‘Discontent and Habits of Evasion’: The Collection of Quit Rents in Van Diemen’s Land 1825-1863[1]

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‘No subject’, wrote Governor Eardley Wilmot in February 1846, ‘appears to have occupied during the last twenty years a greater share of the attention of Government in this Colony than the collection of the Quit Rents, and the issuing of Grants for the lands upon which that Revenue has been reserved’.[2] Quit rents were charges levied on land grants. The rate of quit rent and the conditions under which such rents were levied changed a number of times and became progressively more severe in the early nineteenth century, but normally grantees were not required to pay their rents for seven years either from occupying their land or from obtaining a valid title deed. A key grant condition was to spend a specified amount of money improving and cultivating the land. In the Australian colonies governors made little attempt to collect the rents and thus settlers convinced themselves that, as long as they fulfilled the conditions of their grants, that the rents would never be imposed. When the British Government compelled governors to enforce collection, the settlers resisted and created a rift between government and people.

In this paper, I will examine how attempts by the Governors of Van Diemen’s Land to collect quit rents undermined faith in the legal and political system. Opposition to quit rents became a cause célèbre and was linked with the colonists demands for a

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[1]The title of this paper comes from J. West, A History of Tasmania (edited by A.G.L. Shaw), Sydney 1981 (first published in 1852), p. 114.

[2]Archives Office of Tasmania (AOT), Governor’s Office (GO) 33/54, Wilmot to Stanley, 11 February 1846.

representative assembly. They argued that taxes should only be imposed with the consent of the representatives of the people and, where land had been improperly granted or neglected, perceived that the levying of a quit rent gave government an opening 'to revest' land in the Crown.[3] Colonists were prepared to contest government interference with their land in the courts, which became 'a sort of broking house of power'.[4]

The origins of quit rents can be traced to the Middle Ages when villeins 'commuted their food and labor dues to an annual money payment'.[5] This payment became known as a quit rent because it freed land from 'all feudal dues except fealty'. The quit rent became 'an annual fixed and heritable charge' upon land and was generally applied by the sixteenth century. In the seventeenth and eighteenth centuries the imposition of quit rents had greatly declined in England, but was part of 'the general colonial policy of the British crown' and symbolised 'imperial control' of the land: its use in the West Indies, Canada, Southern Africa, and the thirteen North American colonies demonstrated that they were 'fiefs of the crown'.[6] In most of the American colonies opposition to quit rents was especially strong because colonists regarded it as a form of land tax that

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[3]Launceston Independent, 26 May 1832; The Colonist, 18 February 1834; B. Fletcher, Landed Enterprise and Penal Society: A History of Farming and Grazing in New South Wales Before 1821, Sydney 1976, p. 21.

[4]D. Neal, The Rule of Law in a Penal Colony: Law and Power in Early New South Wales, Cambridge 1991, p. 190.

[5]B.W. Bond,'The Quit-Rent System in the American Colonies', American Historical Review, vol. 17, 1912, p. 496.

[6]ibid., 496-7; B.W. Bond Jr., The Quit-Rent System in the American Colonies, New Haven 1919, p. 459; A.J. Christopher,'Southern Africa and the United States: A Comparison of Pastoral Frontiers', Journal of the West, vol. 20, 1981, pp. 52-59.

threatened their independence.[7] In 1746 in East Jersey the issue of writs of ejectment for non-payment of quit rents caused riots and produced feelings of 'hostility and opposition' which contributed to the American Revolution.[8] Quit rents failed to generate much revenue for government and in Maryland and Virginia, where money was scarce, tobacco was accepted as a form of payment, but ultimately, after a period of concessions, most American colonies abandoned quit rents. The colonists of Van Diemen's Land knew of the North American and Canadian experience and this strengthened their resolve to resist their imposition.[9]

According to Colonial Auditor G.T.W.B. Boyes, the Vandiemonian colonists had much in common with Americans 'in their presumption, arrogance, impudence, and conceit'.[10] Boyes thought that the landowners of Van Diemen's Land were 'all radicals of the worst kind and their children are brought up in the belief that all Governments are bad, that they are deprived of their rights, and that they are ... oppressed by the Mother Country'. Boyes further asserted that 'all the clamour' against taxation came from 'the opulent class'.[11] This attitude might have influenced other classes. According to Madgwick, the colonists who arrived in Australia expected 'the amelioration of

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[7]W.R. Vance,'The Quest for Tenure in the United States', Yale Law Journal, vol. 33, 1923-24, p. 259.

[8]Bond,'The Quit-Rent System', pp. 506-7; J.C. Connolly,'Quit-Rents in Colonial New Jersey as a Contributing Cause for the American Revolution', Proceedings of the New Jersey Historical Society, new series, vol. 7, 1922, pp. 20-21.

[9]For references to the North American experience, see The Colonist, 18 February 1834; Examiner, 2 July 1848.

[10]AOT Non State (NS) 1147/1, Boyes Diary, 11 June 1846, 26 November 1849.

[11]For the opposition of the rich to taxation see H. Melville, The History of Van Diemen's Land, Sydney 1965 (first published in 1835), pp. 129-30.

conditions and the reform of abuses' that they had known in Britain.[12] In terms of taxation, one colonist claimed to have 'fled from the burdens of the Mother Country, and from those burdens they *will* be free'.[13] T.C. Brownell gloated to his sister in England that 'we have no assessed taxes, highway assessments, poor laws, church rates, window duties' and other direct taxes and that they paid only indirect taxes.[14] Colonists might have regarded the feudal nature of quit rents as inappropriate in a new country to which they were attracted by the possibility of independent land ownership.[15]

This attitude to direct taxes, especially on land, partly explains why the colonists so adamantly refused to pay quit rents. For the Colonial Times a quit rent was nothing more than a land tax and, by varying the amount and imposing different conditions at different times, it became 'an inequitable land tax'.[16] Quoting the eighteenth-century legal writer William Blackstone that 'no rent can arise out of a common', it argued that raising revenue from waste land was a tax on industry and imposing a tax on emigrants encouraged to settle 'a new and uncultivated country' was unjust.[17] Some thought that the amount of quit rent was the key point. If a quit rent was 'an acknowledgement of the Seignorage of the Crown', argued The Colonist, then the amount should be nominal and certainly no more than two shillings per one hundred acres.[18] If the quit rent was

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[12]R.B. Madgwick, Immigration into Eastern Australia, 1788-1851, Sydney 1969 (first published in 1937) p. 67.

[13]Colonial Times, 5 October 1827, emphasis in original.

[14]AOT NS 22/1, Brownell to his sister, 28 November 1834.

[15]This was the case in America, see G.S. Alexander,'Time and Property in the American Republican Legal Culture', New York University Law Review, vol. 66, 1991, p. 311.

[16] Colonial Times, 5 October 1827, emphasis in original.

[17]Ibid; W. Blackstone, Commentaries on the Laws of England, Chicago 1979 (first published in 1766), vol. 2, p. 41.

[18]The Colonist, 18 February 1834.

higher than that figure and was designed to be revenue raising, then it was a tax and should be sanctioned by statute. Rather than being authorised by statute, quit rents were authorised by emigration notifications published by the Colonial Office or by local Government Notices. Moreover, Governors had to obtain Colonial Office permission to issue regulations on the collection of quit rents and had to wait far too long for an answer when immediate action would have been in their interests.[19] Van Diemen's Land had four Governors in the period under discussion and each one differed to some extent in the way they dealt with quit rents. In part their approaches were determined by their personalities, their relations with the Colonial Office, the reactions of colonists, and the advice of Crown Law Officers.

Modern writers differ on the nature of quit rents. Fry noted the similarity between quit rents and the rentals paid on some English freehold lands.[20] But by the early nineteenth century the English rentals had become 'nominal or token', whereas by the 1820s the Australian quit rent was, claimed Fry, 'usually a rack rent'. Edgeworth suggests that allowing redemption of quit rents at periods varying from ten to twenty-five years payment meant quit rents were 'not in any meaningful sense rents, but rather purchases by instalments'.[21] In that sense the colonists had a grievance that what had been an incentive to emigrate, a gift of land subject to conditions to cultivate, became a purchase and represented more than a landholder's obligation to the Crown. By refusing to pay

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[19]The Colonial Office was overworked and lacked a high quality staff, see W.P. Morrell, British Colonial Policy in the Age of Peel and Russell, Oxford 1930, pp. 1-28; J.W. Cell, British Colonial Administration in the Mid-Nineteenth Century: The Policy Making Process, New Haven 1970, pp. 3-44.

[20]T.P. Fry,'Land Tenures in Australia', Res Judicatae, vol. 3, 1946-47, p. 160.

[21]B. Edgeworth,'Tenure, Allodialism and Indigenous Rights at Common Law:English, United States and Australian Land Law Compared After Mabo v. Queensland', Anglo-American Law Review, vol. 23, 1994, p. 404.

quit rents, colonists sought freedom from any element of state control over land and asserted their right to unencumbered private ownership.

Not all settlers sought to avoid quit rents. Some saw the agreement to pay quit rents as a covenant, which was binding on the individual settler and the Crown.[22] But, judging by the small amount of revenue collected - £21,000 by 1847 - this was a minority view.[23] In Van Diemen's Land most colonists simply did not pay quit rents and invited the Crown to seek redress in the courts. Such a stand was not as courageous as it seemed. Colonists knew that few juries would support the Crown and expose themselves and fellow colonists to heavy imposts. Trial by jury was 'essentially necessary to the preservation of our liberties' because, as one colonist noted, they lacked a representative assembly and therefore 'no barrier between the People and the power of the Crown'.[24] Colonists believed that juries were 'best calculated to protect man's natural rights, and secure the pure administration of justice'.[25] In 1830 an ordinance empowered a judge to allow a jury in civil cases if desired by either party, and Vandiemonians used this boon to advantage.[26] Faced with obstacles in the courts, all Governors offered concessions to extract some revenue from quit rents, but this strategy made little impression on suspicious colonists. Finally, when the possibility of paying quit rents prevented colonists from seeking a Torrens title to their land, the government succumbed and remitted all debts arising from quit rents in 1863.

QUIT RENTS TO 1825

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[22]Launceston Independent, 25 January 1834, letter by 'Common Sense, Junior'.

[23]R.M. Hartwell, The Economic Development of Van Diemen's Land 1820-1850, Melbourne 1954,p. 40.

[24]The Colonist , 15 July 1834.

[25]Launceston Independent, 31 March 1832.

[26]West,op. cit., pp. 73-4, 81-3, 132-4; A. Castles, An Australian Legal History , Sydney 1982,pp. 273-5.

