JOHN HUBERT PLUNKETT

IN

NEW SOUTH WALES, 1832 -- 1869

by

John N. Molony

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This thesis is my own work.

John N. Molony
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ABBREVIATIONS

ANU  Australian National University
CO   Colonial Office
HRA  Historical Records of Australia
ML   Mitchell Library
NSWA New South Wales Archives
RAHSJ Journal of the Royal Australian Historical Society
SAA  Sydney Archdiocesan Archives
SH or SMH Sydney Morning Herald
VPLA New South Wales Votes and Proceedings of the Legislative Assembly
VPLC New South Wales Votes and Proceedings of the Legislative Council
INTRODUCTION

Prior to 1965 when I began research on a topic dealing with Australian Catholic history in the 19th century I had heard only vaguely of John Hubert Plunkett. I knew that he had been a lawyer in the service of the Crown, that a street in Sydney had been named after him and, more recently, one in the suburb of Chifley in the A.C.T. The period of his service in the Colony of New South Wales threw him into contact, and perhaps contrast, with others whose names have been left to posterity so that they are remembered whilst he has been well-nigh forgotten. Wentworth, Bourke, Forbes, Gipps, Parkes and even Deniehy need no testimonial today. Their times, their lives, their motives and their utterances have been studied and written about at length. It is not possible to pick up a book on Australian history of their period that does not give them recognition. Yet when A.C.V. Melbourne wrote his lasting work on constitutional development up to 1856 he did not find room in his index for a reference to John Hubert Plunkett. John West, in an editorial in the Herald a century ago, wrote that no name would shine brighter than Plunkett's in the pages of Australian history; he was mistaken.¹

In my reading I found that there were constant references to Plunkett in the secular and religious press of the period. The most intriguing of all was a small advertisement which I came across in the Freeman's Journal soon after Plunkett's death. It was inserted by his widow and it stated that, because of her straightened circumstances, she was prepared to take music pupils.² It seemed odd that a man who had worked in the Colony for thirty seven years, receiving a substantial and constant salary, should have left his wife in such circumstances. Another

¹. SMH, 14 March 1856.
². Freeman's Journal, 2 December 1871.
small item was a letter, also from his wife, to the Herald in 1870. She outlined briefly her husband's work, his tireless service to the Colony and his lack of recognition by the Crown. She appealed to history, 'if just' to explain the reason why. It seemed appropriate then to look more closely at Plunkett, not in an attempt to explain his lack of recognition, but to ask the question whether he ever deserved any. This thesis is not my answer to that question because I do not believe that an historian can answer it. All he can do is assemble and interpret to the best of his ability the relevant material. If Plunkett deserved recognition in his own time on the scale West and Mrs. Plunkett affirmed, he deserves it still today. That continuum men call history must grant or deny it to him on the evidence.

The evidence on the work of Plunkett in New South Wales from 1832 when he arrived in the Colony until his death in 1869 ultimately had to come from others than himself. Despite an attempt to trace his personal papers in Australia, England, Ireland and on the Continent it proved impossible to discover more than a remnant. They were held in a trunk marked with Plunkett's name in the office of Makinson and D'Apice, a Sydney legal firm. Plunkett kept a collection of forty letters written to him by Governor Richard Bourke, a few other letters, and his own appointments to various offices in the Colony. The Mitchell Library itself held very little Plunkett material, consisting of a few letters to men like James Macarthur and Henry Parkes. For the rest Plunkett remains in relative obscurity, and one possible explanation is a simple matter of geography and patterns of socializing in Sydney Town. During the whole of his residence in Sydney he lived either in or near to Macquarie Street. Apart from his home and the Australian Club, of which he was one of the first members, the rest of his time went to his work or

1. SMH, 27 April 1870.
2. The Club met for the first time on 24 May 1838; within five days Plunkett was one of the original fifteen members on the committee, Minute Book 1, Australian Club General Committee 1838. ML.
his worship. From one end of Macquarie Street to the other, from St Mary's to Government House, spanning the Law Courts, the Attorney-General's Department and the Parliament, Plunkett moved and met his world. It was in Macquarie Street that Governor John Young asked him to take on his last official appointment in 1865 as Attorney-General. It must have been in and about Macquarie Street and its offices that Plunkett veritably carried on the intercourse that most men commit to writing. If he is to be found today it must be through public sources such as the newspapers, the parliamentary reports, the official communications between Sydney and Downing Street and the legal opinions he gave during his twenty years as Attorney-General. It is chiefly on such sources that I have perforce relied in the writing of this thesis.

One contemporary account of Plunkett of particular interest was forwarded to me from Switzerland. Written in French about 1880 it is part of the 'Memoirs' of Hubert De Castella who knew Plunkett, and whose wife was Plunkett's second cousin. It was sent to me by Claire Schnyder de Wartensee, De Castella's daughter, who still speaks of 'Cousin John' as if he died yesterday. It seems that, after the loss of her parents and four young brothers on the Royal Charter off Anglesea in 1859, Claire's mother returned from finishing school in Paris and lived for some years with the Plunketts in Sydney. She later married Hubert De Castella who had come to Australia 'when the first Governor of Victoria was Mr. La Trobe'. The De Castellas and Plunketts met frequently; the 'Memoirs' were written later and preserved in Switzerland by Mrs. de Wartensee.

Plunkett was born the younger of twins at Mount Plunkett,

1. 'Cousin John was a dear cousin of my Mother's', Claire Schnyder de Wartensee to J.N. Molony, 10 September 1969.
Roscommon in June 1802. His father, George Plunkett, farmed on land which his family had owned since 1162. From the Reformation until the end of the 18th century the land had been held in trust for the Plunketts: it produced sufficient income for the family to live comfortably and to educate their children suitably. On his father's side John Hubert was related to the Earls of Fingall, on his mother's side to the Princes of Aughrim. His mother was Eileen O'Kelly, niece of an Austrian Count O'Kelly, and it was through her that John Hubert was related to Archbishop Oliver Plunkett.

In November 1819 John Hubert entered Trinity College, Dublin and, after an academic course of some distinction, he graduated B.A. on 17 February 1823. Plunkett was called to the Irish Bar in 1826 and went on the Connaught Circuit regularly for the next five years. He took considerable interest in the elections in 1830 and helped an O'Connellite candidate win Roscommon. O'Connell publicly thanked Plunkett for his assistance and later, in 1831, was able to secure his appointment as Solicitor-General of New South Wales. Plunkett was popular, intelligent and had a career before him in Ireland. Suddenly he seems to have requested an appointment outside of Ireland and

1. Plunkett's family background comes from the Genealogical testimonial now in the Archives of the Sisters of Charity, Potts Point, Sydney, and from Freeman's Journal, 15 May 1869. Oliver James Horace Plunkett, 12th Earl of Fingall, has been unable to trace any material of his 'kinsman', John Hubert Plunkett at Killeen Castle, letters to J.N.Molony, 12 September, 1 December 1969.

2. Oliver Plunket, Archbishop of Armagh, was hung, drawn and quartered at Tyburn, 1 July 1681. The charge of high treason for which he was condemned was false, see Dictionary of National Biography, vol.XV, London 1909, pp.1328-31. J.H. Plunkett bequeathed the watch, chalice and a set of vestments of the Archbishop to Manly College, Sydney.

3. The degree parchment is now in the Plunkett papers. Since my visit to Makinson and D'Apice Mr Richard D'Apice has deposited all the Plunkett papers in the Mitchell Library.

4. See the account of the dinner in his honour on 20 September 1830 after the Roscommon election, Freeman's Journal, 15 May 1869.
then accepted one at a penal colony on the far end of the earth. The explanation given in the De Castella 'Memoirs' rings true precisely because it is so simple. Plunkett left Ireland because he was suffering from a broken romance.¹

According to De Castella Plunkett was engaged to a young lady of considerable fortune whose name is not recorded. She received an anonymous letter alleging that Plunkett wanted to marry her only to enjoy her fortune. Unwisely she acquainted Plunkett with the letter, a quarrel ensued and Plunkett 'offense et trop fier pour se desculper' broke the engagement. Wounded, perhaps unhappy and disillusioned about his future, Plunkett sought and found an appointment. He was about to embark for New South Wales when Cupid struck again. He had a cousin, widowed and impoverished, named McDonougha, whose daughter Maria Charlotte had just returned from a convent run by English nuns in Paris.² Plunkett met her as she came forth 'dans la beaute de ses 19 ans, captivante par une "education distinguée"', and pique, an effort to prove that he was not money-grubbing, or the simple fact that he was smitten induced Plunkett to marry her. The marriage took place in London, and Plunkett acquired a wife with his own background and religion to accompany him to New South Wales.

What kind of a man was the young Plunkett who left Ireland in 1831? He returned briefly to his native land in 1842 but so firmly implanted himself in Australia that even in harsh disappointment twenty years later he could not relinquish the Colony. His whole background was of the Irish Catholic aristocracy, tempered by his education in secular or, at least non-

¹. The 'Memoirs', in French and unpaginated, were copied in long hand for me by Mrs de Wartensee. I will deposit them in the Mitchell Library. Hubert De Castella wrote three works on Australian colonial life, Les Squatters Australiens, Paris 1861; Notes d'un Vigneron Australien, Melbourne 1882 and John Bull's Vineyard, Melbourne 1886.

². Her schooling in Paris was financed by her uncle, the bishop of Elphin. In the opinion of De Castella she was sent to Paris too young and was left there too long!
Catholic, institutions. He had heard the whispered stories of priests who said Mass in the mountains and sometimes died for it; he had a kinsman archbishop judicially murdered for politics and religion; his family had lost prestige and lands through repression. But his background also included an acknowledgement that Catholic emancipation had brought change, which so far was only seen in such things as his own appointment, but which gave promise of another future for those of his faith. Deeper than that, however, was the conviction wrought in him through his education that the heritage of Westminster and the legal system that had grown up there through the centuries was the one most suited to civilised man. In him there was human compassion for the downtrodden, a quick and eager resentment at whatever smacked of injustice, a desire to grant to every man his due in human dignity and worth. But, above all, he was moulded by his concept of the law.

The ideal which, before all others, weighed with Plunkett was a culmination of his own sense of authority and his personal role in the development of a society. Perhaps it can be summed up by simply saying that he had a sense of duty, an unflinching dedication to his task. But that simplification entails its own contradictions, for in his case it meant that an Irish Catholic aristocrat gave his temporal allegiance to the British Crown, worked unceasingly for the application of British law, and at the same time retained an inner core entailing allegiance to his God and his Church. Ultimately it was authority that came from above that appealed to Plunkett and the teachings of his Church bolstered that concept, whilst the developments of European civilization since the French Revolution had done little to lessen it. He was prepared to work for change and gradual progress in New South Wales. Years later Gavan Duffy said that

1. At the dinner in September 1830 Plunkett said 'to none is denied the opportunity of being useful, however limited his capacity, or humble his condition', Freeman's Journal, 15 May 1869.
Plunkett came as a young radical casting fear into the hearts of those in the Colony who stood by the old order. But Plunkett was not of the timbre of Young Ireland, and he did not need the Liberator to teach him that both social systems and men react on each other when they change. For Plunkett this meant that change must take place within the law, though he was never a mere legal pedant. To him the law in its essence came from God as the only source of authority. It was for men to shape it, to apply it and to preserve it and the young Solicitor-General bore heavily his own responsibility in that context. Men would wonder in the years to come at the way in which he tried to temper freedom with authority, liberty with the law. As for Plunkett, his course was set the moment he accepted a position in which his whole integrity and his ability to live at ease with his conscience depended upon the extent to which he balanced those aims.

The young Solicitor-General who landed in Sydney in June 1832 soon found that his conscience was not the only trial with which he had to live. To repeat at this time of day the opinion De Castella entertained of Maria Charlotte would serve no purpose unless it helped to illustrate the life of Plunkett himself. Like a good lawyer he would have rejected the evidence of De Castella as parti pris. Yet here and there in other sources there are indications that De Castella was not merely an idle gossipmonger. He wrote that Madame Plunkett was not easy to describe, so it is better to give his own words which, clouded with prejudice as they are, nonetheless convey some flavour of the Solicitor-General and his wife:

It would be difficult to meet two characters less suited to each other, but despite which they passed a long life together. She, despite her amiability and her irreproachable conduct as a spouse, was egotistical, fantastic and jealous; he was kind, devoted to her and always patient. They had no children and this was without doubt their great tragedy. Madame Plunkett spent herself in regret and used it as a pretext to oppose
all enterprise, all plans requiring stability. Demanding and changeable, if her husband proposed anything she didn't agree with, or was himself opposed to her wishes there would be an explosion and the poor man, admirable in his sense of duty and in adherence to Christian virtue, when his love had been spent in these scenes, would submit. However the tempests were for him alone; in the middle of one she could be calm and gracious to others, and as she was possessed of a truly brilliant intelligence and was for the rest an estimable woman, people blamed him, but her popularity did not suffer at all.

De Castella did admit that they had two things in common, their religion and music. Maria Charlotte was a first-rank pianist whilst Plunkett was an accomplished violinist. Together they played Mozart and Haydn and the classics they loved, and in that their union was perfect! But even here Plunkett had to score again in the 'Memoirs' for De Castella recalls that nothing was more charming than old Plunkett playing solo on his Cremona violin 'the plaintive and harmonious airs of Ireland'.

Whatever may be conjectured about her character it is a fact that Maria Charlotte suffered from ill-health, which necessitated frequent changes of climate either to Van Diemen's Land or to Victoria. Plunkett dutifully followed her and as dutifully tried to fulfil his engagements in Sydney. Ironically, after his death, she returned to Sydney and outlived him by twenty-five years. She died penniless and lonely, but as so often can happen her memory of John Hubert had softened with the years. It is perhaps cruel that the same history to which she looked to establish her husband's reputation should do some injury to her own, but in the end Maria Charlotte would perhaps have not wanted it otherwise.

Sometimes the void in a man's heart left by a marriage that is bondless can be filled by friends. In the case of Plunkett this does not seem to have been so once Governor Bourke left the Colony. There is significance in the fact that those
letters from Bourke now form practically all the personal remains of Plunkett. In them a bond is revealed in the urgency with which Bourke constantly asks Plunkett to come and stay with him, to 'eat his fish' with him on a Friday, to take the boat to Parramatta together, to ride with him and enjoy with him the dance he had organized on the green at Parramatta. There is even something sad in the way in which Bourke assured Plunkett that he would not 'on my account be classed amongst the ungrateful ones', as if they both had something to forgive. Before the end 'My dear Sir' had become 'My dear Plunkett' and the day came when Bourke told him of his plans for departure and his thrill at the thought that he would soon 'ride over the Pampas to Buenos Aires'.¹ In the papers there is a long silence of twenty years until Plunkett is again in communication with a governor, but the letters from Sir William Denison are business, with no references to boat rides, eating fish and enjoying the Parramatta races together.

In the eyes of De Castella Plunkett had only one failing, 'the very excess of his own disinterestedness'. He put down to Plunkett's too great a share of the 'indifference of the Irish for business matters' that he had not managed to become a wealthy land-owner when so many others with less opportunity had prospered. But Plunkett did attempt to become a land-owner, at least on a minor scale. He owned about 1200 acres near Wollongong between 1833-1839 when he sold the land at a profit. After that he never seems to have taken any interest in any section of the pastoral, mining or business interests of the Colony. His pension, from the time of his retirement in 1856, was sufficient for himself and his wife, and, apart from his personal belongings he left little behind him. Of his library nothing remains except a few books that he gave to the Parliamentary Library, Sydney. His friend and companion on the voyage to Australia, Father John

¹ See the Bourke letters in the Plunkett papers.
McEncroe, has been honoured with a grave in the crypt of St Mary's Cathedral for his services to colonial Catholicism, after having been buried next to Plunkett at Devonshire Street. Plunkett's remains were later transferred to Waverley where they now lie with those of Maria Charlotte and a few other relatives. The headstone on the grave bears no testimony to the fact that it is Plunkett's last resting place.¹

This thesis, therefore, is an attempt to trace the work of Plunkett in the Colony of New South Wales. It is chronological for the precise reason that no other treatment is possible. Themes run through it, such as his legal work, his involvement with National education, his connection with the various governors and his work for his Church. But no single personal theme can be sustained throughout the period because it was a time of change in New South Wales with its transition from a penal to a free society. One general theme only underlies it all - Plunkett in the service of the Colony. Even in this it was impossible to sustain the thread over the last ten years of his life. New South Wales was a free society with responsible government after 1856, and by 1859 Plunkett had moved to the wings. The last chapter simply attempts to look at Plunkett as he tried, with little success, to adapt to a society he had helped to build.

John Hubert Plunkett had the good fortune to come to Australia at a unique period in the history of white settlement on this continent. Understandably, it has been customary to look closely at the early years of the penal settlement; at the exploratory drive through which the continent was forced to unlock its mysteries; and then to focus attention on the period when the nation became itself through federation. As a result the men and the events of those two periods have captured our imagination and many students of our history are inclined to look to one or

¹. I am indebted to Mr. G. P. Walsh for this information.
the other for their research and inspiration.

Yet an argument can be mounted that in Australia - over a period of roughly thirty years from, say, 1825 to 1856 - an experiment took place that has no equal in the annals of European civilization. For so long it was customary to pass quickly over the period in European civilization that scholars called the Dark Ages. Dark it was, but its darkness was largely a result of our ignorance, for during that time Europe was born out of the ruins of the old civilization of Rome and out of the new, vital energy that the barbarian tribes injected into a decaying structure. Throughout the period there was one constant factor at work - the Church. It is not surprising that the men who guided and shaped that civilization were civil servants turned clerics. Men like Gregory I, Ambrose and countless others whose names are now forgotten had retained the sense of tradition, of law, of justice, of dedication to a task that was not simply a thing of the Church but was also a heritage of the Greco-Roman past. These things they insisted upon, these things they taught to the tribes and a new field of force, Europe, emerged.

Is it too fanciful to see some faint glimpse of a similar dynamism at work on this continent? Who in human history had tried to build a civilized nation on the blending of the felon and the free? Who had taken up the off-scourings of a nation, given them a new land to live in, brought amongst them increasing numbers of free men and finally, but in this case so quickly, said: Go now and be yourselves? It happened so in Australia. Quickly a nation was built. It was civilized, free, prosperous but above all it had a heritage and upon that heritage so much else rested.

The heritage of course was that of Magna Carta, Westminster and the Common Law. Somehow it came about that men in this new continent began to understand that civilization does
not simply happen, but that it has to be worked for and paid for, and the price of dignity and freedom is respect and restraint. Who was it then that taught this lesson in Australia? Certainly the names of those in whom the authority of the Crown ultimately resided like Bourke, Gipps, FitzRoy and Denison must be remembered. Again, those who had the vision like Wentworth, Lowe and, in his lonely, erratic way, Lang will not be forgotten.

