good government of the colony provided that the same were not repugnant to the Act itself, to the unrepealed portions of 31 Geo. III, c. 31 (1791) 'or to any Act of Parliament made or to be made and not hereby repealed, which does or shall by express enactment or by necessary intendment apply to' the Province of Canada, Upper or Lower Canada or both.[102] Attorney-General Palmer and Solicitor-General Collier thought there was much merit in the Chief Justice's suggestion; indeed if Imperial legislation were to be passed, 'the balance of reason and practical convenience' was 'in favour of extending such provisions to all Her Majesty's colonial possessions'.[103]

Little time was lost in giving effect to the Law Officers' recommendations and on June 29th 1865, the royal assent was given to a Bill which resolved once and for all any doubts which might be raised as to the constitutionality of colonial Acts without exact English precedent. As we have seen, s. 3 of the Colonial Laws Validity Act 1865 cut the Gordion knot by the simple expedient of declaring repugnancy to English law no longer to be a ground for adjudging colonial enactments void and inoperative. This provision, it should be noted, applied not only to future colonial legislation but also to legislation already passed. Its effect, therefore, was to validate legislation which at the date of its passing, lacked the force of law.

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100 He was, however, removed from office at a later date. See Alpheus Todd, *Parliamentary Government in the British Colonies* (2nd ed., 1893), 846-56; A. J. Hannan, *The Life of Chief Justice Way* (1960), Ch. 4.

101 These incidents concerned, however, the Parliament's powers of constitutional amendment.

102 Like 7 & 8 Will. III, c. 22 (1696), this probably did not exhaust the grounds on which a colonial Act could be declared void for repugnancy.

103 Opinion of 28/9/1864—E. G. Blackmore, *The Law of the Constitution of South Australia* (1894), 165.