By regulations dated 1787 and 1789 the British Government imposed in New South Wales a quit rent of six pence per thirty acres for emancipists and two shillings per one hundred acres for free settlers for ten years.[27] Governor King applied these conditions in Van Diemen's Land after its settlement in 1803.[28] In 1810 Governor Macquarie maintained a uniform quit rent of two shillings per one hundred acres, requiring cultivation of one twentieth in five years.[29] It appears that Macquarie paid little attention to quit rents as in 1814 Earl Bathurst directed him to collect quit rents regularly.[30] In other colonies this had not occurred and, warned Bathurst, created expectations that the Crown 'either intended to abandon all Claims of this Nature, or acted harshly in enforcing arrears of very long standing'. But this warning went unheeded. After J.T. Bigge's reports of 1822-23, the Colonial Office expected Australian Governors to be more diligent in collecting what was hoped would be a steady source of revenue. Around November 1823 the rate of quit rent was increased from two shillings to fifteen shillings per 100 acres.[31] It seemed overly optimistic to increase the levy when in neither New South Wales nor Van Diemen's Land had Governors tried to enforce the regulations for a relatively small rent.[32]

On 18 May 1825 by the King's Instructions Governor Brisbane imposed a quit rent of five per. cent on the estimated value of the land and required the grantee to spend on the land a sum equal to a quarter of its estimated value within seven years of authority to

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[27]West, op. cit., pp. 122-3.

[28]Historical Records of Australia (HRA), series 3, vol. 1, Sydney 1921, pp. 353-4, Collins to King, 27 January 1806.

[29]West, op. cit., pp. 122-3.

[30]HRA, series 1, Sydney 1916, vol. 8, p. 136, Bathurst to Macquarie, 3 February 1814.

[31]AJCP, CO 280/33, Stephen to Arthur, 1 September 1830.

[32]Fletcher, op. cit., pp. 24-5, 124; S. Morgan, Land Settlement in Early Tasmania: Creating an Antipodean England, Cambridge 1992, pp. 7-8.

locate or foreit the grant.[33] These regulations gave a settler the considerable advantage of a redemption of his quit rent of £16 per year for every convict maintained by him and stipulated redemption of the quit rent at any time within twenty-five years at twenty years purchase.

PREPARING TO COLLECT: GOVERNOR GEORGE ARTHUR 1825-1836

Towards the end of 1825, Van Diemen's Land became a separate colony from New South Wales and George Arthur became the first Governor in the island colony's history to attempt to collect quit rents. But collection could not proceed without establishing the validity of crown grants. Most emigrants received land on the strength of a letter from the Surveyor-General or Colonial Secretary known as a location order.[34] This order allowed the locatee to occupy a certain number of acres, but the only record of the grant was to write the name of the locatee on a chart kept in the Survey Department. Sometimes the location orders contained 'a loose description' of the land, and often no description at all. Many location orders were transferred from father to son or from vendor to purchaser without a conveyance and before grant deeds were acquired. Before attempting to collect quit rents, Arthur aimed to ensure that land was accurately surveyed, that titles to land were obtained, and that titles had been cleared of all disputes, but this proved to be difficult in the extreme.

Arthur first questioned the suitability of Brisbane's regulations to the granting of waste lands in Van Diemen's Land.[35] In New South Wales the available land was much greater and the number of unemployed convicts was much larger. Arthur also described

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[33]Hobart Town Gazette, 16 July 1825, p. 1.

[34]Papers of the Legislative Council of Van Diemen's Land 1850, Paper 5, Papers Relating to the Statute of James, report by Edward Macdowell et al, 20 February 1849.

[35]AJCP, CO 280/3, Arthur to Bathurst, 10 August 1825.

more practical problems. The suggested set off for employing convicts was inapplicable in Van Diemen's Land because of the scarcity of convicts. As settlers regarded assigned convicts as 'a great favour', it made no sense to reduce their quit rents. Settlers faced the great disadvantage of an uncertain market and would benefit greatly if wheat exported from Van Diemen's Land was given preference in other colonies. With a more certain market, settlers would have confidence to more intensively cultivate their lands and be disposed to apply for convicts without any incentive. While the anticipated resurvey of the island might reveal new disposable lands, all the best land had been granted on a limited quit rent. Arthur thought it would be 'ruinous' to offer the remaining inferior lands at the onerous quit rent of five per. cent. He disapproved of giving the earlier settlers two more years to fulfil the conditions of their grants before collecting the quit rents, arguing that 'the earlier the Settlers can be brought to account for the improvement they have made on their Grants, the better'.

Arthur distinguished between old settlers on moderate quit rents and new settlers on the higher rate of five per. cent.[36] The newer settlers suffered most from the temporary reduction of grain prices and it would be unfair to give older settlers financially able to employ free labourers the same set off. Arthur felt it would be invidious and 'very unpleasant' to impose the 1825 regulations on 'these distinct Classes of Settlers'. But Arthur was more concerned that 'vexatious litigation' will ensue from settling the accounts of settlers and the loss of revenue. Knowing well 'the character of a great mass of the Settlers as Masters, and of the Prisoners as Servants', Arthur did not want to encourage 'the already active predisposition to deception and irregularity'. Arthur failed to convince Bathurst to treat Van Diemen's Land differently.[37] In the event,

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[36]AOT, GO 33/2, Arthur to Bathurst, 7 January 1827.

[37]AOT, GO 1/3, Bathurst to Arthur, 14 May 1826.

Arthur did not publish the 1825 regulations in Van Diemen's Land or tell the settlers about the set off for maintaining convicts.[38]

Two other regulations affected quit rents. In April 1826 Downing Street regulations charged a quit rent of five per. cent per annum upon the estimated value of the grant, payable seven years after the issue of the grant deed.[39] Settlers without convicts were allowed abatement of half their quit rent if they spent on improvements five times the estimated value of their land. While the regulations were issued to emigrants on leaving England, Arthur did not publish them in the colony. But he did issue his own regulations in 1828.[40] While the rate of five per. cent per annum was retained, quit rent was payable seven years after the grantee had been authorised to settle on the land (not upon receiving his grant deed) and was then redeemable at twenty years purchase. A grantee was required to spend within seven years a sum equal to the total estimated value of his land or incur resumption of his land. No set off was offered. The Crown reserved the right to build bridges and roads for public purposes on any part of the granted land. A Land Board was established to administer the regulations.

Arthur faced the considerable problem, pointed out by Chief Justice John Pedder and Solicitor-General Alfred Stephen, that grants issued in the name of Governors and not the Sovereign were not legally valid.[41] The grants conveyed no legal title as would allow the grantee to maintain ejectment from such land, or 'to justify, in an action of replevin, a seizure of cattle for doing damage on that land'. To overcome that defect,

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[38]AOT, GO 33/16, Arthur to Stanley, 13 March 1834.

[39]AOT, CSO 8/156/1132, memo. by Welsh and Horne, 31 July 1843.

[40]HRA, series 3, vol. 7, Canberra 1997, pp. 193-9, Arthur to Huskisson, 18 April 1828

[41]AJCP, CO 280/33, Arthur to Goderich, 18 February 1832, Stephen to Arthur, 19 January 1832; HRA, series 3, vol. 5, Sydney 1922,p. 422, Stephen to Arthur, 9 October 1826 and series 3, vol. 7, Canberra 1997, pp. 371-3, Pedder to Arthur, 20 November 1828.

the Colonial Office authorised Arthur 'to issue a Proclamation absolutely to release all rights and interests of the Crown' in such land. But, Stephen argued, this would not prove 'an effectual remedy', and might even cause injury and distress. According to this legal advice, the King could not grant land but by matter of record. The existing instruments were not valid because they were not grants of the King and were not a matter of record. The King's Instruction was 'not equivalent to a law, although it will sanction, and does sanction, the passing of a law'.

Arthur's legal advisers also pointed out that the English regulations did not specify non-alienation as a condition of accepting land grants, but the colonial regulations did and had been frequently breached.[42] In particular, the regulations for valuable town allotments had been 'so generally abused that the parties could not have been proceeded against without causing an excitement which would have been far too general to have been successful'. Although all governments had declared their intention to resume land where the conditions had been 'violated, or not performed', and to enforce quit rents, no action had been taken. Since the regulations of May 1825, the community had, 'with one common voice', Arthur reported in 1832, treated resumption as an impossibility, and the levying of the quit rent of 5 per. cent as a tax 'so odious that it could never be exacted'. Even more frustrating, most of the grants issued by Governors Macquarie and Brisbane, and the location orders given by the Survey Department towards the end of Sorell's regime and the early part of Arthur's, contained 'descriptions so erroneous' that the land could not be found. In most cases the amount of land described, either through 'the ignorance or misconduct' of the Survey Department, far exceeded the amount actually granted. For example, W.E. Lawrence was granted 2,000 acres, but a description of his land showed 12,000 acres. This confused situation would become worse with time and needed to be resolved by the issue of new grants based on an

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[42]AJCP, CO 280/33, Arthur to Goderich, 18 February 1832; HRA, series 3, vol. 4, Sydney 1921, pp. 316-7, Arthur to Bathurst, 11 August 1825.

accurate survey of land. The colonists were also worried that inaccurate land measurements could result in the loss of valuable property at the hands of unscrupulous land dealers and urged Arthur to issue new deed grants.[43]

Arthur planned a number of strategies to overcome these problems.[44] Instead of issuing a Proclamation 'confirming all the old and most erroneous grants', the Crown Law Officers advised the promulgation by a public Notice that His Late Majesty by Royal Warrant absolutely released 'all rights and interests of the Crown accruing by reason of the grants hitherto running in the name not of the Sovereign but of the Governor'. The Notice should point out that the Instruments of Title 'extended only in operation against the Crown' and did not confer a valid legal title. To secure such a title, a new grant or lease would be freely issued on application to the Survey Department. A similar result could have been achieved by statute, but this would have resulted in 'infinite labour' and 'great anxiety' in arbitrating between competing claims arising from errors and mistakes in land descriptions. No statute could be worded in such a way as to prevent litigation.

As for alienation without fulfilling all conditions of the grant, Brisbane's 1825 proclamation 'buried in oblivion all transactions of this nature up to that period'.[45] He issued an indemnity for all breaches of the condition of non-alienation occurring before 18 May where 'fences, clearing, or buildings' had been completed. Settlers interpreted this proclamation to be 'an absolute indemnity to all past cases' and an indication that the government regarded the condition as 'comparatively unimportant and subservient only to the greater object of improvement'. As Arthur had opposed the measure, rightly

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[43]Hobart Town Courier, 6 March 1830; Tasmanian, 9 July, 19 November 1830; Colonial Times, 31 August 1831.