Nevertheless behind them were the clerks, and I use the word, remembering that in the Dark Ages the clerks were the repositories of civilization because they alone could read and write. Two of them come to mind, Edward DeasThomson and John Hubert Plunkett. For over a quarter of a century they both toiled unceasingly to impart to New South Wales the values and traditions they held so dearly. That they were forgotten when the new men came on the scene after responsible government is understandable. To anyone who knows the period in which they worked it is incomprehensible that the contribution they made could ever be forgotten.

Someone else must tell the story of Thomson. As for Plunkett, the problems of this thesis have been intensified by the fact that he had to be so many things - civil servant, lawyer, politician, educator, advisor to the Crown. But, if the variety of Plunkett's roles has aggravated the task of projecting him, another factor has simplified it. In the whole of his residence in New South Wales Plunkett was a figure of unity, stability and quiet strength. He shunned all that was divisive whether social, religious or political. To him the common sharing of human dignity and a Christian tradition, overflowing in civic values of decency, honesty and above all respect for the concept of law, was enough to unite all classes and build a mutual framework for the future. It is not easy to apply to

1. To Plunkett it would have meant much that another colonial administrator was baptized with his name - John Hubert Plunkett Murray. It was Terence Aubrey Murray's way of remembering a close and loyal friend.
Plunkett tags such as liberal, conservative, democratic and the like, or their opposite as the case may be. It is perhaps enough to say that to those who needed him in New South Wales he was, at all times, with all his limitations, everything he could be.

In a sense this story is as much about the men with whom Plunkett worked, and the times in which he worked, as it is about Plunkett. Certainly the paucity of sources on him as a man has contributed to that fact. At the same time it is a tribute to Plunkett that it should be so because in a very real sense the New South Wales in which he lived owed much to him. It has been my loss as much as it will be to any reader that Plunkett rarely comes alive in the narrative. No attempt has been made, no attempt can be made to see him in his home, to dwell on his own innermost thoughts and hopes because Plunkett did not leave any record of these things. Some scholar of the future may perchance discover Plunkett the man; some scholar, irritated by the gaps in this work, may till this field again and reap a richer harvest. History will award its own accolade to Plunkett if he deserves it. For my part it has been reward enough to catch a glimpse of a man who, whatever else, was just.
The year 1832 opened on a note of optimism in the Colony of New South Wales. After the vicissitudes of drought or flood of the former years, 1831 proved a genial season and October of that year saw the departure of General Darling. His term of office was marked by colonial conflict, party spirit and at times effervescent patriotism that threatened to interrupt the slow progress towards a stable society that the late twenties had promised. The arrival of Governor Bourke on 3 December 1831 seemed to provide the opportunity for social harmony and stability that would eventually help the transition from a penal to a free society. Despite the continued arrival of convicts in the Colony, to the number of 2800 in 1831, there were signs that other sources of immigration were being tapped in that year in the persons of a handful of free 'females' who arrived on the Palambam, and then 140 'individuals' came by the Stirling Castle from Scotland, 'on the principle that each shall pay his passage after a reasonable time has elapsed'. Thus the human element needed to make further development possible was beginning to arrive in the Colony. On the other hand the irksome regulations concerning the disposal of land, the cumbersome legal system, the painful attempts at integration between prisoners and free settlers were all elements that made thinking men ponder the possibility of a social system that would mark New South Wales as a normal, prosperous and free Colony within the British Empire.

1. SH, 30 January 1832.
The growth of a penal settlement to a free society that began in the first half of the nineteenth century in New South Wales was a combination of many disparate elements. On the one hand there were those who had come to the Colony as the custodians of a convict society. Many of them had begun to understand the opportunities for development and personal enrichment that New South Wales offered. The majority were unable to think beyond the dependency of the free upon the convicts as the vital link joining prosperity to a work force. A few had voiced their idealistic aspirations towards a society of free men untainted by the mark of the chain or convict uniform. From amongst those who had come to New South Wales involuntarily there were some who, by expiration of time, pardons, or tickets-of-leave had been granted the necessary freedom to make use of their own ingenuity and business acumen. Some had used their freedom well and, except for the dark strain of their past, were little distinguished from the free settlers. But the fact that the past origins of the Colony were still evident, and that it remained a penal settlement into the 1830's, made progress towards a free society both arduous and slow.

In the minds of some few there was the conviction that aspirations and ideals were valuable, indeed needful assets in the drive towards a free society, but who tempered that conviction with the thought that no ordered, peaceful society had ever been built on those ingredients alone. An ordered society must, on the one hand, reflect the transition of aspirations and ideals into a viable political, legal and economic system, and on the other into a combination of social structures that, perforce through compromise and argument, would allow free men to live together in harmony. The narrow system of government inherited, and only slightly developed since the days of Governor Phillip, could not contain the society of New South Wales forty years later. Yet the slow and painful progress already made proved that much thought, foresight and experience
would be needed in the men who would not only preside over the development of the new order, but in some senses shape it.

One of these men was John Hubert Plunkett who was appointed Solicitor-General of New South Wales in October 1831. He sailed on the Southworth from Cork on 6 February 1832 and came ashore at Sydney on 14 June 1832. He was accompanied by his wife, Maria Charlotte, his sister Amelia, his friend Father John McEncroe and a female domestic. He took up his duties that same week.

From the very beginning of his service in Sydney Plunkett was in a somewhat invidious position as he had been appointed as Solicitor-General in place of Edward McDowell, who had earned the displeasure of the Colonial Office by delaying his departure from England for a year, and was consequently relieved of his post. Bourke, however, thought highly of McDowell and had him appointed as Solicitor-General of Van Diemen's Land, whilst Plunkett, who took over his position, had yet to prove that he was a worthy replacement. A factor operating in Plunkett's favour, however, was the increasingly apparent inability of John Kinchela to discharge his duties as Attorney-General with satisfaction. In September 1832 Bourke drew Secretary of State Goderich's attention to Kinchela's deafness.

1. B.T. Balfour to Plunkett, 8 October 1831, offering the appointment in the name of Goderich. Plunkett Papers.
2. SH, 18 June 1832.
and although he remarked that Plunkett had not been long enough in the Colony to be commented on, he said, "He appears very well disposed, and, having more talent for public speaking than Mr Kinchela, he would I think fill the post of Atty. General...with more advantage to the Government". Public opinion, Bourke, and perhaps Plunkett, underestimated Kinchela who did not relinquish the office until 1836, and then to take a temporary post as acting puisne judge. Despite his deafness, he proved his fitness for the Supreme Court post, but he left behind a fund of stories, centred upon his infirmity, that, while giving enjoyment to later ages, earned a horse-whipping for at least one of their authors.

Bourke was pleased with the state of the Bench in 1832. It consisted of Chief Justice Francis Forbes and two puisne justices, James Dowling and William Burton. Bourke told Goderich, "I have no doubt the Court will then give general satisfaction in the Colony. Your Lordship need not now apprehend the revival of any differences of opinion between this Government and the Bench". He was perhaps unaware that the close bonds between the Government and Bench were already a source of irritation to some inhabitants of the Colony. Bourke knew, however, that Goderich was concerned at the previous lack of 'good understanding' between the Government in New South Wales and the Heads of Law. Goderich said that it was notorious 'that those Persons, who of late filled the Chief Law appointments of the Crown in the Colony, have not proved themselves equal to the

1. Bourke to Goderich, 19 September 1832. HRA, 1, XVI, 745-6.
2. On one occasion Kinchela thought a witness was referring to a person named Peter when in fact Peter was a bull. Kinchela asked, 'Well sir, and what did Peter say?' See James Mudie, The Felony of New South Wales, second ed. Walter Stone (ed.) (Melbourne 1964) pp. 148-9. Kinchela's son, James, later horsewhipped Mudie for ridiculing his father.
3. Bourke to Goderich, 19 September 1832, HRA, 1, XVI, 745.
discharge of the arduous duties which belong to their situation, and hence an undue advantage has been given to those who were opposed to them in the Colonial Courts. He did not doubt the fitness of Forbes as Chief Justice, but hoped that he would now be aware of 'the importance of acting cordially with the Executive Government'. Goderich furthermore hoped that the appointments of Kinchela and Plunkett would alleviate matters. Yet to Plunkett, as the junior amongst the Crown law officers, a situation in which harmony prevailed between Government and Bench seemed favourable to the development of those ideals of justice that he thought should be fostered in the Colony. He had learnt on his arrival in the Colony that in the past 'the Governor and the Chief Justice did not speak to each other'. It was a situation that he was pleased to see changed, although he deplored the presence of the Chief Justice in the Executive and Legislative Councils. But it meant that, as never before in the Colony, conditions in the legal profession were favourable to genuine progress.

Two things in particular needed attention. By the early thirties, if not earlier, it was apparent that a new jury system was required: at the same time, in order to preserve and ameliorate the legal system, forms of order and uniformity had to be brought into the whole framework of both Supreme and inferior courts. The system that had grown in the Colony during the previous forty years was a piecemeal, but genuine, attempt to adapt the processes and traditions of British law to a penal colony. By the 1830's it was clear that the development of the Colony rendered it imperative that the legal system

1. Goderich to Bourke, 30 March 1832. Despatches to Governor of N.S.W. p.161 ML. In the opinion of Sir Victor Windeyer Plunkett was 'the first law officer of the Crown in the Colony who was fully competent for his duties'. See J.M. Bennett (ed.) A History of the New South Wales Bar (Sydney 1969), p.52.


3. Ibid.
be further adapted to the requirements of a society in which the element of free settlers and native-born tended to predominate. Plunkett was particularly adapted to participate in this process because, coming as a young man to the Colony, he shared none of the prejudices that long residence had fostered in some. He was not a legal theorist, political reformer or social idealist, but the traditions and spirit of Bentham and Burke were part of his mental framework and he was prepared to align himself with Bourke and Forbes in the work of social, political and legal development.

The argument about trial by jury had gone on for thirty years. As early as 1803 King after consideration had rejected it. In 1807 Bligh was cautiously of the opinion that it ought to be introduced, provided ex-convicts were excluded. Ellis Bent proposed in 1811 that a Supreme Court be established and that a jury system be granted in criminal and some civil cases. Macquarie was a vigorous champion of both the jury system and the eligibility of ex-convicts to serve as jurors, but the Charter of Justice that came into effect in 1814 made no provision for any extension to the system. Modifications were introduced in 1823 when a jury of seven commissioned officers, nominated by the Governor, was prescribed in criminal cases; and in civil actions a jury of twelve was allowed when both plaintiff and defendant requested it, but it could only try issues of fact under the direction of the judge, and its members had to be property-holders in the Colony. The same Act of 1823 left the way open for further development in the jury system, but nothing was done; and in 1828 the government of the United Kingdom saw fit to give to the colonial government, in the form of the Governor and the Legislative Council, the power to spell out in detail the nature of a new system.

Upon Bourke’s arrival in the Colony in December 1831 he found the jury system in confusion. Whilst himself in favour of a more liberal framework he realized that no progress had been made since the matter had been left in the hands of the local authorities; so he laid a Bill before the Legislative Council in May 1833 whose major feature gave a defendant the right to be tried before a jury of seven naval or military officers or before twelve civil inhabitants of the Colony.  

Despite serious opposition from the anti-emancipists the Bill was passed, but there the matter stood, because of the continued opposition of the anti-emancipist party within the Legislative Council and the Colony, and the consequent reluctance of Downing Street to contemplate any further liberalisation of the system. It was not until 1839 that George Gipps was able to abolish military juries entirely, but the step taken under Bourke’s direction, with the active assistance of Forbes and Plunkett, was decisive.  

Bourke’s legislation had to be translated into actuality before its effect could be judged. In this case men opposed to any system that would further strengthen the emancipist party had to be persuaded to cooperate outwardly, if not inwardly, jury lists had to be prepared and the citizens in general had to be educated to respect and to use the system so that its dignity and value might be preserved. By January 1834 Forbes had taken action on the first matter when he fined Robert C. Lethbridge, Philip P. King, Charles Moore and Samuel Lyons one pound each for non-attendance as jurors - the first three for the second time in the session.  

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1. SH, 30 May 1833.  
2. Twenty three years later Plunkett claimed publicly that he had fought alone for 'the glorious privilege of trial by jury'. Whether this was a mere hyperbole and whether he was referring to 1833 or to 1839 are now impossible to establish. See SMH, 13 March 1856.  
the anti-convict element in society, with the **Herald** as its voice, belaboured both the Government and the law officers for the jury system itself, and the manner in which the Courts conducted their business. The **Herald** wanted the British Government to 'depute some legal Hercules to investigate the manner in which the Courts of Law in this Colony have been conducted for a number of years' because the 'existing Law system in New South Wales is an insult to common sense and common honesty', and, as a result, it was often dubbed 'The Horrible Law System'.

Surprised at the excesses of colonial journalism, Plunkett denounced the editors of the **Herald** and prayed for a rule of Court to restrain them from their attacks. Whilst he avowed his veneration for the freedom of the press, which he considered was as 'essential to the existence of the political constitution of the country, when preserved within the bounds prescribed by law, as the air he breathed was essential to the support of life', he nonetheless made it clear that he expected a prompt *amende honorable* without which he would proceed to further action. The **Herald**, on 2 June, proffered its muted apology with its tongue in its cheek. It asserted that to *bring the Law or the Court into contempt, would be an act worthy of Bedlam; an act we should be the first to resist, and shall ever be ready to oppose it with the means in our possession*. Plunkett withdrew his application to file a criminal information, hoping that the editors of the **Herald** had been given 'a salutary warning', whilst the Sydney Gazette concluded that he deserved 'nothing less than the thanks of the entire community for what he had done in this instance'.

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2. Ibid., 19 May 1834.
3. Ibid., 2 June 1834.
4. Sydney Gazette, 3 June 1834.
5. Ibid., 5 June 1834.
The press may have proved a minor source of irritation in the attempt to reform the legal system, but the public itself had to be involved; in particular Jury Lists had to be drawn up to make the system effective. In February 1834 a woman requested trial before a Military Jury. As no officers were present the case had to be postponed. In March Plunkett moved before the Supreme Court to file a Criminal Information for a conditional order against the Sydney Police Magistrate for not having returned a Jury List for that year. He regarded it as a neglect of duty on the part of the Magistrate 'which concerns the whole community'. Forbes and Dowling agreed with him, but Burton was opposed and the motion was not granted. Plunkett retorted that 'he could not go to trial with any of the cases, the Juries not being legally constituted'. Bourke promptly brought in a Bill on 13 March to give further time to prepare and settle the Jury Lists and warned Police Magistrates to do their duty or suffer the penalties of the Law. Even then the Lists were ill prepared; they had incorrect Christian and even wrong surnames; many jurors absented themselves. The result was that the system itself was deemed by some 'a public nuisance'. Plunkett himself, acting as a Magistrate, assisted to draw up the Jury Lists for Sydney. In the opinion of James Macarthur his initiative may have been admirable, but it was none the less useless because the system was a failure. But then Macarthur was himself an opponent of the system, and his proposals for the readmission of former convicts into free society read like a medieval penance book. Some jurymen, when

1. SH, 13 February 1834.
2. Ibid., 3 March 1834.
3. Ibid.
4. Ibid., 20, 24 March 1834.
5. Ibid., 8 May 1834.
they did appear, were in no condition to take an active part in the proceedings as, for example, the man whom Burton fined five pounds for being drunk in Court. ¹ Those attending the Courts who were not in complete possession of their senses may indeed have found it difficult to follow the proceedings at times. In February an elderly gentleman was giving evidence that appeared unintelligible. The Judge instructed the crier to tell him to repeat it. 'You must not begin your story in the middle but at the end', said the crier.²

The minor details of legal procedure caused as much irritation to those not equipped to understand them as their violation did to those whose duty it was to enforce them. Burton fined Sir John Jamison and Major George Druitt fifty pounds each because they sent only copies of the proceedings at a Police examination, rather than the originals.³ The Sydney Gazette commented that it was an absurdity to expect magistrates 'to know the contents of the "Statutes at Large", as perfectly as they know the Lord's Prayer' and a magistrate wrote to say that he knew of only one original deposition being sent over a period of many years.⁴ Plunkett, however, had apparently decided that the point had been made, as he successfully moved before Forbes on 24 February that the fines be remitted, observing that the object of showing that the magistrates were required to send the originals had been attained.⁵

Many people were determined to ensure that the jury system admit only 'men of KNOWN MORAL CHARACTER', men who were 'respectable' to sit, ⁶ but even had this desirable end been attainable

¹. SH, 15 May 1834.
². Ibid., 24 February 1834.
³. Sydney Gazette, 4 February 1834.
⁴. Ibid., 18 February 1834.
⁵. Ibid., 25 February 1834.
⁶. Ibid., 8 and 15 February 1834.
it would scarcely have satisfied the aspirations of some. An aboriginal named Jackey came up for manslaughter before Forbes in August 1834, with Plunkett prosecuting. He was asked what jury he wished to be tried by and he replied 'black-fellows'. This the Court was not empowered to grant, the limit of choice being between a Military or Civil Jury. Jackey was then shown a soldier in uniform and he promptly said 'no soldier', so a Civil Jury was empanelled. Forbes, who was pleased when Plunkett recommended mercy, took the occasion to remark that other cases had arisen before him in which Aboriginals had been hung for an infringement of 'our laws'. He then observed, perhaps unmindful of Jackey's manifest disabilities before the legal system, that 'It was...as much for the benefit of the black as the white portion of the community, that the protection of the law should be equally afforded them; it was a reciprocal protection, founded on the dictates of policy, justice and humanity'.

Four years later, when he was Attorney-General, Plunkett proved that he was firmly committed to Forbes's statement of principle when he prosecuted in the Myall Creek massacre case. But even as early as 1834 he was uneasy about legal procedures regarding Aboriginals. He successfully pleaded for mercy on behalf of one known as Neville's Billy, who was condemned to death on the statement of a man who had died before he could appear in Court, while, despite the fact that they were present at the alleged murder, the evidence of the companions of Neville's Billy could not be received because of their incompetency as Aboriginals to swear an oath.