[44]AJCP, CO 280/33, Arthur to Goderich, 18 February 1832, memorandum by Stephen, 19 January 1832.

[45]AJCP, CO 280/33, Arthur to Goderich, 18 February 1832, Stephen to Arthur, 1 September 1830.

predicting that it would accelerate trafficking in land, it was never published in Van Diemen's Land. But Arthur now agreed with his Executive Council to extend the indemnity to all transgressors against the land conditions of the island to 1825. Anyone who violated their grant conditions after that date would not be issued with a grant until a fine of six pence per acre had been paid, thus providing the Crown with part of the profits gained by the locatees.

As for quit rents, Arthur thought they would 'generally be regularly paid', but expected in some early cases 'to go to extremities'.[46] He did not relish the prospect because the Crown entered the court 'always upon such differences to a manifest disadvantage'. He found town allotments especially perplexing. They had been issued on a higher quit rent than rural grants of no more than forty shillings for grants and thirty shillings for leases, but he found no documentary evidence to explain the difference or why some people received grants and others leases. Arthur followed his advisers in fixing six pence per rod as the quit rent for all holders of town allotments who paid an amount equal to seven years quit rent from 1 January 1829. Generally Arthur accepted the advice of Solicitor General Stephen and imposed the conditions in force when a party first received a location order, but sought Colonial Office advice whether quit rents were payable seven years after the issue of a grant or the possession of the land. He predicted that progress would be slow while land was being accurately surveyed and the Land Board appointed in 1828 investigated 'all disputed questions and claims' on land.[47]

Lord Goderich had been applying himself to the outcomes of colonial land regulations. He concluded that they had failed to meet expectations. In Van Diemen's Land they did

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[46]AJCP, CO 280/33, Arthur to Goderich, 18 February 1832, Stephen to Arthur, 14 June 1830; CO 280/36, Arthur to Goderich, 11 December 1832, Arthur to Frankland and Simpson, 30 August 1832.

[47]ibid.; AJCP, CO 280/16, Arthur to Huskisson, 2 June 1828.

not stop 'large tracts of land from being appropriated by persons unable to improve and cultivate them'.[48] The system of deriving income from quit rents was 'condemned both by reason and experience' and the expectations had been 'disappointed'. It was impossible to satisfy all applicants for land. Goderich, as the Earl of Ripon, determined that in future land would only be disposed of by sale to the highest bidder with a minimum price of five shillings per acre, ten per. cent of the purchase price had to be handed over at the time of sale, and the rest soon after but before occupation. He also suggested that Arthur abate quit rents at a suitable level for every colonist who assisted an emigrant to reach Van Diemen's Land.

Arthur's response has been the subject of dispute. According to Burroughs, Arthur sabotaged what became known as the Ripon Regulations by granting large tracts of land before enforcing the new regulations.[49] But Shaw points out that Arthur, who welcomed being relieved of the invidious task of making grants, merely dealt with existing applications.[50] Whatever the case, his prime concern was to deal with the problems caused by the land regulations and to settle the state of titles to land.[51] A Government Notice published in February 1832 stated Arthur's clear intention to make quit rents payable annually. The collection would begin seven years after the possession of land under a location order at the rate under which the land was accepted. The first amounts payable on the highest rate, five per cent of the estimated value of the land, would be not be due until 1 January 1833. In 1832 he also appointed a new Land Board of two Commissioners to examine claims for Crown grants and enable applicants

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[48]AOT, GO 1/13, Goderich to Arthur, 29 January, 28 February 1831.

[49]P. Burroughs, Britain and Australia 1831-1855: A Study in Imperial Relations and Crown Lands Administration, Oxford 1967, pp. 92-100.

[50]A.G.L. Shaw, Sir George Arthur, Bart, 1784-1854, Melbourne 1980, pp. 137-40.

[51]Hobart Town Gazette, 18 February 1832, pp. 49-53.

to replace defective grants with new grants.[52] This was a purely administrative body and dissatisfied applicants could appeal to Arthur.

Opposition to Quit Rents

Soon after the notice was published, settlers throughout the island voiced their opposition to the collection of quit rents. Initial attacks came from the newspapers. The Hobart Town Courier and Launceston Independent thought the rate of five per. cent was excessive and that the economy could not sustain it.[53] The rate should depend on the capacity of individual settlers to pay, taking into account the cost of running their properties. Most colonists regarded quit rents as 'a kind of ambiguous phantom at a distance' that would never be levied. Colonists should be rewarded for developing, and adding value to, the land and not punished with a heavy impost. The Colonial Times thought that revenue from quit rents should be used for local purposes or to reduce local taxation and not, as proposed, to relieve England of a surplus population.[54] It was unfair to charge new arrivals a heavier rate than old colonists who had the benefit of more fertile lands. Those who held location orders and no legal title, The Colonist pointed out, could not borrow money from banks and had to pay extortionate rates of twenty to thirty per. cent interest to money-lenders, leaving them no capital to spend on improvements.[55]

In May 1832 landed proprietors from Sorell, Ouse, Macquarie, and nearby districts pointed out that as compensation for 'rending asunder all our dearest ties, and risking

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[52]R. Snell,'The Caveat Board: An Overview of a Key Colonial Tribunal 1835-1859', Tasmanian Historical Research Association Papers and Proceedings, vol. 42, 1995, p. 196.

[53]Hobart Town Courier, 25 February, 12 May, 1 June 1832; Launceston Independent, 21 April 1832.

[54]Colonial Times, 7 March, 12 June 1832.

[55]The Colonist, 13 July 1832.

our persons and means in an unknown, distant, and savage' island, they would receive 'a free gift of land equal to the amount of capital they brought with them'.[56] Expecting a fertile soil and climate suitable for farming, they were prepared to pay a moderate quit rent and hoped to 'earn a comfortable subsistence besides'. Instead, they found large tracts of rock, scrub, and mountainous terrain, which were 'utterly incapable of improvement'. Moreover, they lost heavily from 'the pillage and roguery of Convict Servants, and the enormous wages paid to Free Labourers'. They regarded a quit rent as 'merely a nominal rent, an acknowledgement of the superiority from which we hold our Land'. Instead, the government imposed 'a severe, oppressive, grinding, Rack Rent - a rent we are wholly unable to pay - a rent which does not bear upon us equally, and the enforcement whereof will plunge us in difficulty, distress, and Ruin'. As evidence of the harshness of the quit rent, the petitioners pointed out that unlocated Crown lands were annually leased for twenty shillings per hundred acres, while the income from one hundred acres under quit rent and supposedly a free gift will be twenty-five shillings. After spending all they had on developing their grants, to redeem quit rents at twenty years purchase was 'a cruel mockery'.

Bothwell landholders were shocked by Arthur's notice because previous governments had made no attempt to exact smaller quit rents and now Arthur imposed an even higher and more oppressive tax.[57] They claimed that when they left England 'such a mode of Taxation was never contemplated', and believed that, by spending a sum equal to the value of their original grants, they would be given the land. To redeem the quit rents at twenty years purchase in effect annulled the grant and made it a purchase. They argued

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[56]AOT, GO 33/11, petition from landholders of Sorell, Ouse, Macquarie, and nearby districts, 8 May 1832; see also the petition from the neighbouring district of Brighton, Colonial Times, 19 June 1832; this petition might have been informed by the Swing rioters of rural England in 1830, see G. and H. Dow, Landfall in Van Diemen's Land: The Steel's Quest for Greener Pastures, Footscray 1990, pp. 72-3.

[57]AOT, GO 33/11, petition from landholders of Bothwell.

that quit rents did not tax the land, but 'the means which have been imported and expended by us in improving the soil'. Their efforts raised the value of the land from two shillings to five shillings per acre. Unlike the settlers of New South Wales, Vandiemonians had not yet had time 'to reap the reward due to their outlay and exertions'.

Landowners in the Cornwall division, an area with 'some of the most valuable tracts of Land as well as the most wealthy settlers in the Colony', admitted the right of the government to demand quit rents.[58] But they pointed out that the grant conditions had been 'frequently changed and complicated - contradictory to each other in some instances, impracticable and consequently unjust in others, oppressive and painful in all', especially in 'the successive advances' in the amount of quit rents payable after seven years. As the Commissioners appointed by Arthur had produced few valuations, the settlers had no official assessment of the value of their land, no idea of how much their quit rents would be, and no idea of how the set off provisions would reduce their payments. Without a land survey, many settlers were reluctant to build 'permanent residences or farming establishments' in case they found their buildings 'placed in an inconvenient corner of the Estate, or even upon the lands of a neighbour'. Without knowledge of the boundaries, they had not been able to build fences and experienced 'disputes and conflicting claims'. Thus 'discord has been extensively propagated, neighbour has been set against neighbour, man against man, all the malevolent passions have been excited and extensive moral injury inflicted upon our society'.

They further argued that a quit rent of five per. cent equalled or exceeded the existing rack rent value of land, and the rent obtained for improved farms of superior quality was

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[58]AJCP, CO 280/39, petition from landowners of the Cornwall division, 12 February 1833; for an earlier petition in Launceston, see Launceston Advertiser, 5 June 1832.

less than the rate of interest on capital borrowed to fund improvements.[59] After paying this interest, paying their share of other taxes, and investing all their surplus capital, they had nothing left with which to pay the quit rent. To survive, many settlers had to sell off part of their lands. They believed in the general view that quit rents 'would never be actually and practically imposed', but if imposed, should remain at two shillings per one hundred acres.[60]

The Tasmanian, generally a supporter of the government, conceded that a five per. cent rate would cripple the colonists, but pointed out that they had voluntarily agreed to the rate and should have protested in 1828.[61] According to one correspondent, 'Rusticus', if settlers had improved the land as much as they claimed, they would have no difficulty in paying quit rents.[62] But 'Rusticus' knew that colonists had been in the grip of a 'land mania' and spent too much capital in acquiring more land. Enforcing the quit rents would check this trend and direct energies and capital into developing their holdings. 'Rusticus' also pointed out that ignorance of the grant conditions was no excuse because since 1828 more than three-fifths of all land granted had been received by settlers in Van Diemen's Land, not new arrivals.

Although aware of public meetings against quit rents throughout the colony, Arthur told the petitioners that he had no power to interfere with regulations drawn up in England.[63] But he advised Lord Goderich that it would be 'inconvenient to many, and unsatisfying to all Settlers to pay the rent to the Crown which they contracted to give on receiving

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[59]AJCP, CO 280/39, petition from landowners of the Cornwall division, 12 February 1833.