Plunkett was constantly in difficulty throughout his

1. Ibid., 12 August 1834.
first years in the Colony in attempting to tighten up the workings of the legal system. He felt that he was overworked and, at that, in duties that properly speaking were not his own. He was ill-pleased at having to do a great deal of Kinchela's work in Court and pointed out to Secretary of State Stanley in November 1833 that between 1 August to 5 September he had worked on 91 cases obtaining 64 convictions of which 26 were capital. Whilst he himself dealt with all the proceedings with which the Crown was concerned that did not belong to the Criminal Court, he received no help from either Kinchela or W.H. Moore, the Crown Solicitor, although Bourke had asked them to help him. Despite the amount of work he was doing he was paid the normal salary of £800 p.a., even though he was able to point out that had he been paid ordinary fees he would have been able to make £4,000 in a period of six months, for which he in fact received £460. Bourke, constantly given occasion to keep in mind the necessity of curtailing expenses, did not recommend any increment in salary for Plunkett though he recognized that the Solicitor-General was doing most of the Attorney-General's work. The salary of the Attorney-General was £1,200, but Bourke observed that Plunkett was able to make something extra from the Department of Customs when he prosecuted for breaches of the Revenue Law and had in fact made £189.1.2 in the past year.¹

Plunkett was unfortunate in that he had come to the Colony when, apparently, the days of plenty were over. Bourke wrote to Secretary of State Goderich in September 1832 forwarding a request from Plunkett soliciting a grant of land and a building allotment near Sydney.² Stanley refused the request with regret,

¹. Bourke to Stanley, 5 December 1833 and Plunkett to Stanley, November 1833. HRA, 1, XVII, 282-86. See also enclosures 1-3, pp.286-94; also SH, 17 March 1834.
². Bourke to Goderich, 22 September 1832. HRA, 1, XVI, 751.
but it was impossible to comply with it given the Regulations. He asked that no further similar applications be sent on.\(^1\) Plunkett had taken up residence in Hunter Street and had invested in some land at Mount Kembla, and, unlike most of his investments, it proved fortunate.\(^2\) He was moderate in his applications for male convicts and does not appear to have used convict labour on his land. In 1832 he applied for one convict, who was assigned to him. Forbes in the same year applied for ten and received nine. Edward Deas Thompson applied for six and received three, whilst W.C. Wentworth received fifteen after twenty-nine applications.\(^3\) Even in the instance of the convict assigned to him it seems that Plunkett was unfortunate. Whilst he and his wife were absent one of Plunkett's servants was murdered at his home on 26 December 1833. The convict assigned to Plunkett, Bryant Kyne, was charged with the murder and Plunkett conducted the case against him, perhaps in an attempt to mitigate the severity of the sentence. He spoke favourably of Kyne in court on 12 January 1834, but to no useful purpose as a Military Jury found him guilty before Burton who passed the death sentence. Kyne was hanged three days later with the Rev. William Cowper in attendance.\(^4\)

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1. Stanley to Bourke, 15 April 1833, ML, and Bourke to Colonial Secretary, 28 August 1833. In Letters, Land, 2/7951, NSW.A.

2. Letter to The Echo signed 'An Englishman', 22 March 1878, p.5. See also Hon. James Gormly, Gormly's Reminiscences, 3 vols. unpaginated, ML. Plunkett and Gormly's father, Michael, were school-fellows in Ireland. Gormly said that Plunkett sold the land, about 1100 acres near Mount Kembla in 1839 at a profit. See Notice of Sale in Plunkett Papers.

3. See Return of All applicants for male convicts from 1 January to 31 December 1832. It is explained that the high numbers were often a result of repeated applications, 'which some renew nearly monthly'. N.S.W. Governors' Despatches, vol.22, 1833, pp.617-708, ML.

4. See SH, 13 and 16 January 1834 and Sydney Gazette, 11 and 14 January 1834. Kyne was 'respectably connected in Ireland' and was a Justice of the Peace there. SH, 16 January 1834.
Throughout 1833 Plunkett was constantly objecting to being called upon to engage in duties as an attorney. 'I am a Barrister by profession' he proclaimed, and to have to attend to the details and practice of an attorney 'entirely prevents the undisturbed reflection, study and constant reference to Books' necessary to a barrister. He hoped that soon barristers and attorneys would be confined to their respective professions.¹

It has been intimated that Plunkett had a pecuniary interest in the matter, in that his own private practice was seriously affected by his work as an attorney on behalf of Kinchela.²

Plunkett, however, was one of many influential figures, including Forbes, who thought that a division of the legal profession would prove beneficial. The division came into effect in November 1834 with a mixed reception. The Herald had 'looked upon the arrival of a new Attorney as a public evil', and regarded them as a fourth estate 'at the head of the rabble of Sydney' who practised their own form of 'Botany Bay logic'.³ Thus while the Herald rejoiced in the division, others, led by the Australian were not so sure; barristers were seen as a grasping and selfish clique.⁴ Lady Forbes later asserted that the separation did not have 'the cordial support of Sir Francis', and before his death he said that his assenting to it was one of the most injudicious acts of his life.⁵ It was, however, a step in the clarification of the legal system that had long been enforced in England and Ireland and, despite the adverse reaction to it in some quarters, it ultimately proved beneficial.⁶

However if Plunkett had hoped that it would relieve him of some

¹. Plunkett to Colonial Secretary Macleay, 6 April 1833. HRA, 1, XVII, 287-92.
². See C.H. Currey, Sir Francis Forbes, p. 446.
³. SH, 24 November and 18 December 1834.
⁴. For a full account of the division see J.M. Bennett (ed.) A History of the New South Wales Bar, pp. 32-5, 44-51, 60-63.
⁶. See Plunkett's opinion in Australian, 3 July 1833.
of his enforced duties as an assistant to Kinchela he was
mistaken. In the event Bourke asked Plunkett to continue to
assist Kinchela, allegedly because the Attorney-General had
never voted against Bourke's measures in the Legislative
Council, 1 while Secretary of State T. Spring Rice wrote to tell
Bourke to see that Kinchela helped Plunkett in work to which
'no real impediment may exist by reason of his infirmities'. 2
It was a vicious circle that affected Plunkett frequently in
the years to come; it arose from the natural delay in decision-
making in Downing Street when expense was involved or patronage
was feared, the constant necessity of the Colonial authorities
to execute all decisions on appointments through Downing Street,
and Plunkett's own inability to refuse to undertake work when
it was a matter in which he deemed the good of the Public
Service was involved. 3

The work of the Courts was constantly hampered by ineffic-
icieny, neglect and perhaps, at times, ill-will. Plunkett was
concerned at the 'uncertain sittings' and wanted at least a
week's notice of postponement, and then only on 'strong and just
grounds'. On one occasion he complained about a postponement
of the Supreme Court from a Saturday to a Tuesday 'as many of
the professional men engaged in the early causes on Monday were
engaged'. 4 Dr Robert Wardell was involved as Counsel in a
case on the Monday in question, but he was also engaged to play
cricket on that day. Hence the postponement that so nettled
Plunkett, although it proved fruitless for Wardell as it rained
on the Monday and there was no play. 5 Even the pressing problem
of a gaol over-flowing with prisoners had to be considered. In

1. SH, 17 March 1834.
2. T. Spring Rice to Bourke, 15 November 1834. HRA, 1, XVII,
580-3.
3. Ibid., p.581.
4. SH, 3 April 1834.
5. Ibid., and Sydney Gazette, 5 April 1834.
January 1834, at Plunkett's suggestion, a special Session of the Supreme Court was held of the cases of convicts on capital charges 'for the purpose of clearing the Gaol'. To what degree this method of providing further accommodation was successful is uncertain, but by early July there were still 119 persons awaiting trial.

In 1834 the very system upon which the Colony had been built was exposed to the questions and doubts that any society must face when there are men within it determined to reform it. Whilst those like Bourke, Forbes and Plunkett were committed to the ideal that before God and the law all men are equal, other men in New South Wales admitted the ideal for all men except convicts and ex-convicts. Others thought that the Gordian knot that held the society of the Colony fast could be cut by the simple expedient of stopping transportation. The Herald said 'we have outlived our penal character, and the system must be changed, without delay, that has flourished for forty years. The penal farce must be brought to an end, ...' Throughout the year it made the most of every possible convict misdemeanour so as to 'open the eyes of the British Government to the present working of the convict system'.

The Sydney Gazette approved of transportation as the 'surest hope of a radical transformation of character' for some classes of offenders. It wanted Bourke to deal with any instance of 'insubordination' on the part of the convicts, but

1. Executive Council, Minute 2, 17 January 1834. 4/1518 NSW.
2. SH, 3 July 1834.
3. Ibid., 13 February 1834.
4. Ibid., 24 February 1834. See also 27 February, 6 March, 28 April, 12 May and 14 July 1834. 'Mercutio' in a letter to the Herald wrote 'a Settler in New South Wales is... the most degraded, the most abject, the most pitiable object in the wide spread dominions of Great Britain - aye, hear it Mr. Stanley! - hear it Archbishop of Dublin! Ibid., 14 July 1834.
5. Sydney Gazette, 1 February 1834.
it deplored Stanley's allegedly saying that he would make 'transportation worse than death', and it saw Bourke as the true successor to the mantle of Macquarie. By some the Gazette was called 'the Government Mouthpiece' and by others the 'Prisoners' Journal'. To those who thought that Bourke and his friends in the government were the friends of the convicts, the paper was both 'Mouthpiece' and 'Journal' and its assurance that Plunkett never relaxed in his duty when he believed that 'guilt really exists' did little to alleviate the judgment of the Herald which saw him as an ally of Bourke.

The same year, 1834, provided evidence to both the friends and the foes of transportation that it must either be terminated or reformed. In December 1833 six convicts, assigned to a man who held land at 'Castle Forbes' on Patrick's Plains rose in revolt. Their master, James Mudie, believed emphatically in 'an unrelaxing system of restraint on the Convict population' and he practised that restraint with vigour. The six men were tried in Sydney for robbery and maliciously shooting at John Larnach, Mudie's son-in-law. They were found guilty and five of them including a youth of sixteen were hanged - two at 'Castle Forbes' pour encourager les autres. The sixth, David Jones, was given 'hard labour in irons at Norfolk Island for life', a fate that possibly induced him to envy the lot of his former fellows.

1. SH, 13 October 1834.
2. Sydney Gazette, 8 March 1834 and SH, 7 August 1834.
5. Executive Council Minute 41, 12 December 1833, 4/1518 NSWA. It is apparent from the source, which contains a report on the case by Forbes, that Plunkett was very active in prosecuting the six men of 'Castle Forbes'.

The feelings that were stirred up within the Colony and exacerbated by the press prompted Bourke to commission Plunkett and T.A. Hely, Superintendent of Convicts, to go to Patrick's Plains and investigate the charges made against Mudie and Larnach. To the Herald Plunkett and Hely were 'an unknown and nondescript Commission', but their findings, which deemed the charges unproven in the main, still moved Bourke to reprove both Mudie and Larnach for some of their behaviour, and not to reappoint Mudie to the magistracy. Mudie was enraged, a pamphlet war ensued, a wedge was driven between Bourke and his administration on the one hand and many wealthy settlers on the other that was never healed, and the stage was set for the eventual Select Committee on Transportation in London in 1837.

In this instance Plunkett was prepared to do his duty as a civil servant of the Crown, both as Solicitor-General actively engaged in the prosecution of the convicts who revolted at Patrick's Plains, and in helping to pin down Mudie and Larnach for their behaviour. But he saw the case as a manifestation of a malaise in the whole legal system, and it provided him with a further opportunity to get on with a work he had decided upon in his first few months in the Colony - the provision of a handbook that would guide the magistrates in the performance of their duties.

In August 1832, 3 Will. IV. No. 3 became law. Drawn up by Forbes and Plunkett, and favoured by Bourke, it was an important step in that it substantially reduced the excessive powers of Justices of the Peace to inflict punishment. The Act was a humane and enlightened step, although it brought odium on

1. SH, 11 August 1834.
4. Despite Plunkett's investigation into his behaviour, Mudie spared him from the unrestrained condemnation he meted out to all those connected with the administration of law under Bourke. See James Mudie, The Felonry, pp. 147-8.
Bourke and his associates from that section of the community that believed in the necessity of strictly repressive measures against the convicts. At the same time the Act had clarified the jurisdiction of Courts of Petty Sessions, and of a Justice of the Peace sitting alone. Bourke, however, was still uneasy about the excessive powers that remained in the hands of the magistrates, especially those outlined in section 16 of the Act, which gave any two or more justices the power to take cognizance in a summary way, i.e. without a jury or any technical forms of procedure, of a variety of misdemeanours including 'disorderly or dishonest conduct'. In his opinion it was a power that would be 'out of place in any but a Slave Code', and by it 'a most serious trust is here reposed in the Magistrate'.

In order to facilitate the manner in which the magistrates carried out their 'most serious trust' Plunkett worked throughout 1833 and 1834 on the publication of a book that would guide the Justices of the Peace in their duties. Plunkett found on his arrival in the Colony that 'the only Law Book for reference at the Several Benches throughout the Colony, or within the reach of the Magistrate for years past, has been the Edition of

1. Bourke to Stanley 15 January 1834. HRA, 1, XVII, 313-30 and enclosures pp.331-41. This despatch from Bourke forms perhaps the most important summary of his judgment on the system of transportation, convict discipline and the powers of the magistrates. The results of the Corporal Punishment Enquiry instituted by Bourke in 1833 are found in Col. Sec. Bundle 4,2189.1 NSW. One instance of the severity still in force is seen in the report from E.A. Slade, 1 October 1833, giving his opinion that two regular scourgers were necessary at the Hyde Park Barracks 'it being impossible for any scourger to duly administer more than 150 lashes in the course of one day'.

2. John Hubert Plunkett, An Australian Magistrate; or, A Guide to the Duties of a Justice of the Peace for the Colony of New South Wales. Also, a Brief Summary of the Law of the Landlord and Tenant. (Sydney 1835). Plunkett was encouraged by Bourke to undertake the work and 50 copies, costing £112.10.0, were bought by the Government to send to the Courts of Petty Sessions throughout the Colony. See NSW
Burn's Justice, published in the year 1825. Richard Burn first published his Justice of the Peace and Parish Officer in 1755 in two volumes. The work begun by Burn quickly assumed gargantuan proportions and the 30th edition in 1869 ran to five volumes with about 7,000 pages in all. It is doubtful whether many magistrates in the Colony possessed a copy of Burn, and, if they did, whether they had the learning, inclination or time to read it. To Plunkett it was clear that 'In no part of His Majesty's Dominion are the duties that belong to the Magistracy more arduous and complicated, than they are in this Colony, and, upon their proper discharge, depends very much the well being of its anomalous community'. Moreover he knew that Burn's edition of 1825 was published before Peel's Acts and the Act of Lansdowne, that the Acts of Council were very extensive and that only Francis Forbes had a complete compilation of orders and proclamations for the Colony, and, at that, in manuscript form. Plunkett therefore spent the time he could spare from his official duties, in the event mostly after midnight, writing his An Australian Magistrate. The authorities he used were extensive - Hawk, Hale, East, Taunt, Starkie, Archbold's Criminal Proceedings, and others; but in the main Burn was his major source. A comparison between Burn and Plunkett under the

Governors Despatches vol. 25, 1835, pp.164-5, ML, and Plunkett to Colonial Secretary, 1 April 1835, Attorney-General's Letter Book, 1 April 1835, p.156, 4/473 NSWA.


2. Ibid.

3. The volume of 637 folio pages was presented to the NSW Parliamentary Library in 1863. It bears the inscription 'This book was given to me by Sir Francis Forbes in the year 1835. I now present it to the Parliamentary Library as a valuable Record of the Matters therein contained. J.H.Plunkett, 9 February, 1863'. Parliamentary Library of New South Wales, Sydney.

4. He made this claim in his preface.
title 'Murder' bears this out.\(^1\) One interesting departure from Burn that Plunkett was to insist on in later years concerns those who are in 'The King's peace'. 'The Aboriginal Natives of the Colony are within "The King's Peace", and the unlawful killing of them is as much murder as the killing of any other of the King's subjects'.\(^2\)

An Australian Magistrate was never re-edited by Plunkett because of 'his numerous avocations'.\(^3\) The second edition, done by Michael Murphy, a Police Magistrate in New Zealand, appeared in 1840. Still called Plunkett's Australian Magistrate it was re-edited by Edwin C. Suttor in 1847. In 1860 W.H. Wilkinson brought it out again under his own name but he retained the title Plunkett's Australian Magistrate. He referred to it in his preface as 'the well known Australian Law Book "Plunkett's Magistrate"; and noted that Plunkett was consulted whilst the work was in progress, and approved of it.\(^4\) In 1866 and 1876 Wilkinson brought it out again, but by the latter date the title was changed to The Australian Magistrate, presumably because Plunkett died in 1869. The preface to Wilkinson's first edition, in which Plunkett was acknowledged was, however, reprinted. By the fourth edition in 1881 Plunkett was entirely forgotten. Unlike Burn, whose work under his name went into fifteen editions after his death, Plunkett was not remembered as the author of the first Australian law book. Like Burn, however, The Australian Magistrate grew with the years so that by its seventh edition in 1903, under the names of W.H. and F.B. Wilkinson, it

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had grown to 1182 pages and a supplement of 382 pages was added in 1911. The Aboriginals were back however. Dropped from the 1860 edition, by which time the point that they were under the King's peace had presumably penetrated to the magistrates even in the remote interior, they made a return in 1903 where it was noted that it was illegal to supply them with liquor. This was included perhaps unmindful of the fact that in the old manuscript of Francis Forbes a proclamation of 7 November 1818 was noted in which it was forbidden to give Spirits 'or what they themselves called "Bull"' to the Aboriginals.

The Sydney Gazette had long since expressed forthright views on the state of the magistracy. 'The great bulk of the population has been for years under the absolute government of the magistracy'. Many magistrates were 'men who have never been humanized' and their Courts, in which they handed out 'barbarous punishments' were regarded as Courts of 'in-justice'. Thus when Plunkett's book was first announced it remarked that it was a 'long wanted' work and stated that 'we know of no work which has

1. The respective editions after the first were:
   (1) M. Murphy, An Australian Magistrate. (Sydney 1840).
   (2) E.C. Suttor, Plunkett's Australian Magistrate. (Sydney 1847).
   (3) W.H. Wilkinson, Plunkett's Australian Magistrate. (Sydney 1860).
   (4) W.H. Wilkinson, Plunkett's Australian Magistrate. (Sydney 1866).


4. Sydney Gazette, 8 April 1834.
hitherto issued from the colonial press which will prove more generally beneficial'. The fact that Plunkett's book was the first practice book, that it helped to bring a much needed degree of uniformity into the inferior Courts, and that in its essence it was so long in use, indicated that his attention to duty, perhaps beyond the call of duty, was of great benefit to the young Colony.

The other event of 1834 that shocked the whole community was the murder of Robert Wardell on his Petersham estate on 7 September 1834. To Plunkett it proved the necessity of a better police force, whilst the Monitor thought that a great deal would be achieved if all assigned servants were made to wear a distinctive mark on their dress. It was assumed by all that the murder was done by run-away convicts, which proved in the event correct. The Herald took the occasion to attack 'the Convict System, with its attendant Satellite, the Convict Government'. Both were judged as 'bad' and their speedy removal was called for. Plunkett, after failing to obtain an early trial, prosecuted, and with the help of an informer secured the conviction of two men for the murder. John Jenkins, who actually shot Wardell, said from the scaffold that he did not do it for material gain but because his victim 'was a tyrant'. He invited others to follow his example. There were calls for 'an unrelaxing system of restraint on the Convict population' and Bourke and his closest advisers were alleged to be disliked by many of the 'influential and wealthy inhabitants of the Colony' because of the leniency they showed to the convicts.