[60]Landowners from Campbell Town made a similar plea, AJCP, CO 280/41, Arthur to Goderich, 24 May 1833.

[61]Tasmanian, 5 May 1832.

[62]Tasmanian, 8 and 15 June, 6 July 1832, letters by 'Rusticus'.

[63]AOT, GO 33/11, Arthur to Goderich, 28 July 1832.

possession of their lands'. While he wanted 'to promote the prosperity' of the island and avoid imposts that acted detrimentally on farmers, and while he thought five per. cent was 'excessive', he doubted that landowners had reason to complain. If landowners possessed the capital they claimed to have on emigrating, they should be able to pay the quit rent. As the early settlers received land at a nominal quit rent, it was not 'unreasonable' for the government to expect 'some proportionate return'. There was certainly no reason for 'the strong expressions of Alarm and Ruin' voiced by the petitioners.

Arthur felt that some arguments in the petitions and public meetings exaggerated the impact of quit rents and verged on the hysterical.[64] He thought it 'flagrant misrepresentation' to argue that the settlers held their lands 'precariously at the will or pleasure of the local Government, which might dispossess them' whenever it liked.[65] Anyone holding a ticket of occupation was widely regarded as the proprietor of the land equally with someone who held 'the most formal Title', as evidenced by the reluctance to exchange location orders for 'regular legal Title Deeds'. Locatees realised that their holding conditions would be more fully and precisely set down on the grant deed, placing the Crown in a more advantageous position should quit rents be enforced in court. They also believed that the Crown could not exact quit rents until seven years after the grant deeds had been issued. As further evidence that they were not 'permissive occupants', holders of tickets of occupation had 'never been called upon to give up possession without adequate compensation', and, if they refused to give up their land, the Crown took no action.

Even where occupancy was not based on authority from the government or conditions of occupancy had been violated, the right of occupancy alone was secured by

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[64]For an early meeting which denounced the quit rents see Colonial Times, 25 May 1831.

[65]AJCP, CO 280/42, Arthur to Goderich, 12 August 1833.

Vandiemonian juries.[66] For example, Ballanger, an occupant of certain land, defied the Crown for several years and finally in order to eject him a deed grant was issued to Reverend William Bedford of Hobart.[67] Ballanger, disregarding the Crown grant, built upon the land and improved the premises, which he sold at their 'full value' to a buyer who did did not consider he was at risk of losing his property. Ballanger's case showed that the government was unable 'to maintain its own possession against unauthorised intrusion'. Arthur forsaw great embarrassment in fixing the dates when quit rents upon land granted since 1825 should begin, as Colonial Office instructions varied 'considerably', assigned 'dissimilar tenures', and could easily be misinterpreted. If the claims for set off for maintaining convicts and paying quit rents seven years after issuing title deeds and not after possession were accepted, quit rents would be transformed from 'a profitable source' of revenue to one hardly worth collecting.

After reflecting on the demands, the Colonial Office felt unable to retain a quit rent of two shillings per one hundred acres on all lands granted in Van Diemen's Land.[68] The valuation of land incurring quit rents had been fixed at 'a very low rate, when compared with the minimum price', and, after accepting the conditions offered by the Crown, the settlers had 'no reasonable ground for complaint in being called upon to abide by their agreement'. Moreover, those who acquired lands with quit rents faced less hardships than those who purchased their lands outright and it would be unfair to concede further advantages. Although the terms of the instructions were stated in 'very indefinite

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[66]AJCP, CO 280/42, Arthur to Goderich, 12 August 1833. In July 1831 when Arthur wanted to resume certain lands where grant conditions had not been fulfilled, Solicitor-General Stephen warned that juries would present verdicts against the government, P. Chapman (ed.), The Diaries and Letters of G.T.W.B. Boyes: Volume 1 1820-1832, Melbourne 1985, p. 464

[67]AJCP, CO 280/42, Arthur to Goderich, 12 August 1833.

[68]AOT, GO 1/15, Goderich to Arthur, 16 March 1833.

terms', the Colonial Office held that the spirit of grants required quit rents to be paid seven years after the date settlers possessed the land, but invited Arthur to show indulgence in special cases.[69]

On Colonial Office instructions, Arthur prepared rent rolls and classified the arrears of rents and other debts owed to the government.[70] He directed Collector of Internal Revenue J.H. Moore to call for the payment of all quit rent arrears on grants issued before 1826 by publishing a separate notice in the Government Gazette for each district based on the register of grantees held by the Surveyor General.[71] If arrears were not paid, Moore should refer the cases to the Law Officers for legal proceedings.

The 1834 Regulations

In March 1834 Arthur accepted a report from the Commissioners of Survey and Valuation appointed in 1826 to divide Van Diemen's land into counties, hundreds, and parishes, and to assess the value of lands possessed by the Crown or by grant subject to a quit rent of five per. cent upon their valuation.[72] The Commissioners assigned an average valuation of three shillings and four pence per acre, producing a quit rent of two pence per year and a revenue of £7400 per year, independent of rents for suburban allotments in towns. For Hobart Town and Launceston these rates were six shillings per acre per annum, for New Norfolk, Richmond, and Sorell five shillings, and for all other townships four shillings. The quit rent system of Van Diemen's Land would thus be

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[69]AOT, GO 1/17, Stanley to Arthur, 20 January 1834.

[70]AOT, GO 1/5, Stanley to Arthur, 12 June 1833.

[71]AOT, CSO 1/694/15233, Moore to Montagu, 17 January 1834, Burnett to Moore, 14 February 1834.

[72]AOT, GO 33/16, Arthur to Stanley, 13 March 1834; Hobart Town Gazette, 16 May 1834, 337. The report was delayed for various reasons, see A. McKay (ed.), Journals of the Land Commissioners for Van Diemen's Land 1826-28, Hobart 1962, pp. xiii-xvii.

'entirely assimilated' with that of New South Wales and a general rate would be more easily collected than any other method. Arthur estimated that land was now worth from four shillings to twenty shillings an acre and was never worth less than from four shillings to twelve shillings. This showed that the Commissioners average was 'very moderate'. Despite this moderate rate, Arthur thought that claims for set off would proceed, causing the government to lose revenue from quit rents: more disturbingly, some settlers might be liable for repayment of substantial amounts advanced by them in purchasing Crown land.

In May 1834 Arthur's new regulations announced the new valuation and made quit rents redeemable at ten years instead of twenty years on all lands except town allotments if paid within twelve months of the notice.[73] Landowners in Campbell Town were quick to attack even this substantial concession, and were irate that the set off for maintaining convicts and investing capital in their land had been removed.[74] In order to meet the conditions of their grants by improving their land, they raised money on mortgage at excessive rates on interest, varying from ten to twenty-five per. cent. These high rates arose 'mainly from the remittance to England of monies raised in the Colony to the ruin of many, the poverty of others, and menacing the misery and distress of all'. They wanted the original quit rent imposed and money raised in Van Diemen's Land to be spent on 'local purposes'. The Colonist argued that settlers should not pay any tax that was not sanctioned by an Act of Parliament and that juries should decide whether the quit rent was just and lawful.[75] The Colonial Times and Launceston Advertiser

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[73]AOT, CSO 1/721/15707, Moore to Colonial Secretary, 29 May 1834; Hobart Town Gazette, 16 May 1834, p.337, 23 May 1834, p. 350, 27 June 1834, p. 421.

[74]AJCP, CO 280/51, petition from land proprietors in Campbell Town.

[75]The Colonist, 18 February 1834.

urged colonists to adopt a policy of passive resistance and not pay.[76] Public meetings in Hobart Town linked calls for a Representative Assembly to an acknowledgement of set off claims.[77]

Although expecting a higher valuation, the Colonial Office accepted Arthur's reasons for adopting a price of three shillings and four pence per acre, but made it quite clear that set off should be paid irrespective of the number of settlers claiming that entitlement.[78] Secretary of State Spring Rice held that 'the public faith' must be 'maintained inviolate let the consequent inconvenience be what it may', and the instructions given to emigrants should be strictly fulfilled, not interpreted narrowly. That the Colonial Office orders were widely circulated and known by emigrants settling after May 1825 could be easily proved. In offering convicts as a set off, the government made 'a most imprudent bargain but the obligation to perform a contract cannot be said to depend upon the equality or reasonableness of it'. The government must adhere to its pledge. Spring Rice did not think that any claims for the removal of quit rent or repayment of purchase money were 'pregnant with consequences so alarming' as Arthur anticipated. Settlers would have to prove they accepted land under Bathurst's regulations and settlers who did not comply with the conditions of their grants would lose the valid title to their land and could not claim the set off.

In December 1834 Arthur sent the Colonial Office an abstract of the expected quit rents from the different regulations issued to settlers.[79] Precision was impossible until the Commissioners for Titles investigated the circumstances associated with each location.

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[76] Colonial Times, 4 February 1834; Launceston Advertiser, 20 March 1834.

[77] Tasmanian, 8 August 1834.

[78] AOT, GO 1/17, Spring Rice to Arthur, 17 October 1834.

[79] AOT, GO 33/18, Arthur to Lefevre, 24 December 1834; AOT, CSO 1/806/17232, Moore to Colonial Secretary, 27 September 1834.

The numerous changes to grant conditions were 'so interwoven with each other as to render it extremely difficult to ascertain without doubt the class to which each case should be referred'. But from the 3600 grantees, Arthur expected an annual revenue from quit rents of £15,667.8.9 - from quit rents of two shillings per one hundred acres £595.16.6, of fifteen shillings per one hundred acres £2550.14.1, of two pence per acre £7397.0.14, and from allotments £5123.17.10. Arthur intended to make the rent 'as little odious as possible' by giving 'great personal attention' and 'every consideration' to individual cases.[80]

Few settlers took advantage of the offer to redeem their quit rents at ten years purchase.[81] Arthur attributed this to 'the unpopularity of this Revenue, and to the general unwillingness to acknowledge the right of the Government to exact it'. In 1835 the revenue was a mere £1096.[82] Settlers found the payment of arrears especially 'obnoxious', even though in most cases the amounts were low, for example three pounds and five shillings for 640 acres.[83] Locatees remained reluctant to take up their grant deeds and, as we will see in the next section, the defective state of titles did not encourage them to change their minds.

The Caveat Board and 1836 Regulations

In 1835 a decision in Terry v. Spode, by finding that the titles of both parties were defective, cast doubt on the validity of all Crown grants and demonstrated the need for more thorough investigation of all titles.[84] Under the Claims to Grants Act 1835, three

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[80]AJCP, CO 280/51, Arthur to Stanley, 14 October 1834.

[81]AOT, GO 33/18, Arthur to Stanley, 26 December 1834.

[82]AJCP, CO 280/66, Arthur to Glenelg, 4 May 1836.

[83]ibid.; Hobart Town Gazette, 6 November 1834, 825.

[84]Castles, op. cit., pp. 290-92.

Commissioners Investigating Land Titles (known as the Caveat Board) examined and reported on all claims and applications for grants of land under the Crown.[85] They were 'guided by equity and good conscience' and 'the best evidence' that could be presented, but were not 'bound by the strict rules of law or equity in any case or by any technicalities or legal forms whatever'. They had the power to summon witnesses and take evidence on oath. The Commissioners merely advised the Governor, who could reject their recommendations, but they could send a case on appeal to the Supreme Court. The Caveat Board engendered intense feelings amongst the colonists for the next two decades. The True Colonist thought the Caveat Board was 'a trick invented by Colonel Arthur as a means of compelling the payment of arrears of quit rent, which could not be enforced at law'.[86] The Board members, all officials appointed by the Governor, compromised their independence and were tools of government, who could be used 'to impede or altogether turn aside the course of justice' for personal and political ends. The Hobart Town Advertiser cited Jeremy Bentham's axiom that 'all Boards are merely screens for the abuse of power' and wanted disputed claims decided by a jury or Judge and not the Caveat Board.[87] The Advertiser also cited Blackstone that tribunals which decided facts without the intervention of a jury were 'contrary to British law'.

Arthur ignored such attacks and on 5 October 1836 issued new regulations.[88] Anyone applying to the Commissioners for Titles for a Title Deed before 1 October 1837 would, once his claim was confirmed, receive the deeds by paying one year's arrears and any

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[85]Snell,op. cit., pp. 197-213; E. Campbell,'Promises of Land from the Crown: Some Questions of Equity in Colonial Australia', University of Tasmania Law Review, vol. 13, 1994, pp. 33-38.

[86]True Colonist, 25 August 1837, 8 August 1840.

[87]Hobart Town Advertiser, 6, 23 April, 18 May 1841, 3 November 1845.

[88]AOT, GO 1/31, Glenelg to Franklin, 29 August 1838; Hobart Town Gazette, 7 October 1836, pp. 1010-11.

fees or fines. But the applicant had to enter into 'a written obligation to pay up the amount of all previous arrears at any time upon demand' after 1 October 1837. Anyone not taking advantage of this arrangement before 1 October 1837 'would be sued for their arrears of quit rent' as the government intended to enforce 'the rights of the Crown'. If grant deeds had been issued but not taken up, the grantees could enjoy the new terms by obtaining their deeds within three months, but if they did not six months from 1 October 1837, the Instrument would be cancelled. If settlers had already paid their arrears of quit rents and still possessed their lands, Arthur would recommend to the Colonial Office that they be given a remission of quit rent for all but one of the years they had paid until they had obtained their grant deeds. Some colonists thought the regulations a reasonable first step, but others saw it as 'a wheedling manoeuvre' to extract as much revenue as possible from ralcalcitrant landholders.[89]

CONCESSIONS AND THREATS: GOVERNOR JOHN FRANKLIN 1837-1843

The Secretary of State, Lord Glenelg, after much prevarication, did not give 'an unqualified sanction' to Arthur's proposal.[90] He advised Franklin to use his judgement as to whether the proposals would remove obstacles to quit rent collection. But first Franklin had to deal with public and press clamour for a statute to confirm the legal validity of old grants.[91] Alfred Stephen, now Attorney-General, warned Franklin that such a move would cause 'uncertainty, confusion, litigation, and distress', and that the Caveat Board needed to ensure that the grants were free of error by close investigation

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[89] Hobart Town Courier, 7 October 1836; Launceston Advertiser, 13 October 1836.

[90] AOT, GO 1/31, Glenelg to Franklin, 29 August 1838.

[91] True Colonist, 7 April 1837; Colonial Times, 30 May, 27 June 1837; Tasmanian, 16 June, 30 June 1837; Papers of the Legislative Council of Van Diemen's Land 1848, Paper 21, Report from Alfred Stephen Esq., Attorney-General for Van Diemen's Land, Respecting the Confirmation of the Old Grants.

and adjudication between interested parties.[92] After a Legislative Council enquiry into the operations of the Caveat Board, Franklin accepted Stephen's advice.[93] In November 1838 a Government Notice announced that the Surveyor Department would be surveying land and that locatees who applied for their grant deed would be required to pay for the cost of the survey.[94] Once the claims on this land had been settled, locatees had three months within which to take up their grant deeds. If they did not, the land would be regarded as abandoned and would be offered for public sale.

As for quit rents, his advisers urged determined action. Collector of Internal Revenue Moore noted that grantees had not been compelled to take up their deeds by paying quit rents and fees, many believing that the mere fact that a Title Deed had been executed gave them a valid title.[95] Moore urged a decision on the payment of arrears due up to 1835 before trying to collect rents due from 1836. To counter the prevailing view that the government would not attempt to collect quit rents, he suggested enforcing payment in a small number of cases of large grants and allotments 'to establish the right' and repeat the 1834 offer of allowing settlers to redeem their quit rent at ten years purchase if they paid all arrears from 1 January 1836.

Despite the widespread and influential opposition to quit rents, debates within the Executive Council came out strongly for their collection in November 1840 and June 1841. To exert 'a beneficial moral influence over a small community' where points of

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[92]ibid., pp. 2,14; for an example of a defective title see AOT NP 103/8, Davidson Papers, Butler and Son to Davidson, 1 July 1841.

[93]True Colonist, 4, 11, August, 22 September 1837; see also a petition against legislation confirming old grants and for the Caveat Board, Hobart Town Courier, 20 October 1837.

[94]Hobart Town Gazette, 30 November 1838, pp. 1092-3.

[95]AJCP, CO 280/105, Moore to Colonial Secretary, 20 January 1839; AOT, CSO 5/174/4117, Champ to Colonial Secretary, 1 February 1839.

contact were many, Colonial Treasurer Gregory thought the government must not only 'discharge its own obligations to private individuals', but must demand that 'public rights be reciprocally respected'.[96] Gregory estimated that farms were 'very generally worth at least 25 times the quit rent valuation'. Some 1600 grantees had taken out their deeds and paid quit rent by November 1840 and justice required that locatees not be exempted. Colonial Secretary John Montagu similarly pressed for collection, arguing that the revenue was 'almost entirely paid by the lower orders of the people' and the wealthy had the means to pay their share. The legal advisers similarly enjoined Franklin to act promptly and decisively. Solicitor-General H. G. Jones and Attorney-General Edward Macdowell suggested that a General Notice in the Gazette should be followed up with a separate notification from Jones to each individual stating the exact sum owed.[97]

One stumbling block to government action was the so-called Statute of James, a British statute of limitation dating from 1623, which had been used 'to defeat the rightful possession of those who had obtained grants' from the Caveat Board.[98] In Doe on the demise of Lord v. McLaren, the two Supreme Court Judges differed over whether the Statute operated in Van Diemen's Land, with Justice Algernon Montagu being in the affirmative and, noted one Colonial Office official, taking 'a perverse pleasure in

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[96]AJCP, CO 280/133, Extracts from minutes of the Executive Council, 30 November 1840, 26 June 1841; (Britain) 21 James I, cap. 14 and see also cap. 16.

[97]AJCP, CO 280/133, Jones to the Crown Solicitor, 22 July 1840, Macdowell and Jones to Montagu, 16 November 1840.

[98]AJCP, CO 280/243, Denison to Grey, 22 February 1849; AOT, GO 1/75, Grey to Denison, 30 November 1849; Papers of the Legislative Council of Van Diemen's Land 1847-8, Paper 19, Despatch from Lord Stanley on Disallowing the Statute of James Non-Applicability Act.

thwarting the Government in every possible way'.[99] Montagu apparently accepted the authority of an 1835 case Doe Dem. Watt v. Morris that land granted after the Crown had been twenty years out of possession did not allow the grantee to remove the 'wrongful occupant' except by an information of intrusion brought by the Crown.[100] Some colonists supported Montagu, regarded the Statute of James as a barrier against 'arbitrary spoilation', and demanded that the 'privileges of their birthright' be enshrined in a colonial enactment.[101]

To clarify matters, in 1840 the Legislative Council 'by a considerable majority' passed 'An Act to admit the Subject to plead the General Issue in Informations of Intrusion brought on behalf of the King's Majesty, and retain his Possession till Trial ', which declared that the Statute of James did not apply in Van Diemen's Land.[102] Holding that the Act would repeal the Statute of James in the colony, the English Law Officers reported against it. They knew of no circumstances in Van Diemen's Land 'which should deprive the Colonists of an advantage possessed by all the other subjects of Her Majesty in England and in the other dominions of the Crown where the law of England prevails'. The British Government disallowed the Act on 10 November 1842.

In the meantime, with the support of his advisers and in need of revenue to build up his dwindling finances, Franklin issued a Government Notice on quit rents in July 1841.[103]

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[99]AJCP, CO 280/122, Franklin to Russell, 19 November 1840, CO 280/243, minute by DM, 7 July 1849; Papers of the Legislative Council of Van Diemen's Land 1848, Paper 23, Despatch from Sir John Franklin on the Applicability of the Statute of James.

[100] ibid.; Doe Dem. Watt v. Morris (1835) 2 Bing (N.C.) 189

[101]True Colonist, 12 June, 21 August 1840; Hobart Town Advertiser, 22 September 1840.

[102](Van Diemen's Land) 4 Vict., No. 17; Papers of the Legislative Council of Van Diemen's Land 1848, Paper 23, Despatch from Sir John Franklin on the Applicability of the Statute of James.

[103]K. Fitzpatrick, Sir John Franklin in Tasmania 1837-1843, Melbourne 1949, pp. 214-18

Leaving the question open, he thought, would cause 'much evil not politically alone or as respect merely the existence of a good understanding between the Government and the people, but also in its influence over private settlements of property'.[104] He intended to collect two years rent at a time each year until arrears were paid and all arrears before 1835 were released. For example, on 1 January 1842, he would collect quit rents for 1840 and 1841, on 1 January 1843 those for 1839 and 1842, and so on. This was similar to the scheme proposed by Arthur, who in effect wiped arrears before 1836. Franklin had reason to believe his regulations would lessen the 'repugnance' with which payment of quit rents was held even by those 'who in private life are strictly honourable in their dealings with each other'.