1. Sydney Gazette, 23 August 1834.
2. Ibid., 11 September 1834.
3. Ibid., quoted from Monitor, 10 September 1834.
4. SH, 15 September 1834. With some foresight the Herald saw transportation as 'the only obstacle to a House of Assembly'. Ibid.
5. Ibid., 25 September 1834.
6. Ibid., 13 November 1834.
7. Ibid.
8. Ibid., 13 October 1834.
Towards the end of 1834 Plunkett was suffering from 'a very serious and protracted indisposition'. He accordingly requested three weeks leave to take a change of air in the Goulburn district - 'the part of the country to which I am recommended to retire for a change of Climate'. Leave was granted and Plunkett left for Goulburn where he took the air and bought some land. Bourke however was satisfied with the work done by Plunkett during the first three years of his office in New South Wales. He wrote to the Secretary of State Aberdeen that since Plunkett's arrival he had 'had such experience of the Solicitor-General's assiduity, talents and fitness, as to justify me in recommending Mr Plunkett as the Barrister to be retained in the Colony'. It was some consolation to Bourke, who had lost his wife after only five months residence in the Colony, to be surrounded by so many of his fellow countrymen such as Therry, Kinchela and Plunkett, but to those who thought it meant that in 'this illigant [sic] country...there isn't an Englishman or Scotchman...but will be an Irishman in no time at all', it was overcast with misgivings. It was apparent that men like Bourke, Plunkett and Therry seemed bent upon fostering the development of society, irrespective of the now long-held prejudices of some older settlers against the convict and emancipist elements. That they were also Irishmen did not escape notice either.

1. Bland to Colonial Secretary, 19 January 1834, in Dixson Library Archives, Estrays List 15, also Plunkett to Colonial Secretary, Attorney-General's Letter Book, 1835-36, p.155, 4/473 NSWA.

2. Plunkett to Colonial Secretary, 21 January 1835. Dixson Library Archives Estrays List 15.

3. Bourke to Aberdeen, 26 July 1835 in NSW Governors' Despatches, Vol. 24, 1835, ML.

4. SH, 29 September 1834. The attack by the Herald in which these words occur was ironical and directed against Therry and perhaps 'the boy' Plunkett who bothered it with fine phrases borrowed from O'Connell.
Perhaps to compensate for his childless marriage Plunkett spent a good deal of his spare time in the service of the community on an unofficial basis. He was interested in the setting out of a new race course on Botany Bay Road. He was a member of the Committee of the Catholic Church of St. Mary's, Sydney, with Ullathorne, two priests and eighteen laymen, which proved that colonial society in the period brought about a situation in which clergy and laity had to work together to achieve their objectives, especially when the Sydney poor had not only a majority of Roman Catholics, but also of the uneducated 'to a most disproportionate degree'. Just as clergy and laity had to work together on a denominational basis so also, for the same reasons, they worked together on an inter-denominational one. The Benevolent Society ran, amongst other things, an asylum for the poor of the whole Colony. Alexander Macleay was its president, but the members of its working committee ran the gamut of Sydney society with William Cowper, Samuel Marsden, John McEncroe, Roger Therry and Plunkett numbered amongst them. Colonial society was such that the Herald, though it did not approve of many of Plunkett's doings, nor the circles in which he mixed and worked, still printed a letter from 'A Subscriber' defending him from an undisclosed 'malicious and feeble attack'. He was 'a Gentleman who is known to be distinguished for his strict morality and a high sense of honour'. Finally it was a society in which men of every denomination could still celebrate St. Patrick's Day together at a dinner in 1835. During the previous two years

1. SH, 28 January 1833.
2. Ibid., 6 February and 24 February 1834. Plunkett, together with Therry, was regarded by McEncroe as 'a great acquisition' to the Catholic community in Sydney. See J. McEncroe to Archbishop Murray of Dublin, 2 November 1832. St. Mary's Archives, Sydney. McEncroe also said of Bourke 'I have one advantage, anything reasonable I ask of the Governor, he immediately grants'. Ibid.
3. SH, 12 June 1834.
4. Ibid., 17 July 1834.
the day had passed away 'unnoticed by the colonists from Ireland, except, indeed, by the lower orders who demonstrated their honour and love of the Saint by their broken heads'. The higher orders, with Plunkett as Steward, celebrated in 1835 to the strains of 'O, the Roast Beef of Old England' and other melodies, some fifteen toasts were drunk, each thrice, and Plunkett responded to a toast to the Bar with the hope that some of his countrymen connected with it would soon join them all from Old Ireland. ¹

¹ SH, 19 March 1835.
CHAPTER TWO
THE LAST YEARS OF RICHARD BOURKE

By 1835 Governor Bourke was already out of favour with the exclusivist elements in New South Wales society, and the rancour towards him spilled over onto those who were thought to be in collusion with him. Bourke's task was not an easy one: he had to implement moderately liberal tendencies in a society to which liberalism basically meant the granting of some form of equality to those who had suffered the penalties of the law. After a passage of over a hundred years it is readily understandable that the weight of judgment will fall on the men who opposed those measures of Bourke that favoured the cause of the emancipist. It is another thing, however, to try to come to grips with the mentality of men who found that they were being surrounded by emancipists, some of whom were prospering economically, others of whom were loud in their demands for equality, and all of whom were beginning to share in the prerogatives of those who had never been tainted by servitude. But to fail to consider the feelings of the exclusives is to under-estimate the task faced by Bourke, Forbes and Plunkett. Furthermore it can easily lead to misrepresentation of men like James Macarthur, Alexander Macleay and Richard Jones who were forced to struggle to overcome their own inherent distaste for a system that would treat them as equal to those men who had been sent to this country to expiate their crimes and to reform their characters. Judge Burton was one who by instinct leant to the side of the exclusives, although he balanced his instinct by an upright sense of justice. From his Bench he could not but deplore what he regarded as ever deepening fissures in society, stemming from its diverse elements. He thus saw moral education as the only means by which unity would be achieved. So many people were passing from the bond to the free state that free institutions would never flourish unless the majority were
'virtuous' and the Judge pleaded eloquently for their education. But moral education, whether through family, church or school was not yet readily available so, meanwhile, means of coercion had to remain foremost in maintaining the stability of colonial society in New South Wales.

To some, however, even coercive means were too liberal. In December 1835 Plunkett was sent to Norfolk Island to act as judge in the trial of two men, one for murder and the other for attempted murder. They were both found guilty and executed. The Herald thought the whole thing was a waste of money. Martial law, not a judge and jury, was deemed good enough for the 'thrice convicted felons' of the Island. Plunkett himself was blamed for his very participation in the affair. Acting as a judge made him a pluralist, and that was a state to be 'opposed by every legitimate means'. His name was linked with the 'O'Connell Tail faction' fostered by Bourke, which was regarded as a dire infliction on the Colony, and a 'day of retribution' was longed for that would see the downfall of Bourke and anyone who was his 'com-pat-riot'. An atmosphere was rapidly developing in which a representative of the Government found it difficult to retain his impartiality. But Bourke and Plunkett could draw some consolation from the fact that, whilst the Herald was unwearied in its attacks, the Gazette remained steadfast, the Australian frequently sprang

1. SH, 23 November 1835. Address of Burton to the jury at the last Session of the Supreme Court, 18 November 1835.
3. SH, 28 December 1835.
4. Ibid., 30 November 1835
5. Ibid., 11 January 1836, 24 August 1835, 21 January 1836.
to their defence and even Lang's *Colonist* spoke in their favour on some issues.¹

If Bourke looked increasingly to Plunkett to sustain him in the exercise of his office, he nonetheless deeply felt the loss of Francis Forbes who, by April 1836, was no longer able to carry out the burdens of an office he had upheld with honour since his arrival as Chief Justice in 1824.² A 'mob' gathered to farewell Forbes at the Racecourse on Saturday, 16 April, and surprise was professed at seeing Plunkett's name amongst those present, 'Knowing, as we thought we did know, that the Solicitor-General has always kept aloof from meddling in the party politics of the Colony'. It was remarked, however, that as Plunkett was not an uncommon name it was possible that the Plunkett in question was the keeper of the Liverpool mad-house, rather than the Solicitor-General.³ The departure of Forbes, although thought then to be temporary, necessitated a rearrangement in the judicial and legal office-bearers. Dowling became acting Chief Justice, Kinchela, despite his deafness, acting puisne judge, and Plunkett acting Attorney-General.⁴ James Macarthur paid a warm, public tribute to Plunkett a few days later at the St George's Dinner. He was 'a man that

2. Bourke to Glenelg, 2 April 1836, HRA, 1, XVIII, 368. 'His anxiety for the public service and the credit of the court, in which he presides, induced him to continue his official labors much longer and more intensely than a due regard for his health warranted'.
3. SH, 21 April 1836. The Plunkett at the gathering was in fact the keeper. He was no relation to John Hubert Plunkett. See Edward Plunkett to Colonial Secretary 14 July 1831. Colonial Secretary In-letters 2/7951. NSWA.
Australia must be proud to have at the head of the bar'. In his reply Plunkett regarded Macarthur's words as 'the ebullition of the feelings of a private friend' and went on to refute the charges made against him that he was a pluralist.1

Plunkett was the victim of the circumstances that arose from the necessity impressed upon Bourke by Glenelg of reducing the expenses of the judicial establishment.2 Whilst he was expected to perform the duties of both Attorney-General and Solicitor-General, as the latter office was abolished with his appointment as Attorney-General, he did not receive any rise in salary above the £1,200.0.0 paid to the Attorney-General, although he requested £1,400.0.0 to hold both offices.3 His attention to both duties also meant that he was compelled to neglect the private practice that had hitherto proved a source of substantial income to him.4 His appointment to replace Kinchela was motivated by the desire of Bourke to have someone

1. SH, 25 April 1836. The friendship between Macarthur and Plunkett, despite their differing religious loyalties and the gulf between their attitudes to questions such as the jury laws, was retained for life. See Plunkett to Macarthur 2 September 1865. 'There is no one whose good opinion I value more than yours or for whose judgment I have a greater respect'. Macarthur papers. vol.30, p.151, ML.
2. Glenelg to Bourke, 26 February 1836. HRA, 1, XVIII, 298-9.
3. Plunkett to Colonial Secretary, 31 March 1836. Opinions of the Attorney-General, pp.198-201. 4/473, NSWA. Finances became so tightened that in 1837 Bourke asked Plunkett to dispense with one of the clerks in his office. 'I am sure you will not desire to burden the public with the expense of retaining him'. Bourke to Plunkett. Tuesday, n.d. but early 1837. Plunkett Papers. In 1837 Plunkett complained that things were so stringent that his office stationery was 'scarcely sufficient to carry on the current business'. Plunkett to Colonial Store Keeper, 10 March 1837. Attorney-General's Correspondence. p.447 ML.
4. See SH, 4, 21, 28 March 1836 for cases in which Plunkett was retained as a barrister, in one instance on behalf of James Mudie against Anne Howe for libel. Mudie was awarded £50.0.0 after claiming £1,000.0.0. Ibid, 4 March 1836.
upon whom he could rely in the Legislative Council, as, with the departure of Forbes, Bourke lost the main support he had there. He could not look to Riddell and Macleay for support in 'many important Colonial questions', but he relied upon Plunkett whom he thought would prove of 'very valuable assistance'. The state of the Bench, on which Dowling and Burton lived in a temporary but uneasy truce, and to which Kinchela could contribute that minimum imposed by his impediment, made Plunkett's task as Attorney-General more complicated. Many involved manoeuvres went on before the appointments were settled, with Dowling and Burton both pressing their claims to be Chief Justice, Kinchela endeavouring to keep his office as Attorney-General whilst at the same time retaining his temporary appointment to the Bench, and Plunkett trying to act in an independent but conciliatory manner. Amidst it all he impressed Bourke, at least, with his dedication to the responsibilities of his office. It was widely rumoured that Burton had suggested the abandonment of the office of Solicitor-General in order to force Plunkett to resign from the office of Attorney-General, or to break his spirit through the work load he would be required to carry. Plunkett took occasion later to refute the charge against Burton but it was a heavy burden he undertook when he accepted the position of Attorney-General in 1836.

The Herald, meanwhile, made his task no easier by continuing to attack him on account of his alleged activities as a pluralist. There were only seven barristers in the Colony at the time, including Plunkett and Therry, and it is understandable that he was sought after. He was dubbed a 'Botany Bay Pluralist',

1. Bourke to Glenelg, 12 April 1836. HRA, 1, XVIII, 377-8.
3. SH, 7 February 1840. He 'handsomely denied' the accusation against Burton, made in the Australasian Chronicle and asserted that Burton was his friend in 1836. Plunkett's official appointment as Attorney-General was 17 September 1836. See Government Gazette, 21 September 1836.
accused of giving work to Therry that he ought to be doing himself, thus leaving himself free to engage in private practice and also thereby ensuring that Therry's own salary was augmented, and, in general, berated for his private professional activities. No consideration was given to the fact that it was inevitable that competent men would only reluctantly undertake public legal office on a salary of £1,200, granted that they could make much more than that amount in private practice. That they would engage in it at all unless they were given the opportunity to augment their salary privately was unlikely, and the Colonial Office admitted this fact. In 1837 Governor Franklin stopped the Crown Law Officers in Van Diemen's Land from private practice, with the result that Alfred Stephen resigned in the knowledge that his private practice would be more profitable to him than the emoluments of the office of Attorney-General. Plunkett meanwhile made no further attempt to defend his own position, but when Sydney Stephen accused him of monopolising the Crown Briefs in consort with Therry, Plunkett insisted that Stephen proceed with the case against him in Court. The three judges dismissed the charges as 'altogether frivolous' and Burton warned Stephen, then third in order of precedence at the Bar, 'You had better go home and not let us see you any more today'.

Perhaps the most important aspect of Plunkett's 'pluralism' was in a field far removed from public litigation in the Courts. During the four years since his arrival in 1832 he had become a warm friend and constant advisor to Richard Bourke. Bourke turned

1. *SH*, 22 December, 6 February, 17, 21 November 1836 and 3 July 1837.
to Plunkett for advice on a wide variety of matters such as: whom he ought to appoint as manager of the Female Factory, when he should close a session of the Legislative Council, how to improve the administration of Criminal Justice, whether Broughton was legally competent to sit in the Legislative Council and whether the Bishop ought to have an officially recognized Consistorial Court. Ultimately he told Plunkett succinctly 'In all these cases I am properly guided by your opinion and advice' and, although he was referring to a particular legal case on that occasion, it had become clear that, especially after the departure of Forbes, Plunkett was Bourke's closest friend and confidant.

It was on the basis of this reliance upon Plunkett that Bourke arranged for a session of the Legislative Council in June 1836 at a time that was specifically convenient to Plunkett. During this sitting of the Council the Act, 7 William IV, No. 3 was passed and, under its usual title of the Church Act, it was probably the most important piece of legislation in the period of Bourke's governorship. Plunkett always claimed that he personally drew up the Bill, and in later life he considered it his most precious contribution to the development of New South Wales society. Essentially the Church Act granted state aid to religion in New South Wales when it had become necessary to clarify the position of the Church of England in regard to the


2. Bourke to Plunkett, 23 October 1837. Ibid.

3. Bourke wrote to Plunkett to tell him that he would call the Council together for 21 June provided it 'suits your other business' and then wrote three days later to say that he had done so as it seemed that it was 'most convenient' to Plunkett. Bourke to Plunkett, 7 and 10 May 1836. Ibid.

4. SMH, 21 March 1856. Plunkett claimed that he and Bourke had the Act drafted some months before even the Colonial Secretary Macleay saw it. Ibid.
state on the one hand, and on the other to assist the churches in providing that benign formative influence in the Colony that men like Bourke and Plunkett regarded as essential for its well-being and development. The Act remained in force until 1862 when state aid to religion was withdrawn but by then, as Plunkett acknowledged, it had achieved its primary objective and helped to facilitate its secondary aim. It has been argued by contemporary writers that the Act was one 'by which religious equality was firmly and permanently established in the colony'. And the argument has stood the test of time.

In the same year 1836, Bourke, again with Plunkett's active assistance, attempted to introduce into New South Wales a system of general education based on the Irish National System. It was immediately seen as an attempt by the Governor 'to benefit the progeny of his "unfortunate" Roman Catholic countrymen' and it was suggested that it was up to the British Government to pay for the education of the children of Irish convicts, rather than the emigrants 'who are willing and able to educate their own children, and would not, under any circumstances, allow them to participate in the contamination which "the general system" must occasion'. According to Bourke the main opponent to the system was Bishop Broughton. 'It is peculiarly unfortunate for the cause of Education that a Prelate of Dr. Broughton's exclusive principles should hold a distinguished and influential Place in the Colony at this moment'. As a result 'The cry of danger to the Church, of Popery and Infidelity, was raised in this little Community for the first time, and the harmony, which has hitherto prevailed

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3. SH, 6 June 1836.
between Protestants and Catholics, appeared to be hazarded. That there was considerable truth to Bourke's statement regarding harmonious relations, whatever about Bishop Broughton's contribution to their worsening, can scarcely be doubted.

A study of the Herald in the five years prior to 1836 reveals only the odd instance of attacks on Catholic morality, whether individual or social, and on Catholic worship. From July 1836 the Herald constantly attacked Roman Catholicism, whether in leading articles, contributions, selected articles from other sources, or letters. That John Hubert Plunkett, well known as a Roman Catholic, despite his consistent attempt to act first and foremost as a responsible public servant, should figure largely in those attacks is understandable. 'The Roman Catholic Attorney-General Plunkett...made an absolutely violent speech [in the Council] against the reception of these Petitions which he designated libellous on His Majesty's Government.' It was characteristic of Plunkett that he would shift the emphasis from a matter of sectarianism to one of loyalty to the Crown, when discussing the Petitions against National Education. It was also perhaps symptomatic of his lack of understanding of British loyalty that he failed to see its consistency with dissent. His other motive was his loyalty to Bourke himself, which stemmed both from his conviction on the wisdom of the measure and his admiration for the man who proposed it. Bourke was told to 'take his liberal principles elsewhere...and it is to be hoped that his successor will at once dismiss every one of his creatures - because we can assure him that, unless he does so, he never can carry on the government with satisfaction to the respectable colonists'.

1. Bourke to Glenelg, 8 August 1836. HRA, 1, XVIII, 474-8, and Bourke to Glenelg, 8 August 1836, plus enclosures. Ibid. 466-70.

2. See SH, 8 August 1836, 26 January, 2, 13 February 1837. 'Nemo' was the pen name of a frequent contributor.

3. Ibid., 8 August 1836.
Plunkett, formerly a gentleman 'mild as mother's milk' was now all 'bounce' and 'humbug' and he was amongst those 'filthy minions who have been fattening under the administration of this misguided Representative of Royalty' who will emit 'a regular Irish howl' on Bourke's departure. In the event Bourke was to leave the Colony within the following year and it was to be another thirteen years before a Board of National Education was established with Plunkett as its first Chairman.

The jury question still preoccupied the minds of both the officials of the Government and those who administered the law in the Courts in 1836 and 1837. It was not simply a matter of the competency or even the integrity of individual emancipists to sit on juries. It was in a sense the very touchstone by which one measured the progress of New South Wales towards a free society. Plunkett did his utmost to enforce the jury laws, warning, at the opening of the Supreme Court in 1836, that jurors who did not present themselves for service would be fined, and that he would discharge the jury in each case. Together with Kinchela he gave an opinion in favour of the new system. They were emphatic that they could not recollect a single case in which the verdict rendered by a jury since its introduction 'was decidedly wrong'. At the same time they thought that magistrates had a bounden duty to pay greater attention to the drawing up of the lists for jury service.

To others the 'Convict Jury Bill' was the greatest evil yet to befall 'this unhappy country'. When William Watt was acquitted of libel by a jury in 1835, it was stated that a 'rabble' acclaimed the verdict, which was taken as proof that the

1. Ibid., 3, 14, 17 November 1836.
2. Ibid., 5 May 1836.
4. SH, 24 August 1835.
jury itself was partly 'rabble' and the 'Good People of England' were implored to deliver New South Wales from such verdicts. From his new seat in the Legislative Council Plunkett used 'an unhappy illustration' in defence of the system and its verdicts, by saying that it worked as well in the Colony as it did in Ireland. Eventually he became wearied of the attacks of the Herald and took the editors, Stephen and Stokes, into court for 'an attempt to obstruct the administration of justice'. They were fined £200.0.0, but only temporarily silenced, because, four months later, when several persons were fined for not attending to serve as jurors in the previous term, the Herald said 'let the "liberal" Judges [Dowling and Kinchela] of the Supreme Court fine as fast as they like - respectable men will not sit in the jury-box with men who commit depredations to the moment of entering the box! 

Meanwhile in London James Macarthur, whilst he was not opposed to an emancipist juror as such, was against the indiscriminate admission of emancipists to juries. In his judgment the allowance of 'civil rights, and the exercise of political duties' ought to be limited by certain conditions which he outlined, and which read like a system of partial, rather than plenary, indulgences. He, mirroring the mind of the exclusives, saw the extension of jury service to emancipists as the thin edge of the wedge, which would result in their eventual introduction into the field of representative government. This was a thought that filled the minds of the exclusives 'by the most gloomy forebodings'. These opinions were given weight by Burton who,

1. Ibid., 3, 24 August 1835. See also Bourke to Glenelg, 28 February 1836, and enclosures, HRA, 1, XVIII, 306-30.
2. SH, 25 July 1836. At this time the Legislative Council was still closed to the public so that its proceedings were known only through information passed to the press.
3. Ibid., 3, 27 October 1836 and 23 February 1837.
4. Macarthur to Grey, 9 February 1837. Petitions to the King 1835-37, pp.95-115, ML. Macarthur thought that almost all the crime committed in the Colony was perpetrated by convicts or emancipists. Ibid., p.98.
although unwilling to come out directly against emancipists participating in jury duties, nonetheless threw 'doubt on the integrity of Juries in certain cases tried before him'.¹ In the Legislative Council it was left to Dowling and Plunkett to fight for the retention of the extended system when the Act was renewed in 1836, apparently with such effect that the objectors abated their opposition. Bourke moreover could point out that whilst only 400 people signed the petition requesting, amongst other things, the restriction of jury rights, 6,000 colonists, 'capable of forming sound opinions' desired the opposite.²

If the responsibility granted to some emancipists to act as jurors was regarded as obnoxious, the responsibility granted to Plunkett to act in place of a Grand Jury in the Colony was equally repellent to those who had misgivings about the overall administration of the law in New South Wales. The powers of the Attorney-General were summed up by his critics under six headings:

1. Putting any man in the dock without counsel.
2. Trying the man on his own indictment.
3. Knowing the panel of jurymen for each day.
4. Consequently trying the man by what jury he pleased.
5. Addressing the jury for the prosecution.
6. Addressing the jury in reply to the defence of the prisoner.

The criticism of his acting as a Grand Jury arose principally over a case in which he charged two men, Henry Donnison and Willoughby Bean, of Brisbane Water, of cattle stealing. Both men were magistrates and the charge of stealing cattle was a grave one. Plunkett said in Court that he hoped that Grand Juries would soon be introduced into the Colony, but there was a widespread sense

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1. Bourke to Glenelg, 10 June 1836, HRA, 1, XVIII, 436-8. Bourke called Burton's opinions 'vague aspersions'.
2. Ibid., p. 438, and Bourke to Glenelg, 25 July 1836, Ibid., pp. 456-7 and Bourke to Glenelg, 13 April 1836, with enclosed petitions, Ibid., pp. 391-403.
3. SH, 11 May 1837.
of outrage that he had put Donnison and Bean up for trial because he was not considered 'a strictly independent officer of the Crown'. In the event Donnison and Bean were found not guilty but by his act Plunkett served notice that he was no respector of persons, when it came to serving the ends of justice.

A year before Plunkett had stated that he would act against 'every individual, however high their station in life might be, where the slightest suspicion [of cattle stealing] attached'. It seems that not only was the actual stealing of cattle widespread in the interior, but the practice was prevalent of buying cattle from suspected persons before they were committed for trial for charges of stealing cattle and retaining them on a spurious legal right. Within a short time Plunkett was in full cry and many prosecutions against cattle stealers were taking place. This was generally regarded as a good thing because, hitherto, the crime had practically gone unpunished, and it was not unknown for whole herds of cattle to disappear and be sold elsewhere, mixed in with lots from other runs. By the end of the year Plunkett was able to express his delight with the success of the drive against cattle stealers. They were now almost wiped out and those that remained knew that if they were caught they would be brought to trial. Highway robbery was also on the decrease with not a single conviction on that count. Dowling said that it was the first time such a thing had happened in eight years, and then permitted himself a witticism on a Bench notable for its aridity: 'The present might be termed a maiden session for highway robbery'.

1. Ibid., 2, 6 March 1837.
2. See Depositions forwarded to Attorney-General's Office commencing 26 May 1832 in which it is clear that many more prosecutions were taking place against cattle stealers by 1837, 4/467.4 and 4/477.5 NSWA, and SH, 9 May 1836.
3. SH, 17 November 1836. Dowling was well known for his wit. He once lamented publicly that he owned 500 acres of land 'but they would not depasture a bandicoot'. Therry to James Macarthur, December 1864, Macarthur papers, vol. 34, pp.361-8 ML.
It is perhaps surprising that with things moving towards a solution to the problem of cattle stealing, Plunkett should have allowed himself to become party to a prosecution that could only result in bitterness, suspicion and a general widening of the gap between the exclusive and the emancipist parties. John Bingle, a settler on the Hunter where he had amassed considerable wealth, and was one of those whom Bourke had struck from the list of magistrates in 1836 because of his 'unfitness'. He was, together with an accomplice sent for trial on a charge of cattle stealing by Plunkett in May 1837. In the case Plunkett personally acted as prosecutor. He in his own defence made it clear that he thought the prosecution was simply an act of political expediency against him. Plunkett, in reply, spelt out his attitude to the power of the Attorney-General and his concept of its use:

No man would more rejoice than he would at the Attorney-General being relieved from acting as Grand Jury; feeling as a British subject, and estimating and revering the institutions of Britain, he could not consider that he was acting constitutionally when occupying the place of a Grand Jury; but at present he was compelled to do it.... He would not allow any power on earth to influence him in this.... In the exercise of his duty he would make no difference between a gentleman and the meanest person in the Colony.

This disavowal was to little avail because Plunkett was already considered an 'irresponsible public officer' by the Herald which asked, 'Does John Hubert Plunkett desire to immortalise his name?' and said that the public simply did not believe him when he stated that he had no political motives. To their verdict of Not Guilty the jury had added a rider that the prisoners had acted 'with great impropriety' which the Herald said was of no consequence because it was the product of one single juror, Edwin Atwell Hayes, 'an obsequious government

1. Bourke to Glenelg, 14 May 1837, HRA, 1, XVIII, 750-1 and, for previous impressions on Bingle see Bourke to Goderich, 24 August, 1832 in HRA, 1, XVI, 719-23.
2. SH, 15 May 1837.
parasite'. Plunkett tried, unsuccessfully to prosecute the editor for a libel on the jury, but failed, allegedly through his 'precipitancy and want of knowledge'. The paper then ran a letter that deplored the lack of delicacy and justice to others in one 'so sensitive' himself.

On another charge, however, Plunkett's activity as Grand Jury was not questioned, at least in public. Six men 'all of substance' were charged with conspiracy on land sales, in that whilst only one of them had bid at the sale they had afterwards met together and parcelled out the land at a much higher price to each other. The case naturally excited great interest and it drew a crowded Court to watch the proceedings. The main defence was that there could be no question of conspiracy as 'it was nothing more than was constantly done'. The conspirators were found guilty, but Plunkett was not present in court when they were sentenced. Roger Therry, acting on his behalf, explained that Plunkett did not press for severity, making it plain that the Attorney-General's motive was to 'prevent the continuance of a great public evil [so] highly injurious to the Colony'. The 'system had been checked already' so the conspirators were fined £100. 0.0 each. Therry said that 'the thanks of the public were due to the Attorney-General for conducting the prosecution'.

During this same period Plunkett had to continue to foster the operation of the normal legal processes in the Courts. The frequent breakdown in the system between the centre of authority in Sydney and the outlying districts meant that people were often held in gaol for periods of up to twelve months before being brought to trial. At the adjournment of the Criminal Court in

1. To Bourke the imputation that the prisoners had acted 'with great impropriety' was 'more than justified'. See Bourke to Glenelg, 14 May 1837, HRA, 1, XVIII, 751. For the case see SH, 15, 22, 25 May; 5, 6, June 1837.

2. SH, 15 May 1837.
May 1836 there were 150 cases still untried, some from the previous September, and Plunkett tried to explain away a situation that he felt could not be laid at his door as he was not responsible for 'twelve years of neglect'. He spent the ensuing months well, so that by November he was able to express his delight that all cases but one had come up for trial, despite the fact that 2030 prisoners had been received into the Sydney gaol in 1836.¹ The lack of Circuit Courts threw the whole responsibility onto the Crown Law officers in Sydney, and the manifest appetite for litigation on the part of the population, together with the mass of work engendered by the amount of local crime, all added to the burden of an office already subject to overwork by the abolition of the position of Solicitor-General. This same situation was heightened by the seemingly unbounded interest of the ordinary citizens in all the details of court proceedings. Cases, especially civil cases, were reported at wearisome length in the press, and the courts were normally full with persons come to view the constant stream of Crown versus the prisoner, or citizen versus citizen.

As leader of the Bar Plunkett had to accept responsibilities for his colleagues that ultimately he found excessive and he thus in 1837 recommended the formation of a Law Society for Attorneys.² At the same time he continued to work in their interest, moving that William a'Beckett be admitted as an advocate before the Supreme Court, that John Moore Dillon be admitted as an attorney, and, unsuccessfully, on the same matter, for George Milner Stephen, when Dowling insisted that Stephen would have to serve five years before he could be admitted. He was concerned that attorneys be examined 'with respect to character as well as ability' when they applied for admission to practise, and won:

¹. Ibid., 26 May, 17 November 1836. 2 January 1837.
². J.M. Bennett, A History of the New South Wales Bar, notes that a Law Society was founded in 1843, but that in early colonial times the interest taken by the Attorney-General in the members of the Bar compensated somewhat for the lack of a Society. p.139. See also SH, 13 July 1837.
the unusual praise of the Herald on this account.¹

At the time the law officers at Sydney had to exercise jurisdiction over the growing settlement at Port Phillip and it was a firm conviction on Plunkett's part, which he conveyed to Bourke, that given the distance involved, Port Phillip was 'almost without the pale of the law'. Bourke asked him whether he wanted a resident judge there or whether it would be sufficient for one to go there for assizes. Plunkett was of the opinion that a fourth judge ought to be appointed to the Supreme Court of New South Wales in order that one judge could visit Port Phillip for assizes twice annually. This opinion was communicated by Bourke to Glenelg and it was acceded to a year later.² It is curious that Bourke makes no reference to having asked for an opinion from those most intimately connected with the matter, the judges, but it illustrated how far he had learnt to rely on Plunkett's advice.

The other matter in which Plunkett figured prominently in 1837 was that of the election of a Chairman of the Quarter Sessions. Late in 1835 an election was held for this position in which Campbell Drummond Riddell, Colonial Treasurer, and consequently a member of the Governor's Executive Council, opposed Bourke's chosen candidate for the office, Roger Therry. Riddell won and was suspended as an executive councillor by Bourke. It was a decision upon which the Governor chose to stake his position. when Riddell was restored to the Council at the command of the Colonial Office in 1836, Passions were aroused on all

1. Ibid., 6 March, 5 June 1837 and 10 October 1836.  
2. See Plunkett to Colonial Secretary, 13 June 1837, Col. Sec. Letters, p.1812, ML; Bourke to Plunkett, 2 June 1837, Plunkett Papers; Bourke to Glenelg, 14 June 1837, HRA,1,XVIII, 780-83 and Glenelg to Gipps, 3 April 1838, HRA,1,XIX, 353-4. It is perhaps indicative of the attempt at efficiency in colonial government that Bourke asked Plunkett's opinion on this matter, at least in a private letter on 2 June (see above). Plunkett replied on 13 June with a lengthy opinion (see above) and Bourke wrote his despatch the following day - 14 June. None-
sides, especially when Bourke struck from the Commission of the Peace almost all the civil officers, many of whom had opposed Therry's election, an act regarded by the Herald as that 'of a madman!'. Bourke's explanation to Glenelg in March 1836, was based on the fact that it was no longer necessary to appoint civil officers as there now existed sufficient material 'for a stipendiary or unpaid Magistracy'. The governor's statement bears the mark of integrity, if not political wisdom.

In March 1837 sixteen of the magistrates who had successfully opposed Therry wrote to the Herald to say that they had tried to get Plunkett to stand in 1835, and that they would have supported him, but Bourke had refused to appoint him to the Commission of the Peace, thus blocking his nomination. Plunkett himself must have given some indication that he would have then been available as 'there was strong reason at that time to hope [he] would have allowed himself to be put in'. The Herald asked 'Why was not Mr. Plunkett's name inserted in the Commission as requested? The independent magistrates would at once have elected him had he come forward as a candidate at that period'. Therry was 'a political and religious partizan'.

Plunkett appears to have made up his mind rapidly when the argument between Bourke and the magistrates was renewed in 1837. By this time he was a member of a Legislative Council

1. Bourke to Glenelg, 1 December 1835, and enclosures, HRA, 1, XVIII, 216-23; Bourke to Glenelg, 2 December 1835 Ibid.; 223-4; Glenelg to Bourke, 11 August 1836, Ibid. 479-83.
2. Bourke to Glenelg, 24 January 1836, HRA, 1, XVIII, 264-5; Bourke to Glenelg, 1 March 1836, Ibid. 333-41; SH, 7 January 1836.
3. SH, 2,9 March 1837. Perhaps Plunkett was unsure of Therry's fitness based on other grounds. In August 1840 he allegedly told Thomas Callaghan that he thought Therry was driven by 'futile and fretful ambition' and that whilst he was 'very intelligent' he was nonetheless a 'very idle and slovenly man.
whose Constitution was quaintly alleged to be 'purely Roman Catholic' and pervaded by 'papistical influence'. No proof was proffered for these assertions but they must have rankled with the one member of the Council, Plunkett, who was a Roman Catholic. At the very least they tended to cement his loyalty to Bourke who was constantly seen as an ally in fostering the cause of Plunkett's Church. Thus when another candidate of Bourke, William Montagu Manning, stood for election as Chairman of the Quarter Sessions in 1837 Plunkett threw the full force of his position as Attorney-General behind Manning. Plunkett's advocacy of Manning was heightened by the fact that Lachlan Macalister was chosen by the anti-Bourke element to oppose Manning.

Manning himself was not regarded as a party man which meant that the opposition to him stemmed solely from the fact that he was Bourke's nominee. Furthermore the chosen opponent, Lachlan Macalister, though in other respects worthy of the office of Chairman, lacked the professional legal training desirable in one holding such a responsible position. Plunkett went to the meeting of the Sydney magistrates where he upheld his right to be present on the grounds that although Attorney-General he could and would sit, if he thought necessary, on appeal cases. He said of Manning and Macalister that 'one is disqualified as the other is eminently qualified'. He asserted that Macalister had no real knowledge of the law and 'Without Courts of law free institutions cannot be supposed to exist, and it is well known that there is no tyranny so dangerous as badly administered Courts of Law'. In the event Manning won in Sydney by 17 votes to 8, but his passage through

who never applied his mind to law or to any other subject with any steadiness or attention...' See quote from Callaghan's diary in J.M. Bennett, A History of the New South Wales Bar, 65-6.

1. SH, 12 September 1836.
2. Ibid., 12 September, 6 October 1836.
the other districts was closely contested with the result that he finally won the position after some rather curious legal manoeuvres by Plunkett.  

The stand taken by Plunkett confirmed the *Herald*’s view that he was simply one of the ‘legal Bourkites’ who deserved to be sent back to Ireland to take his place on the roll of O’Connell’s magistrates. It was meanwhile rumoured that Macalister was about to bring an action against Plunkett for slander, but he weakened his case by an intemperate letter to the *Sydney Gazette* in which he accused the Attorney-General of trying to ‘ruin four gentlemen’ thus perpetrating ‘unheard of outrages upon British feeling, upon British rights, upon British justice’. This resulted in Plunkett calling for a rule against Macalister for libel. Poor Macalister must have been somewhat bewildered at a turn of events in which he had begun as an instrument of one faction, was defeated by the other, and now found himself in jeopardy on account of a letter that must itself have been little more than the rash effusion of a man pained by the attack made upon him by Plunkett over the Chairman affair. In any case he chose to stay out of reach for twelve months until Plunkett had him arrested at Goulburn and brought to trial in Sydney. Plunkett was attacked as ‘a man who first *provokes* and then *prosecutes!*’ But he went ahead with the action nonetheless.