The Colonial Office sanctioned the regulations, but colonists remained unappeased.[105] Charging that quit rents were 'unjust' and, in the midst of a depression, beyond the means of colonists, the Colonial Times and Cornwall Chronicle urged resistance by 'every legal means'.[106] If Franklin brought actions in the courts, he would add further to the burdens of colonists and if he forced people out of their homes or into gaol, his right to rule would be irreparably undermined.[107] To protect themselves, the Hobart Town Courier urged all colonists to contribute to a legal defence fund, to employ 'the whole available talent of the bar', and to contest the ground 'inch by inch'.[108] If property was distrained, the Hobart Town Advertiser, an advocate of passive resistance, was convinced that no citizen would buy it.[109] The Morning Advertiser and Launceston

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[104] AOT, GO 33/39, Franklin to Russell, 25 August 1841.

[105] AOT, GO 1/46, Stanley to Franklin, 2 June 1842; AJCP, CO 280/169, Wilmot to Stanley, 30 May 1844.

[106] Colonial Times, 24, 31 August 1841; Cornwall Chronicle, 1 January 1842.

[107] Colonial Times, 22 February 1842.

[108] Hobart Town Courier, 25 February 1842.

[109] Hobart Town Advertiser, 7 January 1842.

Courier urged citizens to preempt government action by sending in their bills for the set off they earned in maintaining convicts.[110]

After the government threatened to bring a writ of intrusion against Edward Abbott for non-payment of quit rent on forty-two acres, the Launceston Advertiser called colonists to 'unite in the resolute determination to resist the payment of this odious tax'.[111] A New Norfolk meeting, pointing out that the set off from maintaining convicts more than paid for their quit rents, urged Franklin to follow the example of New Brunswick in remitting quit rents on application and even returning money previously paid.[112] Franklin tried to retrieve his reputation for fair play by agreeing to pay set off to eligible applicants and to give 'the most favourable consideration to special cases' where immediate enforcement of quit rents would impose a hardship.[113] While some welcomed Franklin's offer of relief, most colonists remained suspicious of government.[114]

FURTHER CONCESSIONS AND LEGAL DISPUTES: GOVERNOR EARDLEY WILMOT 1843-1846

Under Wilmot, the legal difficulties of collecting quit rents came to the fore. He arrived to find the opinion of the Law Officers of the Crown that before quit rents could be exacted a Crown Grant had to be issued and be in the possession of a grantee for seven

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[110]Morning Advertiser, 12, 19 August 1841; Launceston Courier, 21 February 1842.

[111]Lanuceston Advertiser, 17 March 1842.

[112]Colonial Times, 3 May 1842; for New Brunswick, see J.E. Howe,'Quit-rents in New Brunswick', Canadian Historical Association, Annual Report ,1928, pp. 55-61 .

[113]Colonial Times, 19 July 1842.

[114]Hobart Town Advertiser, 15 July 1842.

years.[115] The Law Officers reported that Arthur's orders published in 1828 and 1832 did not cancel the Downing Street notification of April 1826.[116] The 1826 notification specifically stated that the quit rent did not apply until seven years after the issue of a grant and provided for a set off. The Crown's only course was to treat all persons who refused to pay quit rent for land held without a Crown Grant or by an informal grant by the Governor as intruders and eject them by the prerogative writ of intrusion. But that would not be an honourable even if legal use of the King's Warrant. No jury would present a verdict for the Crown in such cases. The Law Officers advised Wilmot to give deep consideration before invoking informations of intrusion 'to turn people out of their Lands for not paying arrears of Quit Rent, which cannot be legally demanded as such'. But for grants already issued, they advised that quit rents should be exacted by power of distress.

After the Commissioner of Titles reported that he felt bound by the Law Officers' opinion, Wilmot decided by a notice published on 19 April 1844 to release all arrears owing to the Crown for applicants for titles.[117] He made 'equitable provision' for those who had already paid their arrears. Those payments would be applied, either to liquidate future quit rents or to redeem their quit rents at ten years' purchase. Wilmot discovered that Governor Macquarie's regulations of 1810 gave authority for every

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[115]AJCP, CO 280/169, Wilmot to Stanley, 30 May 1844.

[116]AJCP, CO 280/169, report by Horne and Welsh, 31 July 1843.

[117]Hobart Town Gazette, 19 April 1844, p. 458; AJCP, CO 280/169, Wilmot to Stanley, 30 May 1844. Stanley initially censured Wilmot's action, but his successor Gladstone accepted Wilmot's fuller explanation of his decision, warning him not to take important decisions until he presented his reasons to the Colonial Office see AOT, GO 1/57, Stanley to Wilmot, 9 January 1845 and GO 1/60, Gladstone to Wilmot, 21 January 1846. Stanley had in part feared that Wilmot's concessions would prove embarrassing for Governor Gipps in New South Wales and he was right, see HRA, series 1, vol. 23, Sydney 1925, p. 555, Gipps to Stanley, 28 April 1844.

location order to be issued with a Grant Deed 'at the earliest possible period'.[118] In 1825 Arthur discontinued this practice to ease Crown resumption of lands where settlers did not fulfil their conditions. This reinforced the Law Officer's view that by its own policy, the government had become 'so exceedingly embarrassed'. Wilmot was concerned that a legal decision against the government might have resulted in repayment of £16,000 in quit rent. His notice helped him escape from a difficult position and, rather than repay rents, the second paragraph offering redemption of quit rent produced a revenue of £2000. Apart from the non-enforcement of quit rent owed to 31 December 1843, the Caveat Board did not charge arrears for grants issued in 1844 and later returned one year's arrear for all grants prepared since 1 January 1845. Wilmot followed his predecessors in giving up arrears of quit rent in order to encourage the taking up of Grant Deeds, thus providing for the later legal collection of quit rents and a steady income for government. These judicious regulations attracted favourable comment, but some thought Wilmot should have invited colonists to claim their set off for maintaining convicts.[119]

Like Franklin, Wilmot was bedevilled by judicial differences over the application of the Statute of James. In 1844 Justice Montagu asked Wilmot to remove doubts surrounding the issue.[120] Wilmot's solution was to appoint a third Judge because it would be 'unconstitutional' for the Legislative Council to direct or control 'the opinions of the Judges by legal enactments and thus convert it into a Court of Law to decide upon questions of Law and Equity'. Secretary of State Stanley disagreed. The Legislative Council had been expressly assigned power to resolve disputes over whether English

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[118]AOT, GO 33/51, Wilmot to Stanley, 23 June 1845.

[119]Hobart Town Courier, 19 April 1844; Hobart Town Advertiser, 23 April 1844; True Colonist, 26 April 1844; Examiner, 27 April 1844.

[120]AJCP, CO 280/168, Montagu to Wilmot, 14 March 1844, Wilmot to Montagu, 15 March 1844; AOT, GO 1/56, Stanley to Wilmot, 10 September 1844.

laws were in force in Van Diemen's Land and in cases where the Judges were divided. The Legislative Council should pass a law that the Statute of James was in force. Action was certainly needed as suitors made a mockery of the legal system by picking the time to bring forward a case, selecting Montagu if they relied on the Statute of James or Pedder if the reverse.[121] When Wilmot introduced a Bill to prevent the operation of the Statute of James, opposition was mobilised to secure its withdrawal.[122]

Wilmot also tried to tackle the problem of settlers who applied for titles and proved their claims, but then allowed their Grant Deeds 'to remain, unenrolled, in the Treasury, with the view, at least in some cases, of avoiding payment' of quit rent.[123] Arthur's notice of 5 October 1836 warned that all grants not taken up would be cancelled in six months. Franklin expressed a similar intention in November 1838. Consequently, a number of Grant Deeds were taken up, but none were cancelled because the Law Officers doubted that transferring instruments from the Colonial Secretary to the Treasurer did not so modify 'the complete right, dominion, ...[and] control previously possessed by the Crown over the instrument ... as to interfere with the power of cancellation'.[124] On reflection, the Law Officers held that, as the Treasurer was an officer of the Crown, the Crown retained custody of the instruments, the grantee could not enforce his right of property and possession in court, and no interest passed in the land until enrolment. The Crown thus had the power to cancel grants. Once cancelled, applications for new Grant Deeds should bear the cost of preparation. The Law Officers also suggested that Wilmot not sign a Grant Deed until all fees, fines, and quit rent had been paid.

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[121]Launceston Advertiser, 27 August 1846.

[122]Colonial Times, 18, 25 August 1846.

[123]AOT, GO 33/54, Wilmot to Stanley, 11 February 1846, Fraser to Colonial Secretary, 26 May 1845.

[124]AOT, GO 33/54, memo. by Fleming, 12 September 1845, memo. by Horne, 16 October 1845.

Armed with this legal advice and faced with 'the large accumulation of Deeds', Wilmot published a notice with a list of grants that had been more than twelve months in the Treasury and said he would cancel any not taken up.[125] In the event, 126 parties did take up their grant deeds, and, true to his word, Wilmot cancelled the deeds of thirty-nine defaulters and antagonised settlers by burning the deeds but was unsure what to do with the land. Franklin had intended to sell cancelled deeds, but Wilmot was sensitive to the legal difficulties of so doing, arising from the application of the Statute of James. He also thought it unfair to sell the lands of settlers who had taken some steps to obtain deeds, while not dealing in the same way with locatees, who made no attempt to establish their title to Crown land. He sought the advice of the Colonial Office whether he should compel locatees to take up their grants or replace cancelled grants with new ones, but charge double fees.

The third area tackled by Wilmot was grantees who had been issued with Grant Deeds, but who ignored applications from the Collector of Internal Revenue to pay accrued quit rent.[126] Wilmot directed that they be distrained as laid down by the Law Officers. The Law Officers advised the appointment of bailiffs by patent in the name of the Queen and armed them with powers derived from british statutes.[127] Under the Landlord and Tenant Act 1730 a bailiff was authorised to distrain named individuals for specified amounts of quit rent and, under the Distress for Rent Act 1689, to impound and sell

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[125]Hobart Town Gazette, 28 October 1845, p. 1355; AOT, GO 33/54, Wilmot to Stanley, 11 February 1846; AOT, GO 1/63, Grey to Denison, 25 November 1846; AJCP, CO 280/193, Wilmot to Stanley, 2 April 1846; Britannia and Trades Advocate, 19 March 1846.