The principal actor amongst the ‘four gentlemen’ whom Plunkett allegedly tried to ruin was Bingle and it was Bingle’s case that he artfully used to prove the libel when Macalister was brought to court. A’Beckett and Windeyer acted for the prosecution and Foster and Broadhurst for the defence and again Macalister did not help himself by stating in court that the

Australian was simply the organ of Plunkett and Therry. Plunkett used effectively the words of Bingle when they met before Bingle's trial in May 1837, 'Mr Attorney-General, whatever may be the result of this affair, I shall feel extremely obliged to you for your handsome and gentlemanlike conduct towards me'. Willis, on the Bench, thought that Plunkett would have done better to have taken civil action, in which case the whole matter would have been 'more satisfactorily investigated', but Macalister was found guilty 'under very strong provocation and excitement'. When brought up for sentence Macalister was fined £50.0.0 but Burton, speaking for the judges and for a large part of a silent community, thought that Plunkett was unconstitutional in attending the election to the Chairmanship in the first place, imprudent in taking action against Macalister, and vindictive in having him arrested. Plunkett's defence was based on the distinction between his office and his person, in that he could allow aspersions to be cast on his character in a private capacity, but once the exercise of the office of Attorney-General was cast in doubt, especially in such a grave matter as sending men for trial for political ends, then he had no option but to take action.¹

In the years to come Plunkett was to undergo many difficult periods during which his integrity as a Law officer would be questioned. But he would never again be able to draw strength from a friendship of the kind that he so clearly enjoyed with Richard Bourke. Most of the correspondence between them dates from the last three years of Bourke's governorship, 1835-1837, and reveal the bond between the two men. There is an urgency with which Bourke constantly urges Plunkett to come to Parramatta and stay with him for periods up to a week, as if there were few others to whom the Governor could extend such an invitation.²

¹. Ibid., 23 November, 3 December 1838, and Australian 20,22 November 1838.
². There are twelve such invitations between March 1836 and November 1837 in Bourke's letters. Plunkett Papers.
Although the hospitality was spartan enough with 'no feasts and no Cook' there was always a room to spare and on occasions, such as the opening of the Landsdowne Bridge or the Parramatta Races, a dinner with a dance in the evening could be organized. Bourke used to tell Plunkett how his own health was, how he looked forward to a ride and, at the same time, urge upon him the usefulness of taking a change of air to Parramatta. 'I will not promise you great sport but the Country Air will do you all good' he wrote once when asking Plunkett to bring his wife and sister to Parramatta and stay the week, but he clearly thought that to be together was enough. All of this was mixed in with business ranging over the affairs of the Colony, and some evenings it was their custom to look over the newly arrived English papers together, or discuss such matters as the propriety of allowing Polding to appear at a levee 'in Pontificalibus' although it is unlikely that even Polding would have contemplated an appearance in mitre, chasuble and pallium.

Towards the middle of 1837 it was known that the Governor's resignation, made conclusive by the reinstatement of Riddell to the Executive Council, had been accepted. Together he and Plunkett made ready for the departure and Bourke thought that representatives of the differing 'communions' ought to address the Queen at his last levee in 'this land of religious freedom'. In this, his last letter, Bourke reveals the buoyancy with which he anticipated his departure, and there is no hint that it would leave a void in Plunkett's life that never again would be filled. The only evidence for that void is the almost pathetic bundle of

1. Bourke to Plunkett, Friday n.d.; Bourke to Plunkett, Sunday n.d. but mid-January 1836 as the Landsdowne Bridge was opened on 26 January 1836. Ibid. and Sydney Gazette, 28 January 1836.
2. Bourke to Plunkett, Thursday n.d. Plunkett Papers
3. Bourke to Plunkett, 2 June 1837. Ibid.
4. Bourke to Plunkett, Friday night, n.d. but November 1837. Ibid.
dusty letters that Plunkett clearly treasured through the next thirty years and left to history as the main body of his personal remains.

If to Glenelg, as well as to many people in the Colony, it was 'a matter of sincere regret that the growing interests of the important Colony of New South Wales will be deprived of your talents and experience'; to others, like Broughton with whom Bourke was 'much at variance', and the exclusive party generally, it was a source of great consolation that their views were at last seemingly vindicated in London. Bourke's departure in December 1837 was 'sufficient for us and for our friends to know, that upon the Convict System, the Jury System, the Irish System and upon every other anti-Emigrant and anti-Protestant System, the "liberals" have been soundly beaten'. The Herald reviewed the years of Bourke's stewardship and singled out several matters as warranting especial odium. The Summary Punishment Act was no more than an 'Act to promote the Idleness, Insolence and general Insubordination of the Convict population'. The publication of an anti-Mudie tract by William Williams and Therry's defence of it were other matters of concern, but, strangely, in the circumstances, the worst act of the governorship was the appointment of Plunkett and Hely in the Mudie affair. It was 'manifestly illegal', they were 'a brace of inquisitors' and the effect was to spread insubordination everywhere. The day before Bourke departed Wentworth made a long speech in his favour. At the end he turned to consider the way in which the Herald had treated Bourke. He said, 'I feel that the Governor and the Attorney-General have done an irreparable injury to the freedom of the

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1. Glenelg to Bourke, 3 July 1837, HRA, 1, XIX, 4, and Samuel Marsden to Dr. Coates, 26 April 1837. Bonwick Transcripts Series 1 Box 54, vol. 6, p. 1884, ML. Marsden prayed 'the great Head of the Church, may protect us from Error and Violence' meaning Roman Catholicism and National Education. Ibid

2. SH, 1 January 1838


4. Ibid., 7 September 1837.
press in this Colony, in not putting a stop to this system of
attack'. But then, with a system in which the governor wielded
immense powers, two nominated councils conducted their affairs
behind closed doors, and many of the decisions regarding the
welfare of the Colony were taken thousands of miles away, it may
well be asked what balance could be introduced unless through a
press that was sometimes permitted to overstep the limits that
a more self-responsible society may have imposed.

The departure of the Irish-born governor Richard Bourke
may have seemed a blow to the progress of the Colony in its slow
march towards the liberal institutions of a free society. To
Plunkett, and others like Deas Thomson, Bourke's son-in-law whom
he had promoted to Alexander Macleay's position as Colonial
Secretary, it may have appeared that the evening of their ascend­
cy had come. Yet they could have been aware that the Whig
government in Westminster was likely to continue to foster the
trends towards a more liberal society that had been noticeable
under Bourke. And though the next governor, George Gipps, acted
with greater prudence than his predecessor had done, and was slower
to reveal the tendencies of his mind, he was to prove as firmly
committed as Bourke had been to promote the transition of New
South Wales from a penal to a free society. In this endeavour his
main supporter was John Hubert Plunkett.

1. Ibid., 4 December 1837. In 1836 Kinchela thought 'the libel­
        lous Matters published in the Newspapers in this Colony
        either against the Government or any individual of too little
        importance to require...filing Information ex officio against
        offenders'. Kinchela to Threlkeld, 28 January 1836. Attorney-
        Generals Correspondence, pp.425-6, ML. It was an opinion with
        which Plunkett in the main concurred.
CHAPTER THREE

THE WHITE MAN AND HIS LAW

The administration of the Colony was in the hands of the senior military officer, Lt.-Col. Kenneth Snodgrass, from 5 December 1837 until the arrival of Sir George Gipps on 23 February, 1838. Gipps took the oaths of office on 24 February as Captain General and Governor in Chief of the Colony. He was quickly warned that the 'words Whig and Tory, as applicable to our Colonial politics, are mere cant words used by cunning knaves who are interested in propagating the deception'. At the same time, if he had any such concepts, then he ought also know that the Tories were respectable men whilst the Whigs were no more than 'shoeless drunks' who talked in a maudlin manner about 'poor blacks', convicts, and such lesser mortals.

Gipps was to see the passing of the system of transportation that had given to New South Wales its own particular social character. He was also to see the conflict concerning the right of the Aboriginal to be regarded as a human being, with the consequent right to his own life, fought out in the Colony. In the first case the decision was taken in London, and to the end, Plunkett was opposed to the cessation of transportation, though he was equally opposed to its revival when the question arose later. In the second case it was Plunkett who staked his reputation and personal peace of mind on the firm principle that the Aboriginal was the equal of the white man in the essential basis

1. Gipps to Glenelg, 26 February 1838, HRA, 1, XIX, 305.
2. SH, 8 March 1838. Gipps arrived in time to see the partisan nature of the support for a statue of Bourke. Plunkett subscribed £20.0.0, Wentworth £50.0.0, Polding £15.0.0, but Broughton and many other leading colonists refrained from subscribing. See Australian, 15 May 1838.
of his own humanity. Plunkett won in the end, and his victory is one of the more noble events in that shameful series that marked the relationship between the two races from 1788 onwards. Nowadays it has become common, even praiseworthy, to fight for the rights of the Aboriginal. In Plunkett's day it was otherwise, and the magnitude of his contribution can only be judged in the light of the opposition he met.

The year 1838 was marked by a development that many had long expected, but to which there had been resistance for years. In 1837 the Legislative Council of Van Diemen's Land was opened to the public, and the Herald wondered when the 'liberals' of New South Wales would adopt the same measure.\(^1\) In the Legislative Council, on 29 May 1838, Plunkett presented a petition praying that strangers be admitted during debates, and a few days later the Council accepted the proposal although there was some opposition to it.\(^2\) Each member was allowed to present two strangers, whilst the governor was allowed any number. They had to withdraw upon a motion of any member, upon all divisions, and on any question submitted to the Council.\(^3\) When he wrote to Glenelg, Gipps made it clear that he fully approved of the 'proposition' of the Attorney-General; he thought it undesirable to veil the Council's proceedings and further remarked that to open them might tend to 'reconcile the people of the Colony to the repeated postponement in the Imperial Parliament of the measure which is to give to the Colony a Legislative Body, more suited than the present one to its actual wants and to its daily increasing importance.' In his reply Glenelg chose to ignore Gipps's elaborations on the issue, and simply stated that Her Majesty's Government approved of the measure.\(^4\)

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1. SH, 17 July 1837.
2. Australian, 1, 8 June 1838. Dowling led the opposition in the Council but only on legal and technical grounds.
3. VPLC, 1838, pp.11-12.
4. Gipps to Glenelg, 5 June 1838 and Glenelg to Gipps, 5 November 1838, HRA, 1, XIX, 433, 646.
The opening of the Council to the public had the immediate effect of making known its proceedings to a much wider audience than to those few persons who were able and interested enough to attend its sessions. The Herald lost no time in appointing a reporter to the Council and from 11 June 1838, when the debates of 7 June were given in full, the paper provided a service for the community which it maintained for the next forty one years until the commencement of Hansard in New South Wales. For almost thirty of those years Plunkett was a member of the Council, or, after 1856, of the Legislative Assembly. It is, consequently, upon the Herald's reports of his speeches in the Councils that considerable reliance must be placed in order to ascertain his attitude to the various questions, problems and developments that concerned the colonial legislature of the period.

One of the first things to come up for discussion in June 1838 was the renewal of the Jury Act. Plunkett moved for its continuation in the face of strong opposition from the exclusives, and it was passed in the same form as it had been formulated in 1833. As a 'liberal theorist' Plunkett was also opposed to the Bushranging Act and especially to the section of it that ordered the execution within forty eight hours of the sentence of a person convicted under it. He thought that requirement 'a bloody enactment' and one which was so 'entirely repugnant to the law of England' that he affirmed himself unwilling to prosecute under the Act. He knew that he would not succeed in having it repealed given the prevalence of the crime and the attitude of the colonists to bushrangers, so he contented himself with trying, unsuccessfully, to have its more obnoxious features amended. Gipps concurred with his opinions but told Glenelg 'the time is I

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1. SH, 14 June 1838. The Act was considered 'a judicial monstrosity which has never yet been paralleled in any other part of the world'.

fear however not yet arrived, when it can be dispensed with in New South Wales.¹

Similarly in 1838 Gipps and Plunkett were not able to carry an Ordinance Bill. It was dropped after having been construed as a threat to the Colony itself because it was feared that it would create a 'great Military Corporation, that might ultimately get possession of a great portion of the lands of the Country, and, by means of its wealth and power, obtain an unconstitutional influence'. The true nature of the Bill was quite otherwise: it was only intended as a means to facilitate the transfer of the removal of the Military Barracks to another site. But the strong opposition indicated the healthy state of public opinion: even the oblique threat of a rising military establishment caused a widespread reaction. Gipps and Plunkett were summed up as men 'who seem to act as if they were merely quartered upon the Colony to do the bidding of their blundering and corrupt Whig patrons at home'.² The honeymoon between Gipps and the expectant and hopeful exclusives was already over. He, together with Plunkett, were to bear the burden of their criticism and scrutiny for a long time to come.

The evidence given before the Molesworth Committee on Transportation caused considerable consternation once it was known in New South Wales. Early in the proceedings of the Legislative Council of 1838 the matter was taken up and a petition was presented praying for the appointment of a local Committee to enquire into the Transportation system and thus counteract, if possible, the views engendered in England.³ Plunkett was strongly

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¹ Gipps to Glenelg, 26 January 1839. HRA, 1, XIX, 774-80.
² Gipps to Glenelg, 26, 27, 28 September 1838, Ibid., 592-8 and SH, 6 July 1838.
opposed to the proposal as he thought no useful legislation could come of it. In his opinion it would further embitter the contending parties in the Colony, and with the departure of Bourke, despite the reactions to Gipps in certain quarters, he had hoped that conflict would abate. He said that if there were to be a Committee, all the Council should be on it; and he would make it his business to 'ascertain what each assignee does to promote the moral reformation of the convict' because he knew that the assignment system was abused by some 'even in high society'. He thought also that if transportation were stopped those who wanted it stopped would be the first to ask later for its re-establishment, e.g. Plunkett was sure that James Macarthur his personal friend, was biased, and in this matter, was simply the advocate of a party. In any case, he thought there was too great a tendency to attribute all crime to the convicts and thus take too little notice of the composition of the prisoner body in Sydney gaol.¹

Throughout the debate on the proposed Committee Plunkett had some harsh things to say about the men who had attacked the Colony in their writings. He dismissed Mudie, together with The Times, which he thought was 'hired to vilify the Colony', but he paid more attention to Ullathorne whom he classified as one of those who only brought to view the bad side of the Colony. He thought that Ullathorne was the worst offender of the lot and his 'book was perfect poetry from end to end', but it came as no real surprise to him because in his experience 'whenever clergymen dabble in politics, they make the worst possible politicians'. Not surprisingly, as a member of the Temperance Society, although not a teetotaller, he considered drunkenness as 'the root of all misfortune in the Colony'. Broughton, speaking in the debate, arrived at the interesting deduction that, because it had been intended to send the First Fleet out without a chaplain, the

¹. SH, 28 June, 6 July 1838, reports of Legislative Council proceedings of 26 June, 3 July 1838.
British government could only have had punishment and not reform-ation of the convicts in mind, a deduction with which Plunkett agreed.¹ Eventually Plunkett managed to get through a motion that a Committee be considered premature until the Molesworth Report was received, and, consequently the Council passed twelve resolutions refuting the attacks made on the Colony and favouring the continuation of transportation.² At the time New South Wales was suffering from an acute shortage of labour and there were cries for the importation of Indian 'Coolies' at £10.0.0 a head, for the assignment of all convicts to landholders as servants and shepherds, and for the acquisition of labourers from the South Sea Islands on the grounds that 'labour the settlers must have, let it come from where it will'.³

Through the debates on the estimates in the Council in early August Plunkett was not present, as he was occupied in the Supreme Court in his capacity as Attorney-General. He returned to the Council on 15 August to have an amicable argument with Broughton about the advisability of a Bill authorising in certain restricted cases the marriage of minors without the consent of parents or guardians. He used his own experience in England to prove his point on the grounds that he had found considerable difficulty in obtaining the requisite authorization to marry his own wife. The Bill was passed, to become 2 Vict. No. 13.⁴ He argued vigorously for the establishment of Circuit Courts, a matter in which the local authorities were powerless to act. He said that one was especially needed at Port Phillip and instanced a case over the stealing of an old bag of no value in which it cost

¹ SH, 4, 6, 13 July 1838, reports of Legislative Council proceedings of 3, 10 July 1838. See also W.B. Ullathorne, The Horrors of Transportation Briefly Unfolded to the People (Dublin 1838).

² SH, 18 July 1838, report of Legislative Council proceedings of 17 July 1838. See Australian, 10 August 1838, for protests against the misrepresentations in London.

³ SH, 9 April, 3 May 1838.

⁴ SH, 17 August 1838, report of Legislative Council proceedings of 15 August 1838, and Gipps to Glenelg, 26 January 1839, HRA, 1, XIX, 774-80.
£40.0.0 to bring the witnesses from Melbourne. In the event an Act was passed to provide for trial by Jury at the Courts of Quarter Sessions held at Melbourne and Port Macquarie.¹

Probably on account of the strain of a session in which he had considerable work both as a member of the Council and Attorney-General, Plunkett was ill for a while at the end of August. He appeared in the Council to make a plea for the re-establishment of the office of Solicitor-General. Although the newspapers often accused him of neglecting his public for his private work he thought that it was up to them to prove it.² He said that 'he came out under the express understanding that he was to be allowed to have private practice' and Downing Street wanted it to continue that way. In any case he only handled nisi prius business and never pleading or conveyancing. Becoming eloquent about his work he asserted that he often sat until three in the morning to finish it 'for he makes it a rule never to let the business of one day trench upon another'.³ Surprisingly, given their usual mutual antipathy, Richard Jones supported Plunkett. He said that he had seen a long Bill on the licensing of public houses presented to the Council in Plunkett's own handwriting and judged it as a task of considerable magnitude. He thought that Therry ought to be appointed Solicitor-General and the duties of the Court of Requests could then be handled by the Police Magistrates.⁴ Plunkett's speech, in the mind of the Herald, amounted to 'one huge capital I'. He was simply part of the 'Bourkite Stew' and one Roman Catholic law officer in the Colony was enough as there was a

1. SH, 31 August 1838, report of Legislative Council proceedings of 24 August 1838, and Gipps to Glenelg, 26 January 1839, HRA, 1, XX, 775.
2. Australian, 29 June 1838, and SH, 31 August 1838, reports of Legislative Council proceedings of 24 August 1838.
3. Ibid.
4. Ibid.
want of confidence in them. The Council however passed a resolution praising Therry's abilities, thus paving the way for his promotion when the occasion arose. Plunkett was concerned at the high crime rate which he considered was too frequently a result of over consumption of spirits. This led him to take steps to restrict the granting of licenses to public houses, and to regulate the sale and consumption of 'fermented and spirituous liquors' in the Colony. He drew up the Bill, took full responsibility for it and presented it to the Council. He thought that progress would be made if the great body of the inhabitants of this Colony could be weaned from spirit drinking, and encouraged to drink wine or beer and he hoped that people would be moved to plant vines, and make their own wine. In order to achieve this aim, part of his Bill proposed that the Wine and Beer License be at a lower rate than the Spirit License, which was itself raised to £30.0.0. The proposed hours of the public houses may seem strange by today's standards. They were to be from 4 a.m. to 9 p.m. in the summer, October to March, and from 6 a.m. until 8 p.m. for the remainder of the year. Plunkett also proposed that the old law ought to be changed that closed the public houses on a Sunday. He thought that closing them was perhaps unfair to many mechanics and others who were paid on a Saturday night and who 'like to indulge themselves a little on a Sunday'. At the same time he was moderate in his proposal as to what period of time their indulgence ought to be given rein, proposing that one hour would suffice for the purpose. As had

1. SH, 28 September 1838. The editorial stated that £28,513.6.8 was spent on the law department in the last year in 'a Colony containing only a few thousands of free people'. 'Will It Be Credited?' it asked. Gipps told Glenelg 'The Law business of the Colony is enormous' especially 'the administration of Criminal Justice'. See Gipps to Glenelg, 13 October 1838, HRA, 1, XIX, 613-4.
2. R. Therry to Glenelg, 4 September 1838, HRA, 1, XIX, 580.
4. SH, 14 September 1838, report of Legislative Council proceedings of 3 September 1838.
become customary the Herald was against this Bill almost on the a fiortiori grounds that because Plunkett had put it up it must be bad. 'The fact is, there is too much law-making in this Colony. Everything is considered to require a law, and thus, in attempting to amend, or remove, one evil, our legislators create hundreds'. In fact the Legislative Council in 1838 did pass 29 new Acts, more than in any previous session, which perhaps says something for the thirst for law-making on the part of the Council; it may also say a great deal for the benefits that accrued from the opening of the Council's proceedings to public scrutiny.

In the mind of Gipps the main matter to which opposition had been raised in the Council was that of the proposed pension for Francis Forbes who was about to return to live in retirement in Sydney. The old Tory group, led by Richard Jones and Hannibal Macarthur, had not lessened their hostility to Forbes, hostility that was summed up at his departure in 1836 by recording delight and stating that no 'respectable emigrant Colonists' ever wanted to see 'His Honor's face here again'. Accordingly Jones moved in the Council, and Macarthur seconded, that the item regarding Forbes' pension be struck out. Together with Forbes's pension the question also arose as to one for Alexander Macleay who had been relieved of his office as Colonial Secretary by Bourke and replaced by the governor's son-in-law, Edward Deas Thompson. Plunkett had good reasons for supporting the pension to Forbes.

1. SH, 8 October 1838.
2. Gipps to Glenelg, 26 January 1839, HRA, 1, XIX, 774-80, lists the Acts - 31 in number and SH, 29 October 1838, notes that 29 of them were new Acts as the Jury Act, 1 Vict. No.1. and the Bushranging Act, 1 Vict. No.2. were simply renewed.
3. SH, 22 February 1836.
4. See Glenelg to Gipps, 13 October 1838, HRA, 1, XIX, 611 and Sydney Gazette, 1 September 1838, report of Legislative Council proceedings of 29 August 1838.
because he was 'a great advocate of Sir Francis', but any support he gave to Macleay could only be on the grounds of principle and he gave it readily.¹

The debate about the pensions was prolonged and at times acrimonious. Plunkett held that Forbes and Macleay 'almost created their offices'. In the case of Forbes he had anticipated the rules made in England fourteen years later, and he was to some extent the model upon which English legal reform was based. In the case of judges Plunkett thought that a pension was especially necessary because they could not go into private practice on retirement, and their salaries in the Colony were in any case too small, as illustrated by the fact that Burton could not keep a horse. In regard to himself he said that he was not asking for a precedent to be set in order to cover his own future as 'he should consider a judicial appointment no promotion'. In the event both pensions were passed, though in the form of appropriations rather than as additions to the Pension List.²

In 1838 the payment of ministers of the Presbyterian Church was the subject of a Bill brought before the Council. This unhappy matter had dragged on for some time and was caused by the schism within the Presbyterian Church in the Colony as a result of which payment had been withheld from ministers of the Lang section of the Church.³ Plunkett's opinion was that the ministers ought to receive payment provided they could prove that they had a certain number in their respective congregations. He explained that there were bigots in every Church and he himself had been asked by some of his co-religionists whether John Dunmore Lang

¹. SH, 7 September 1838, report of Legislative Council proceedings of 28 August 1838.
2. SH, 7, 12 September 1838, reports of Legislative Council proceedings of 28, 30 August 1838.
had made a Presbyterian of him. 'The only reason that he advocated the measure was on the ground of liberty of conscience' and because he thought that it would tend to restore peace amongst the Presbyterians.' The Bill was passed becoming 2 Vict. No. 16. and Gipps told Glenelg that 'This act was received with very general approbation, and has had the effect, I am happy to say, of restoring in a great degree religious peace amongst us;...' The Bill was opposed by Broughton who observed, acutely, that Plunkett was fortunate in that he would be praised as a liberal whilst he, Broughton, would be condemned for his opposition. In point of fact neither praise nor blame fell without distinction on either. Alexander Berry caused an uproar in the Council when he intimated that Plunkett only introduced the Bill 'to weaken the Protestant religion in this Colony by dividing it in itself', and 'A Fool' wrote to the Herald to warn all Protestants that Plunkett was only using the cry of religious liberty in order, ultimately, to advance his own Church. This whole situation was exacerbated when Judge Burton allegedly attacked the 'idolatrous worship' of Roman Catholics in a speech to the Diocesan Committee of the Church of England. There was an immediate explosion amongst the Catholic community and they, at a meeting, moved a vote of no confidence in Burton. The Herald requested the Protestant emigrant colonists to come forward and put a motion of want of confidence in 'Popish law officers and other appurtenances of what ought to be exclusively a Protestant govern-

1. SH, 19 September 1838, report of Legislative Council proceedings of 5, 11 September 1838.
2. Gipps to Glenelg, 14 January 1839, HRA, 1, XIX, 755-6. The salaries were only guaranteed to the end of 1839.
3. SH, 19, 21 September 1838, reports of Legislative Council proceedings of 5, 13 September 1838; SH, 26 October 1838.
4. Australian, 31 July 1838. Plunkett and Therry were not present at the Catholic gathering but Polding probably had them in mind when he said that some prominent laymen, unable to be present, were 'equally pained and aggrieved by reason of the slander thrown upon their religion....'
ment*, and later asked why Plunkett did not prosecute Polding and his priests for 'something very like a libel on a Protestant Judge?'.

Towards the end of 1838 Plunkett, as Attorney-General, became involved in the trial of eleven white men for the murder of a group of Aboriginal men, women and children. The case excited a great deal of interest not only in the Colony, but in England also. Then, as later, it was frequently seen out of its general context of the conflict of two civilizations, and whilst the emphasis was placed on a wanton act of murder on the one hand, or a necessary act of reprisal on the other, the essential issues were clouded by sentiment, bitterness and misunderstanding. In May 1836 Dowling summed up in a case in which an Aboriginal, Jack Congo Murrell, and another native, were tried for the murder of two other natives. Part of the argument of Counsel for the Aboriginals was that they received no protection from English law and were thereby not bound by it. The case set a precedent and Dowling was quick to reject the argument; 'in the presence of Almighty God [he] declared, that he looked upon them as human beings, having souls to be saved, and under the same divine protection as Europeans'. The other point of view was expressed at the same time by the Herald after the Australian had written an article insinuating that Major Mitchell was an accessory to a slaughter of a party of Aboriginals. To the editor 'it is in the order of nature that, as civilization advances, savage nations must be exterminated... the Major was not to suffer his party to be sacrificed out of deference to the opinions of associated political and humbugging maniacs and hypocrites who write and prate of matters of which they know nothing whatever'.

1. SH, 3 August, 3 October 1838.
2. Ibid. 16 May 1836 and C.H. Currey, Forbes, pp. 470-1. Murrell and his companions were found Not Guilty.
3. SH, 26 December 1836.
'assorted maniacs' had been readily identifiable as Bourke and those who thought like him, including Plunkett.

If the legal issue was still clouded the practical issue was even more difficult. It was one thing for the men in Downing Street like Glenelg and James Stephen, the Under-Secretary of the Colonial Office to hold to exalted views on the human dignity of the Aboriginal, it was another for the government officers in Sydney to afford them the protection from the moral or physical dangers that contact with a white civilization made inevitable. At the same time it was almost impossible to ensure that white settlers, rapidly extending the limits of settlement beyond the boundaries legally established, would be protected from the ravages that the Aboriginals not only perpetrated against their flocks, but at times against their lives and personal property. It was in this context of ideals and practical realities that the Myall Creek massacre took place, and it is only in this context that the conflict can be understood.

The whole question of the protection of the Aboriginals had been discussed by a Select Committee of the House of Commons after a resolution to that effect was moved on 9 February 1836. Its purpose was to consider the measures to be adopted in order to secure to the Aboriginals, 'the due observance of Justice and the protection of their rights, to promote the spread of Civilization among them, and to lead them to the peaceful and voluntary reception of the Christian Religion'. As a result a system of protectors was set up with G.A. Robinson as Chief Protector together with four assistants. The Herald wanted to know what was all this nonsense about the arrival of a protector for the Aborigines. A protector for the white man was what was needed. The editor had recently spoken to a gentleman with a sheep and cattle station who had declared that he would shoot them as wild

1. See HRA, 1, XIX, 792 and Glenelg to Gipps, 31 January 1838. Ibid. pp.252-5.
beasts, if he detected them in spearing and carrying off his sheep and cattle, which they had been in the habit of doing. This was an attitude with which the editor was inclined to agree. Soon afterwards there was a protest against the expenditure of colonial revenue for the protectorate. Glenelg had made it clear that the cost was to be borne locally and he expected 'cheerful cooperation' in such an important matter. One response was clear. 'Let the sentimental crew at home who

"Sit by the fire, and presume to know
What's done in the Capitol",
defray the cost of "Protectors of the Aborigines", if they are really so much enraptured with their sable proteges'. The same editorial thought that Gipps ought to allow Plunkett to resign if he thought his duties too onerous, because 'Sparta hath many a worthier son than he'.

It was left, however, to 'A Grazier on the Murrumbidgee' to enunciate the most forthright views on the protectorate and its intended charges. He signed himself 'Anti-Hypocrite' and said that the whole thing was a waste of money because 'the aboriginals of my native country are the most degenerate, despicable and brutal race of beings in existence...a scoff and a jest on humanity.... Any attempt to civilize the Aboriginals of New Holland is futile and vain...they will and must become extinct.' At least two fellow citizens were shocked. In their opinion such a mentality was the precise one that caused wanton murder of the Aboriginals, and unless action was soon taken their blood would be upon the whites. The Reverend Mr Saunders at a meeting of the Aborigines Protection Society said that the Herald was an 'advocate of murder', while Lancelot Edward Threlkeld

1. SH, 8 August 1838.
2. Glenelg to Gipps, 31 January 1838. HRA, 1, XIX, 254.
3. SH, 5 September 1838.
4. Ibid., 19 September, 24 October 1838.
said that 'he was bound to state that the Editors of newspapers stood charged with criminality before God' because they inflamed people to exterminate the Aboriginals.¹

Gipps and his Executive Council spent a good deal of time in early 1838 discussing the various outrages perpetrated both on and by the Aboriginals. In his despatches he enumerated cases of both, and drew particular attention to a 'collision' that had taken place between a party of Mounted Police under Major Nunn and a tribe of Aboriginals, in which some of the latter lost their lives.² Plunkett had suggested that an enquiry be held into the circumstances surrounding the case, with which The Council agreed, but it eventually came to nothing as too long a period elapsed between the affair and the Enquiry.³ At the same time the Council considered the matter of deaths by violence amongst the Aboriginals generally and concluded, 'As human beings partaking of one common nature, but less enlightened than ourselves, as the original Possessors of the soil from which the wealth of the Colony has been principally derived, and as subjects of the Queen...[they] have a right to the protection of the Government and the sympathy and kindness of every separate individual'.⁴ As a result it was decided to issue regulations in the form of a Government Notice requiring that there be an enquiry into the violent death of any Aboriginal at the hands of a white man, in the same way as that held in the located parts of the Territory when the death of a white man

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1. Australian, 18, 23 October 1838. Alexander McLeay chaired a well attended public meeting set up to form a Branch Society of the British and Foreign Aborigines' Protection Society.

2. Gipps to Glenelg, 25, 27 April 1838. HRA, 1, XIX, 396-40.


occurred through violence or suddenly. This decision took place on 6 April 1838, but before the promulgation of the Notice took place word was received that three men had been 'barbarously murdered' by natives in the North, and eight men belonging to a party of sheep and cattle drovers of George Faithful were similarly killed whilst taking flocks and herds to Port Phillip. The Executive Council met and decided to defer the Notice 'until the excitement which has been caused by the loss of Human Life...' had abated.

By July the situation had reached the stage at which Gipps had to admit that the calls on the services of the Mounted Police had become so constant, consequent upon repeated 'outrages', that he was not even able to spare the necessary men required as witnesses in the Nunn case. In the vicinity of Port Phillip, and on the road leading to it, the attacks of the Aboriginals caused those interested in settling that part of the Colony to request that Gipps 'levy war against the Blacks' or allow the enrolment and arming of a Militia for that purpose. He refused to do either, and indicated little sympathy with the owners of the flocks who 'for the sake of obtaining better pasturage for...[them], will venture with them to such a distance from protection, [that] they must be considered to run the same risk as men would do, who were to drive their sheep into a Country infested with wolves, with this difference however that, if they were really wolves, the Government would encourage the shepherds to combine and destroy them, whilst all we can now do is to raise, in the name of Justice and humanity, a voice in favor of our poor savage fellow creatures, too feeble to be heard at such a distance'.

Instead he proposed to set up Military posts to keep communications open between Sydney and Port Phillip.

1. Ibid., Minutes 23 and 24, 27 March, 6 April 1838. NSW A, 4/1520.
2. Gipps to Glenelg, 27 April 1838, HRA, 1, XIX, 397-8, and Minute 25 of Executive Council, 2 May 1838, NSW A, 4/1520.
4. Ibid.
It was precisely at this time that 'At length the settlers were compelled to take the law into their own hands and defend themselves', as Alexander Harris saw it a decade later.¹ The exact manner of their handling of the law was not at the time clear to Gipps except that, from a report, he feared that 'in this case twenty two human beings, including several women and children, have been deliberately put to death by a large party of white men,...' He informed Glenelg, laid the letter from his informant, Frederick J. Foot, before the Executive Council, and concurred that Edward Denny Day, Police Magistrate at Muswellbrook, 'should be directed to proceed with as little delay as possible to the vicinity of the scene of these inhuman transactions, and there to institute a strict Inquiry into the circumstances, and apprehend all Parties concerned in it, or suspected of being so'.² The name of the place at which the 'transactions' in question occurred was Myall Creek.

Day proceeded to the cattle station of Henry Dangar which lay on the banks of Myall Creek about 350 miles north west from Sydney. There he apprehended eleven men, all convicts or expirees, though the twelfth who was known to have taken part in the massacre, John Fleming, a native of the Colony, escaped. Day brought them to Sydney, where Plunkett sent them for trial on 15 November on an information containing nine Counts. 'The first four Counts charged them in various ways with the murder of an Aboriginal Black named Daddy...the five other Counts...with the murder of an Aboriginal male Black, name unknown'.³ The men were tried before Dowling and a Civil Jury and all pleaded Not Guilty. Dowling told the Jury to dismiss from their memories anything they had

heard or read and to arrive at their conclusions by 'evidence alone'. This was probably wise advice, because the Herald had requested jurors 'not to convict persons on charges originating in collisions with the blacks, except upon the most conclusive evidence of wanton cruelty'.

The actual crime, as outlined by Plunkett, was naked in its simplicity. About fifty Aboriginals - men, women and children, belonging to the reputedly inoffensive Myall tribe, had been living on and about the Dangar station for some weeks, neither provoking nor being provoked. In the afternoon of 10 June 1838, a Sunday, they were surrounded, to the number of about thirty, roped, led away and shot. Two young women were spared, one child was saved by a stockman and two other boys escaped to a nearby creek bed. An attempt was made on the following day to burn the remains. The event was witnessed by a lame Aboriginal who had remained hidden behind a tree, but his evidence was not used given the then state of the law that did not allow evidence to be taken from those having no religious beliefs. Harris described it as 'a formal execution'. for the outrages committed by the blacks. No evidence was submitted that the Aboriginals in question had ever been party to any outrages.

The accused made no defence except that 'Daddy's' remains could not be identified with certainty: they rested on evidence given as to their characters. After their apprehension, but before the trial, £300 had been subscribed towards their defence at a meeting at Patrick's Plains presided over by Robert Scott,

2. SH, 14 September 1838.
3. See the account of the trial in Australian, 17 November 1838, SH, 19 November 1838 and in G.B. Barton papers, 'History of Australasia', Part II, vol.4, MS 128, Dixson Library.
4. Alexander Harris, Settlers and Convicts, p.388
landholder and magistrate. He arranged for William Foster, a'Beckett and Windeyer to defend them while Plunkett and Therry prosecuted. He also visited them in prison and advised them not to 'split among themselves, saying that there was no direct evidence against them, and that, if they were only true to each other they could not be convicted'.¹ Plunkett informed Gipps of these proceedings and Scott told Gipps before the trial that he regretted his actions as he did not then know the full facts. He then took as active a part as he could in the defence. Gipps later omitted his name from the New Commission of the Peace issued in December.² The Colonial Office considered that Gipps would have failed in his duty had he not removed Scott from the Commission because 'The station, which he held in Society, made it the more necessary to mark the disapprobation of the Government of his conduct'.³

As stated, the defence offered on behalf of the accused by their counsel was simply that there was no case as 'there is no proof that the body of a Black man named Daddy has been found, and for anything that appears to the contrary he is still alive...'.⁴ Dowling summed up and made it clear that the whole argument rested upon identity - namely that they had to be satisfied that one of the bodies in question was Daddy's, or that any of the bodies were those who had been 'taken away by the prisoners'.⁵ The jury retired for fifteen minutes and then returned a verdict

2. Ibid., p. 705.
3. Normanby to Gipps, 17 July 1839, HRA, 1, XX, 242-3. The Marquis of Normanby succeeded as Secretary of State for the Colonies when Glenelg resigned in 1839.
5. Ibid.
of not guilty. Dowling did not record his reaction so there is no way of knowing whether he was clearly astonished as Judge Willis had been a few days before when a verdict of not guilty had been reached in five minutes in the case of a white man indicted for shooting an Aboriginal. Plunkett however reacted with alacrity and applied to have the prisoners remanded on other charges, and there is no evidence to suggest that he acted on any but his own initiative in the course he took. The Herald stated that 'There is, positively, a black fever abroad - a nasty epidemic black disease' which resulted in 'inequality of justice...to the blacks and whites', in favour of the blacks. A week later it asked 'are the lives of men who may be innocent, to be placed in jeopardy, day after day, to suit the caprice of any Attorney-General' and warned that 'The settlers WILL set the Government at defiance, by taking the law into their own hands - by executing summary justice' unless the Aboriginals are restrained.