[126]AJCP, CO 280/193, Bicheno to Crown Solicitor, 16 October 1845

[127]AJCP, CO 280/192, memo. Fleming and Horne, 1 March 1845, memo. by Fleming, 30 September 1845, and memo. by Horne, 14 October 1845; AJCP, CO 280/193, memo. by Fleming, 22 October 1845, memo. by Horne, 10 November 1845.

distresses.[128] A more contentious issue was whether parties distrained should be allowed to replevin the distress. Solicitor-General Valentine Fleming thought replevin should be allowed as this would remove 'a strong ground for imputing harshness to the Crown process'.[129] He warned that enforcing quit rent might prove expensive. If replevin was allowed, 'the right and legality of the distress' will be contested, and a jury will almost certainly find against the Crown. Fleming did not think the distrained parties would replevy, but would initiate actions for trespass against the bailiff. Again, the jury would find against the Crown and, if the bailiff or those acting under his instructions made 'any slip', would award the plaintiff 'heavy damages'. Support for this view came from the jury decision in R. v. The Fentons in December 1845, 'an index of the adverse spirit to the rights of the Crown by which juries seem to be actuated'. One of the defendants, Michael Fenton, had, with five other nominated members, walked out of the Legislative Council in protest at government financial policy in October 1845, and one wonders whether he sought to undermine the government further by embroiling it in an unpopular court case.[130]

In the case, the Crown sued on behalf of a citizen who, from the nature of title deeds, had no other remedy: the Attorney-General signed a writ of intrusion to enable the wronged party 'to get the benefit of the decision in his favour both of the Caveat Board and the Supreme Court'.[131] But the issues of such a writ had to be tried by a jury, and this created predictable problems for the Crown. Fleming observed:

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[128](Britain) *Landlord and Tenant Act* 1730 4 Geo. 2, cap. 28 and *Distress for Rent Act* 1689 2 Will. & Mar., cap. 5.

[129]AJCP, CO 280/193, memo. by Fleming, 23 December 1845.

[130]W.A. Townsley, The Struggle for Self-Government in Tasmania 1842-1856, 2nd ed, Hobart 1977, pp. 80-86.

[131]This case was far too complicated to detail here, see AJCP, CO 280/243, Denison to Grey, 23 February 1849 and Papers of the Legislative Council of Tasmania 1850, Paper 6, Letter to Earl Grey from M.

> although intrusion, accompanied by armed violence and intimidation, was proved by the clearest evidence, although not a shadow of right or title was shown in the intruders, and although the Judge expressly charged in favour of the Crown,
>
> and that a finding against it would be a verdict contrary to law, yet the Jury, and it a special one, instantly, unanimously, without retiring from the box, and without even going through the formula by the foreman of collecting the opinion of his brethren, delivered, as if by preconcert, a verdict for the defendants.[132]

One argument of the defence was that the Crown might secure possession of land and compel payment of quit rent.[133] It appeared that the jury so decided because the Crown was a party and might use its prerogative writ in other cases involving its own rights. Fleming thought the Crown had no chance of a successful suit where it instituted its own process for its own ends. He felt it his duty to stress how collecting quit rent will result in 'the expense, delay, and irritation of a legal contest in every instance'.

Attorney-General Horne concurred.[134] The 'universal' hostility and an agricultural depression made the present time 'the most unfitting opportunity for commencing

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Fenton Esq. MLC on the Claims to Grants Act Amendment Bill; for a report of the trial see The Observer, 19, 23 December 1845 and Colonial Times, 5 May 1846, letter by Michael Fenton; an ejectment case brought against the Fentons also failed, see Doe dem. Garrett v. Fenton, Hobart Town Courier, 27 June 1846. For a discussion of the use of information by intrusion, see J. Chitty, A Treatise on the Law of the Prerogatives of the Crown, London 1820, pp. 332-5.

[132]AJCP, CO 280/193, memo. by Fleming, 23 December 1845, emphasis in original.

[133]Ibid.

[134]AJCP, CO 280/193, memo. by Horne, 31 January 1846; see also the case of Thomas Laughton, Papers of the Legislative Council of Van Diemen's Land 1848, Paper 26, Memorial of Thomas Laughton of Partridge Island; Hobart Town Advertiser, 20 March 1846.

proceedings upon the Quit Rent question'.[135] Given the complications arising from the sale of quit rent lands, and the different rates, Horne suggested an Imperial statute to remove the term quit rent and commute the quit rent for a general land tax, redeemable at a certain time, using a summary process to compel payment, and defining how the revenue would be applied. Aware that the 'legal impediments were so intricate and numerous', 'the risks to be run by the collectors so great', and 'the expenses of collection so onerous', Wilmot found that 'respectable persons' refused to accept the office of Collector.[136]

Concerned by the real possibility of heavy losses in the courts, Wilmot had no choice but to suspend proceedings and seek advice from the Colonial Office.[137] As the Fenton case demonstrated, appeals to the court would be 'in this limited community little better than a mockery' and would lower 'the character of the administration of justice'. He opposed a land tax, which would be fraught with even more difficulties and not necessarily produce sufficient revenue. Opposition to quit rents was partly based on the 'extreme inequality' of its imposition due to settlers holding their land under 'different tenures. To levy a land tax 'charged upon any general principle, and known to be in lieu of Quit rent would be to add to the existing irritation of feeling, instead of composing it'. Wilmot deferred the enforcement of quit rents, but continued to issue grants and obtained at least some revenue.

MORE CONCESSIONS AND VIRTUAL ABANDONMENT: GOVERNOR WILLIAM DENISON 1847-1850

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[135]ibid.; see for example the meeting held in Campbell Town, Examiner 27 September 1845; Cornwall Chronicle, 27 September 1845.

[136]AOT, CSO 24/11/236, memo. by 2 June 1847.

[137]AJCP, CO 280/192, Wilmot to Stanley, 13 February 1846.

Despite Wilmot's efforts in dealing with quit rents and titles to land, Denison had some way to go before the issue could be resolved satisfactorily for all parties. In response to Wilmot's enquiries, Secretary of State Grey presented Dension with a strong assertion of 'the Rights of the Crown'.[138] Addressing the question of taking up titles by grantees and locatees, Grey was not prepared 'to defer the enforcement of a just and available claim because it would postpone the enforcement of another claim which, though equally just, happens for the moment to be less practically available'. Denison should thus sell the lands of cancelled grants, but first give the present holders a chance to obtain a conveyance for their lands on paying double fees. As for locatees, much depended on their numbers and on whether their 'combined opposition' would defeat the government. Grey instructed Denison to issue a notice to locatees that if they did not establish their claims to the land within a certain time, the fees will be doubled and another period of default would result in the sale of the land as Crown property.

As for quit rents, Grey agreed with Wilmot that it was 'most inadvisable, if not impossible, to proceed in direct opposition to the feelings of the Colony'.[139] Grey felt that an Imperial statute imposing a land tax would be impolitic. He suggested that Denison commute the quit rent on generous terms, but 'to cancel them unconditionally would be to inflict an injustice on those who have more recently purchased Lands'. Grey's predecessor William Gladstone had advised Governor Fitzroy of New South Wales to develop a plan of commutation that would entirely free the land of quit rents for those who paid their arrears and Grey commended this advice to Denison.[140]

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[138]AOT, GO 1/63, Grey to Denison, 25 November 1846.

[139]AOT, GO 1/63, Grey to Denison, 25 November 1846.

[140]ibid., Gladstone to Fitzroy, 1 March 1846. Fiztroy apparently went too far and was censured by Grey, HRA, series 1, vol. 26, Sydney 1925, pp. 141-5, Fitzroy to Grey, 4 January 1848, Grey to Fitzroy, 2 June 1848.

Dension seems to have been guided by the sage advice of the Chairman of the Caveat Board, Adam Turnbull, that in the past threats unfulfilled had merely 'compromised' the 'good faith' of government.[141] Advocating a policy of conciliation, Turnbull opposed Grey's willingness to sell lands recovered from cancelled grants because this would antagonise settlers and 'could never be carried into effect'. Colonial Secretary J.E. Bicheno advised that it was 'not what is right to be done, but what is best'. A report by Turnbull, Surveyor-General R, Power, and the Registrar of the Supreme Court William Sorell, Jnr. argued for a speedy resolution.

Denison accepted the government's inability to enforce its wishes in the courts and realised that most locatees had escaped their liabilities. He found that 6390 location orders had been issued for more that two million acres of land, but only 2941 locatees had taken up their grant deeds by paying £21,000 in arrears of quit rent.[142] Rather than willingly taking up their grant, these locatees did so 'under the pressure of some necessity', usually the need for 'a good legal title' so they could borrow money. Once the grant had been issued, few grantees paid their annual quit rent and adopted a policy of 'passive resistance'. Denison conceded that if quit rents could not be recovered when reserved on a grant deed, there was no possibility 'when merely implied under a location order'. Dension similarly dismissed the idea of selling the land of defaulters: if a buyer 'accepted a grant and brought ejectment, he might be defeated under color[sic] of the operation of what is called the Statute of James'. I shall return to Denison's attempt to neutralise the effect of this statute.

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[141]AJCP, CO 280/212, memo. by Turnbull, 10 July 1847; AOT, CSO 24/11/236, memo. by Denison, 7 June 1847, report by Turnbull, Power, and Sorell, 29 June 1847, memo. by Bicheno, 5 July 1847.

[142]AJCP, CO 280/212, Denison to Grey, 3 October 1847, report by Turnbull, Power, and Sorell, 29 June 1847.

Combined with this awareness of legal and political realities, Denison showed some sympathy for settlers. He thought that a rate of five per. cent on the value of lands was not a quit rent but a rack rent, which 'ought to be reduced so as to be in fact what its name indicates'.[143] He determined to appeal 'rather to the evident interests than to the fears of the community'. He substituted 'one unvarying form of grant deed' for the various forms in use and reduced the quit rent on all grant deeds to a peppercorn. For locatees, he reduced all quit rents to two shillings per one hundred acres, provided that all arrears since April 1844 should be paid at that rate, remitted all previous claims, and fixed the redemption at ten years purchase. Any person with a grant deed who had already paid their arrears equal to the rate of redemption would be taken to have redeemed their quit rents.

These regulations equalised all the rates and reduced arrears to three years, which Denison hoped would not be too generous as to offend settlers who had paid previous charges.[144] He made payment of the redemption 'an indispensable condition precedent to the taking up of a Grant'. He expected a rate of two shillings to accrue £2000 a year exclusive of town allotments, which were also reduced. In Hobart Town and Launceston the quit rent was reduced from six pence per perch to one penny per perch; town allotments in the interior from two and three pence per perch to half a penny. Denison felt his regulations had the desired effect. Applications for grants increased after his notice was issued and 'removed an occasion of embittered feeling between the Colony and its Government'. But Denison's cause was not helped when the British Parliament passed legislation freeing the Van Diemen's Land Company of all quit rents: settlers felt justified in receiving the same privilege.[145]

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[143]AJCP, CO 280/212, Denison to Grey, 3 October 1847; Hobart Town Gazette, 20 July 1847, pp. 730-31.

[144]ibid.

[145](Britain) 10 and 11 Vict,, c. 57; Hobart Town Advertiser, 25 January 1848; Examiner, 22 July 1848.

The greater willingness to take up deed grants pleased Denison, but he realised that 'that degree of confidence is not placed in Crown Grants which is required by the Public interest'.[146] He intended to pass legislation making 'Royal Grants conclusive in all cases, both in law and in equity'. To achieve this aim, Denison had to tackle the problems caused by the Statute of James, which could deprive holders of grant deeds, as determined by the Caveat Board, of the possession of their land. Some lawyers advised clients not to take up grants unless they occupied their land.[147] In 1848 Denison prepared a Bill, which provided that no grant issued by the Caveat Board could be questioned because the Crown had been out of possession for more than twenty years and that a grantee could employ an action of ejectment against a wrongful occupant without recourse first to an information of intrusion.[148] Denison believed most settlers disapproved of the operation of the Statute of James and wanted 'some guarantees against the abuse of the powers or advantages conferred by it'. His proposed legislation would restore confidence in the security of Crown grants.

In support, Denison sent the Colonial Office the views of his Law Officers, a report by a committee of leading members of the legal profession, especially conveyancing solicitors, and other relevant documents.[149] He wanted to know whether the English

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[146]AJCP, CO 280/212, Denison to Grey, 3 October 1847; for an example of a settler who paid his quit rents see Dow and Dow, op. cit., p. 120.

[147]Papers of the Legislative Council of Van Diemen's Land 1846, Paper 6, Minutes of Evidence Taken Before the Committee of the Legislative Council on the Statute of James, pp. 5-6.

[148]AJCP, CO 280/243, Denison to Grey, 22 February 1849; AOT, GO 1/75, Grey to Denison, 30 November 1849.

[149]AJCP, CO 280/243, Denison to Grey, 22 February 1849; Papers of the Legislative Council of Van Diemen's Land 1850, Paper 5, Papers Relating to the Statute of James, report by lawyers, 20 February 1849, Fleming to Bicheno, 2 February 1849, Fleming and Smith to Bicheno, 5 February 1849.

Law Officers had changed their minds about the operation of the Statute of James, and whether his Bill would counter the difficulties, while leaving 'the subject every advantage to which he is fully entitled'. Arguments against the Bill for weakening the rights of the subject, especially trial by jury, and enabling the Crown to confiscate land were contained in a vigorous if tendentious letter from Michael Fenton, who had resumed his seat as a non-official member of the Legislative Council.[150] Despite Fenton's view, the Law Officers sanctioned Denison's Bill because it merely ruled that 'no information of intrusion shall be necessary in certain specified cases' and afforded 'a sufficient and available remedy for the evils which it is designed to meet'.[151] But in the end Denison withdrew the Bill. Public opinion was too divided over its practical effect and too wary of the designs of the Crown to abridge 'the inestimable right of trial by jury'.[152] Denison was too busy fighting to retain transportation against the wishes of the colonists and developing a land policy that would stop population drift to the mainland goldfields to settle the titles to land question.[153]

THE TORRENS SYSTEM AND THE END OF QUIT RENTS 1861-1863

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[150]Papers of the Legislative Council of Van Diemen's Land 1850, Paper 6, Letter to Earl Grey from M. Fenton, Esq. MLC on the Claims to Grants Act Amendment Bill; for Denison's view of Fenton's letter see AJCP, CO 280/243, Denison to Grey, 23 February 1849; see also petitions against the Bill, Papers of the Legislative Council of Van Diemen's Land 1847-8, Paper 25, Petition from Mrs Burn against the Claims to Grants' Act and Paper 26, Petition from John Martin against Claims to Grants' Act, and ibid., 1848, Paper 18, Petition of J.Jackson and E. Addison Against the Amended Bill for Settling Claims to Grants.

[151]AOT, GO 1/75, Grey to Denison, 30 November 1849.

[152]Colonial Times, 20 August 1850; Hobart Town Advertiser, 20 August 1850; Britannia and Trades Advocate, 15, 22 August 1850.

[153]Burroughs, op. cit., pp. 343-4; Hartwell, op. cit., p. 43.

After the Torrens System was introduced in 1861, interest in quit rents was revived by the Recorder of Titles, William Tarleton.[154] In July 1862 Tarleton reported that the quit rent system formed 'a most serious impediment' to the success of the Torrens System.[155] Holders of old grants and location orders could not obtain their Torrens title until their arrears of quit rent had been paid. They declined to do so and continued to rely on 'defective titles'. Tarleton found that few colonists took advantage of terms offered by Wilmot and Denison, and now the arrears and sums required to redeem quit rents amounted, 'in many cases, to the actual value of the land, and in all to a most serious per-centage'. As the government collected a small revenue (about £610 between 1860 and 1862) and as settlers could not be forced to pay, Tarleton suggested that occupants be offered the 'liberal terms' of the remission of all quit rent arrears and five years payment to discharge the debt in full and receive a grant in fee simple.[156] Members of the House of Assembly took up the cause and, in an unprecedented fit of generosity, voted by seventeen votes to seven to abolish quit rents and remitted all claims to arrears.[157] Their decision was enshrined in the Quit Rent Remission Bill 1863, which passed quickly through both Houses of Parliament without dissent.[158]

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[154]For the introduction of the Torrens System in Tasmania, see S. Petrow, 'Knocking Down the House: The Introduction of the Torrens System in Tasmania', University of Tasmania Law Review, vol. 11, 1992, pp. 167-81.

[155]Tasmania, House of Assembly, Journals, 1862, vol. 8, paper 84, Quit Rents and 1863, vol. 9, paper 18, Quit Rents.

[156] In 1859 the populist politician James Matthews asked the Colonial Treasurer for a return on the amount of quit rents received since the settlement of Van Diemen's Land up to 30 June 1859 and the amount of arrears still owing, but there is no evidence to show that this return was ever tabled or even compiled, ibid., vol. 4, 17 August 1859, 48.

[157]Mercury, 4 March 1863; Hobart Town Advertiser, 9 March 1863.

[158]Mercury, 7, 11 March 1863; (Tas) 26 Vict., Sess. 2, No. 2. The Quit Rent Remission Act remained on the statute books until repealed by the Statute Law Revision Act 1991.

CONCLUSION

Conventional wisdom has it that Governors were all powerful in colonial Australia and had more autocratic powers than the Sovereign. The attempted imposition of quit rents in Van Diemen's Land causes us to modify this view. Despite being tempted by concessions and threatened by legal proceedings, large numbers of settlers refused to pay an impost they felt was unjust and unnecessary. Governors became entangled in a web of legal uncertainty and were reluctant to test their authority in the courts. Settlers had concluded what was in effect a contract or covenant with the government to pay quit rents, but that contract or covenant was, it appears, unenforceable. Moreover, Governors did not set a good example when they tried to avoid paying the set off that was properly due to settlers. Ironically, Governor Arthur had consciously tried to create a gentry, whose power was mainly derived from land, but he did not expect that the gentry would be so consistently disposed to thwart government economic policies.[159]

Experience elsewhere should have alerted the Colonial Office to the dangers of using quit rents as a form of revenue. The failure to ensure the agreement was watertight was a baffingly huge mistake. This mistake was compounded by imposing unrealistically high quit rents before any real attempt had been made to collect nominal rates, and granting more land to settlers who had not their paid quit rents. The preoccupation of British Governments with financial problems at home resulted in a miscalculation about the capacity and willingness of Australian settlers to pay for the cost of developing the new colonies: settlers were not won over by the use of the revenue from quit rent to relieve the British Treasury rather than to expend on local purposes. Further, the concept of a quit rent was outmoded, but formulating other methods of collecting revenue from land grants seemed beyond the ingenuity of colonial

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[159]M. Roe, Quest for Authority in Eastern Australia 1835-1851, Melbourne 1965, chapter 2.

administrators. Some Governors made mistakes of their own. For example, Arthur's decision not to issue titles with grants made retrieving quit rents more difficult for his successors. But the inability of the Colonial Office to treat the needs of colonists with more consideration placed Governors in a difficult position and in the case of quit rents undermined their authority to govern. Quit rents evoked major outpourings of discontent and strengthened the movement for self-government and for the control of local finances.

We can sympathise with the settlers for viewing quit rents as an unwanted restriction from the feudal past, and 'an obstacle to complete colonial independence'.[160] In this spirit, the Colonial Times argued that old fictions such as 'Crown rights and prerogatives, its immunity from payment of costs, and other privileges' were 'the offspring of far different times and circumstances' and not appropriate to 'a youthful colony'.[161] But the settlers deserve censure as well. All grantees and locatees agreed to pay quit rents, but it appeared that many had no intention of meeting that obligation, even when the quit rent was nominal, if not a peppercorn. Undeniably, many experienced great difficulties and spent large amounts of money in developing their land, but that did not excuse them from paying their quit rents. More disturbing was their use of the law to protect their interests. It was one thing to use the courts to contest the rights of the Crown and to rely on juries to determine the outcome. But it was quite another thing, as occurred in the Fentons' case, to predetermine the outcome and consciously decide against the Crown, even to the detriment of a fellow settler. This turned the court from a legal to a political arena and showed a cynicism about the jury system and the courts that did not sit well with idealistic talk about the rights of the

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[160]Bond, The Quit-Rent System in the American Colonies, pp. 21-2.

[161]Colonial Times, 20 August 1850.

freeborn Englishmen and the palladium of liberties.[162] The settlers had a right to an impartial and full investigation of a legal issue, but did they have a right to act in ways that perverted the course of justice for private ends? If we accept that the essence of colonial politics and colonial life was about the pursuit of private ends, the answer must be yes. To survive against a powerful Executive, the settler interest in particular had to stand firm against any interference with the source of their power and stand firm they did. Moreover, the antagonism between Governors and settlers did not end when quit rents were remitted. The refusal to pay carriage duties and railway rates showed that suspicion of government and the evasion of taxes remained strongly entrenched until the 1870s.[163]

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[162] S. Petrow,'A Case of Mistaken Identity: The Vandiemonian Spirit and the Law', Tasmanian Historical Studies, vol. 6 (1), 1998, pp. 23-33.

[163] S. Petrow,'Carriages and Scab: Elite Contention Against the Law in Nineteenth Century Tasmania', Newcastle Law Review, vol. 2(2), 1997, pp. 70-91; S. Petrow,'Resisting the Law: Opposition to the Launceston and Western Railway Rate 1872-1874', University of Tasmania Law Review, vol. 15, 1996, pp. 77-104.