Plunkett proceeded however, but this time only laid an information against seven of the eleven in the hope that the other four would be called in favour of their companions as witnesses, and possibly incriminate themselves, or that they would turn Queen's evidence and assist the prosecution. The charge in this instance consisted of twenty counts upon five of which they were accused of having murdered a child; five others referred to a male child, five more to a female child, and the last five gave the name of the male child as Charlie. The same Counsel, 'three of the ablest Counsel at the Bar' defended them. Burton was on the Bench and he prepared well for the trial as proved by his extensive

1. Australian, 17 November 1838.
2. SH, 9 November 1838.
3. Ibid, 19 November 1838.
4. Ibid, 26 November 1838.
5. Gipps to Glenelg, 19 December 1838. HRA, 1, XIX, 702.
notes on murder, malice, and aiding and abetting, all amounting to six pages in his own hand, drawn from various authors.¹ The trial began on 26 November but was adjourned to the 27th on the plea of a'Beckett. On that day a demurrer was entered against the first five charges on the grounds that no child had been sufficiently identified and as a consequence the trial could not legally proceed. A plea of autre fois acquit was made against the next five charges which contended that they had already been acquitted of that offence at their first trial. To the other ten charges they pleaded not guilty.² Plunkett did not contest the demurrer, but Burton rejected it declaring that there was sufficient certainty in the description of the child. Plunkett joined issue on the autre fois acquit plea and a jury, empannelled to try it, rejected it.³ As a consequence the prisoners were tried on 29 November and found guilty on the first five charges, but acquitted on the others, strangely enough on the grounds that there had not been sufficient proof that the name of the child in question was Charlie.⁴ The seven men were brought before the three judges on 5 December when both the demurrer and autre fois acquit were further considered and rejected by the Bench. Burton reviewed the facts of the case 'in order that they [the public] may see what offence it is for which you are about to offer up your lives'. They were then condemned to be hanged.⁵ Two days later the Executive Council met and 'The Right Reverend the Lord Bishop having retired' Gipps, Thomson and Riddell confirmed the sentence of death, after hearing the opinions of Dowling and Burton.⁶

2. Ibid., p. 28.
3. Ibid., pp. 28-46.
4. Ibid., pp. 47-107.
5. SH, 7 December 1838.
In the meantime the Herald, in particular, kept its sights trained on Plunkett. He was accused of placing the prisoners 'twice in jeopardy on the same charge', he was told that 'the only dignified course to him is to resign, if he would avoid the mortification of a removal upon the public petition of the Colonists' and he was threatened that a public petition would be got up against him to the Secretary of State on the grounds that responsibility for the Colony ought to be in the hands of 'those who have the greatest stake in the Colony'. When he asked for an attachment against two publicans, who had allegedly publicly threatened some of the jurors in the trial, he was told that 'it is quite plain that he is not fit to exercise the extensive powers with which he is invested', and Gipps was warned not to stain the honour of the Colony by hanging the condemned men, because, while the murder of white men went unavenged 'it is nothing less than legal murder' to hang whites.

As before the trials, so also after their condemnation to death, there was considerable activity on behalf of the seven prisoners. Three petitions were presented to the Executive Council once it was known that the executions were to go ahead. The first came from the eleven jurors in the original trial. They stated that it was their opinion that the seven men condemned in the second trial had been found not guilty on the same count in the first. They asked that the prisoners be at least given the 'benefit of appeal to the fountain of Mercy...Her Majesty'. The second petition came from ten of the jurors in the second trial who thought that 'the ends of justice have been satisfied by... [the prisoners] condemnation and long imprisonment', whilst the third came from Sydney, Parramatta and Windsor and was signed by about 450 people. It began badly by referring to the men as being 'now under sentence for the alleged murder of an aboriginal child to the authorities unknown...' and spoke of 'no direct evidence

1. SH, 5, 7, 10, 14 December 1838.
being furnished of their guilt'. It contrasted them with the Aboriginal murderers who 'have not been brought to justice' and pleaded for their lives.\(^1\) The Executive Council met on 14 December, and having considered the pleas, rejected them as they offered 'no reasons for altering the decision'.\(^2\) When Gipps wrote to Glenelg a few days later he mentioned the last petition, 'not very numerously signed' but omitted to mention the more significant petitions from the jurors.\(^3\) In any case it was too late to mention petitions that, perhaps, ought to have been given greater consideration because the execution had taken place the day before when all the criminals 'behaved in a very proper manner, and were very attentive to their religious duties'.\(^4\) Furthermore Gipps probably knew that in Glenelg he was dealing with a person who thought that everyone should clearly understand that the government 'will not shrink from enforcing the Law against all those who, not for the purpose of self-defence but wantonly, commit acts of violence or aggression against the aboriginal inhabitants'.\(^5\) It was perhaps ironical that Glenelg wrote that sentence three days after the execution took place, unaware both of the degree to which the Law had been enforced and of the extent to which the lesson had been borne in upon the inhabitants of New South Wales.

In the opinion of Alexander Harris the hanging of the men of Myall Creek resulted in the use of poison to get rid of 'the most troublesome of a tribe' because firearms were not favoured

\(^1\) Enclosures A.1,2,3 to Minute 51 of Executive Council, 14 December 1838, pp.694-703. \textit{NSWA}. 4/1445.

\(^2\) Executive Council Minute 51, 14 December 1838, \textit{NSWA}. 4/1520.

\(^3\) Gipps to Glenelg, 19 December 1838. \textit{HRA}, 1, XIX, 700-4. An examination of the signatures to the petition in \textit{NSWA} reveals no name known to me from other sources which perhaps indicates that those who had so strenuously fought on behalf of the condemned men gave up after the second trial. There is only one magistrate, J. Maxwell, amongst the names.

\(^4\) \textit{SH}, 19 December 1838.

\(^5\) Glenelg to Gipps, 21 December 1838, \textit{HRA}, 1, XIX, 706-7.
any longer. He thought that the men were 'hanged for what they had been taught was perfectly lawful by their masters; and some of these masters [were] magistrates of the territory'; that it was a case of 'The sacrifice of these seven mens' lives to the protection theory', and that after a period of ferocity 'the original and customary course of things was permitted to return'.

As for Plunkett, looked upon by many as the instigator and perpetrator of a crime more enormous than Myall Creek, he was a deluded 'liberal' and an 'unconscious instrument'. 'J.H.B.' wrote in the form of a petition to Gipps regarding the Attorney-General. He said that the act of the men was not wilful murder, as they did not know that it was murder to kill Aboriginals, and, therefore, Plunkett had no right to prosecute for murder. He held 'immutably his opinion that the aforesaid J.H. Plunkett Esq. Attorney-General, is in the position of a man who had already committed one great wrong...and does most respectfully and most strenuously pray, that the aforesaid J.H. Plunkett Esq. may be immediately removed from his office, before the occurrence of any additional error'. The Herald mildly commented that this subject 'at present, possesses a great share of public interest'. But Plunkett may have felt consoled later when he heard Dowling say to the other men who could not be brought to trial because the material witness Davy, could not be instructed due to his inability to give evidence 'If any barbarizing delusion has pervaded the hard hearts of those who have presumed to set up a distinction between God's creatures; I trust that the delusion is now finally dispelled'. He may even have been strengthened to read a later letter which stated that the shepherds in the Murray district were now uncertain how to deal with marauding aborigines because 'they all have a palpably manifest dread of Her Majesty's Attorney-General'.

2. SH, 17, 26 December 1838 and 7 January 1839.
3. Ibid., 15 February 1839.
Myall Creek itself, as an event in colonial history, passed into the pages of officialdom, criminology and folklore. It did little, perhaps, to lessen the tensions between the white and Aboriginal inhabitants of the Colony. On the contrary it probably served in the minds of many to heighten those tensions. It cast a shadow over the theory of the protectorate that, despite its patronage and bureaucracy, may have helped to bring another aspect of white civilization to the Aboriginals than the ones to which they had become accustomed. One thing of lasting benefit only came from Myall Creek: henceforth all were aware that there was equality before the law for the white and the black inhabitants, insofar as the sacredness of human life was concerned. For that one thing Plunkett was chiefly responsible. That, in the eyes of some, equality seemed for a period to have favoured the Aboriginal, was perhaps a reflection of no more than a minimal attempt to redress a balance that had long been lacking. In the long run adequate protection was available to the white settlers who rapidly passed over the land, whilst the Aboriginals withdrew in their remnants to areas where few white men ever came to prey or be preyed upon. Years later historians were to look upon Gipps as the central figure in the attempt to apply the law to white and black

1. See i. Despatches relative to Myall Creek - ordered to be printed 12 August 1839 (London 1839), House of Commons Papers 526.


iv. Australia. A Full and Particular Report of the Trial of Eleven Men for the...Murder...of Twenty Eight Individuals (Glasgow 1839). Copied from Sydney Gazette, 15 November 1838.

alike.¹ Contemporaries saw Plunkett as the responsible agent and as a result 'He was detested by the squatters...' but Mrs Campbell Praed proclaimed: 'All hail to thee, Plunkett! Had there been more like thee, the national conscience would have less cause for reproach'.²

It is small wonder that two days after the execution of the Myall Creek murderers Plunkett should have applied for leave of absence. He stated, that since coming to the Colony almost seven years before, he had had only a fortnight's leave, due to illness in early 1835. Ill health still dogged him, he said, but his main reason for applying was to attend to personal matters in Ireland.³ Many men with stronger mental and physical constitutions would have found it difficult to stand up to the pressures brought to bear on Plunkett, especially in 1838, and his attitude to the responsibilities of his office can be gauged by the fact that he asked for his two years leave to commence in November 1839 'so as to afford ample time to ensure the efficiency of the Public Service'. Yet it was precisely in his capacity as a public servant that he had been viciously attacked so frequently throughout 1838, and the very office he held of Attorney-General required him to act in one field in a manner with which he did not agree, but about which he could not argue. In England itself the very nature of the Grand Jury was under question at the time, and it was scarcely to be

4. Ibid.
expected that Downing Street would contemplate experimenting with an office, in a Colony, that was not proving completely satisfactory at home. The Australian was opposed to a Grand Jury here on the grounds that its members may be inclined to shield a 'brother justice' or a 'respectable friend' whereas,

We...declare that, in our opinion, no body of men, of however ancient an order - however gratuitous, or even expensive to themselves, their services may be - could have done the duties which devolved on Mr Plunkett with more honour and impartiality, or with equal skill and discrimination.

But to the Herald this was the very crux of the matter. It held that whilst the emancipist and liberal element in the society was prepared to grant to former convicts the right to sit on juries, and to one 'irresponsible' public servant the right to send men for trial - a right which he allegedly used for political purposes at times, yet that element was not prepared to recognize the integrity of the men who were the very essence of the society, financially and socially.

Whilst it was easy to overestimate the division of New South Wales Society based on the exclusive-emancipist, or liberal-conservative tags, it was also easy to view it with the sanguine hopes of Gipps who thought that by 1838 the old party concepts were waning. A group of official government representatives such as that which held power in 1838, of whom Gipps and Plunkett were the leaders, by its dedication to the development of a society on the English liberal pattern, was bound to arouse resentment in men who had worked hard to make that same society a viable economic unit. Undoubtedly the most beneficial instrument working towards both enlightenment on the one hand, and restraint on the other, was the press, with the Australian as a representative of the first view,

1. Australian, 9 February 1838.
2. Ibid.
3. SH, 24 December 1838.
and the Herald of the other. Both outlooks were necessary, and it says something for Plunkett that, despite the continued attacks made upon him, he was able to see this, especially in a situation in which the power structure basically resided in the hands of those with whom he agreed. He said in Court in 1838 that,

> He rejoiced that there was a press - a free press in the Colony to restrain bad men who had no sense of moral and religious restraint in their everyday practice; he contended that free and open discussion by the press on public measures and public men should be encouraged...he contended that the legal profession who were invested with a monopoly of the law were public men, and that their conduct was fair matter for public criticism.

The Colony was still groping towards free institutions, an acceptance of civilized values and an understanding of its own status vis-a-vis the British Isles, from which most of its inhabitants had come, bond or free. That it was still composed of disparate elements, the fusion of which had only just begun in that slow march towards nationhood, is illustrated by two events of the year 1838. In February a man named Moore murdered his master. He was seen in the street in Sydney, just after the crime, wiping blood onto his finger and dropping it into his mouth saying 'this is flash Hosking's heart's blood, and thank God I have got a good appetite to eat it'. In May the New Rules and Orders of the Supreme Court were issued. One stated that a clerk, before being articled, had to prove before Plunkett and two other examiners that, besides being of good conduct, 'he is able to translate the first six books of Vergil's Aeneid, the Gospel of St John in Greek, and has a competent knowledge of the first six books of Euclid'.

1. Australian, 6 July 1838.
2. SH, 26 February, 21 May 1838.
CHAPTER FOUR

A ROMAN CATHOLIC LAW OFFICER

On New Year's Day 1839 George Gipps wrote to Glenelg to acknowledge that he had heard that the New South Wales Act had been renewed for another year.1 He registered his clear disappointment that the Colony had not been granted a Constitution, as, in his opinion 'the present Council...[was] quite inadequate to the wants of the Colony;...it neither affords to the Governor, in matters of legislation, the assistance which he has a right to expect from it; nor does it give to the Acts of his Government the support with the People, which the sanction of such a Body ought to carry with it'. He went on to suggest a partly elective and partly nominee Council as the best means of providing for the Colony during its 'intermediate or transition state'.2 He also suggested changes in the present New South Wales Act relating to the administration of Justice. Some of them, such as the abolition of Military Juries and of the power given to the judges to veto acts of Council, were acted upon. Yet if Gipps had expected that the Council of 1839 would fulfil his expectations regarding the development of legislation that would gradually relax the structures of the old penal society, and give way to others more appropriate to a free society, he was to be disappointed.

New South Wales was so structured as to hinder its development as a free society with a constitutional government. The basis of the problem was twofold: the social fissure resulting from the bond and free division, and the reflex colonial suspicion

1. The Act of 1828, 9 G IV, c.83, was intended initially as a temporary Act to last until 1837. The reshaping of the constitution of New South Wales was postponed and the Act, with slight modification, was renewed regularly until the Act of 1842. See A.C.V. Melbourne, Early Constitutional Development in Australia, pp.198-9.

2. Gipps to Glenelg, 1 January 1839, HRA, 1, XIX, 719-24
of any decisions of the Westminster Parliament that interfered with local revenue. On this last point Gipps was quite explicit. He thought it absolutely necessary that a full explanation be given to the people and the Council regarding the 'Appropriation of the Territorial Revenue of the Colony'. He wisely said nothing on the fissure within society, given that only time with political, social and economic changes, would heal it.

Drought had again struck the Colony in 1837, but it was not until the following year that its effects began to show enough for the Governor to order prayers for rain. The drought went on with spasmodic relief until 1843, making it necessary to import wheat and flour to about a third of the needs with a resultant depression in the economy. The worst year of the drought was 1839 and its effects were seen markedly in Sydney where in August 'The Sydney Association for the Temporary Relief of the Poor' was set up. Broughton was chairman at the first meeting, Plunkett a member of the Committee, and all ministers of religion in Sydney were requested to join. Many did - Catholic and Protestant. This meeting took place shortly after Bishop Broughton had written to Gipps to complain about the admission and reception of Polding at a levee held at Government House 'wearing those habiliments which are appropriate to a Bishop of the Church of Rome'. Gipps sent the protest to Normanby and Lord John Russell who took over the Colonial Office in 1839 replied, telling Gipps to 'take no further notice of so frivolous a complaint'. In his complaint Broughton had made it clear that he was 'acting wholly upon public grounds, and not with a design, which indeed I expressly disclaim, of manifesting any personal disrespect towards Dr Polding'.

1. Ibid.
2. Gipps to Glenelg, 8 April 1839. Ibid., 107-9.
3. SH, 5 August 1839.
5. Gipps to Normanby, 29 July 1839, Ibid., 265; Russell to Gipps 17 December 1839, Ibid., 435.
6. Bishop of Australia to Gipps, 25 May 1839, Ibid., 266.
It is within this context of uneasy religious relations that much of the opposition to Plunkett as a Roman Catholic must be studied. The question as to whether there was an Established Church in these colonies need not arise here, although there were claims as late as 1838 that there was such a Church in New South Wales. The relevant fact was that the greater portion of the inhabitants of New South Wales, certainly the wealthier and more influential portion, were either members of the Church of England, or of one or other of the Protestant denominations. The question was thus bound to arise as to the extent to which members of the Roman Catholic Church would be permitted to hold government offices in such a community. George Gipps was not a Catholic, although Blackwood's Magazine in an article on 'Colonial Misgovernment' called him a Roman Catholic cousin of O'Connell, a religious profession and a relationship which the Herald was quick to disavow. But Gipps was sensitive, in some matters, to the weight of public opinion and it was with this in mind that he wrote to London in 1840 suggesting that Roger Therry be appointed as Solicitor-General.

The office of Solicitor-General had been abolished in 1836 when Plunkett became Attorney-General. But it had been an unhappy arrangement as it meant that Plunkett was overworked, with consequent delays in the legal matters affecting the Crown. By the end of 1839 it had become clear that Gipps was in difficulty regarding an appointment to the office of Attorney-General during Plunkett's proposed leave of absence. No fit person could be found to undertake an office that entailed so much labour, so Plunkett agreed to defer his leave for another year in the hope that the problem would be solved. Gipps suggested that Therry be appointed as Solicitor-General with the understanding that in Plunkett's absence he would

1. SH, 11 January 1838. The same paper in 1836 asserted that 'the religion of the state is the Protestant religion'; ibid., 12 September 1836.
2. Ibid., 24 May 1839.
act as Attorney-General. The difficulty, however, was not merely financial. Gipps wrote 'Mr Therry is a Roman Catholic, as also (your Lordship is aware) is Mr Plunkett'. He went on,

I beg to assure your Lordship that, considering Mr Therry to be well qualified for the Office, and his position at the Bar to be such as to give him superior claims to those which any other person can advance, I do not myself think his religion ought to stand in the way of his promotion; but at the same time I cannot conceal from myself, and I ought not to conceal from your Lordship, that the accidental circumstance of both the Attorney and Solicitor-General being Roman Catholics may be made by some parties in the Colony a matter of imputation on the Government'.

When Russell replied he ignored the whole matter and flatly refused to consider the proposed appointment until Gipps had cut down on the expense of the Establishments of his Government. Gipps, however, had already made arrangements to appoint Therry as acting Attorney-General and a'Beckett as acting Solicitor-General before he received Russell's reply and Russell confirmed the temporary arrangement without mention of religious complications.

Yet the question of religion in this instance was just a small cloud that was to cast a gloom over much of Plunkett's career in New South Wales. Coupled with his dedication to his office as a public servant, and a seemingly fatal streak of indecision when it came to making judgments as to his own future, it was to result in his never attaining the office to which he eventually seemed to aspire, that of Chief Justice, and never being recognized by the Crown for his services until such recognition had ceased to have meaning to him. His indecision was apparent already in 1839 when he refused an appointment to the New South Wales Bench that, once accepted, would have assuredly resulted in his becoming

2. Russell to Gipps, 20 July 1840, ibid., 716; Gipps to Russell 20 March 1841, ibid., XXI, 290-2; Russell to Gipps, 13 August 1841, ibid., 468.
Chief Justice quite rapidly. In March 1839 Burton left on leave and Gipps turned to Plunkett and Therry to take the appointment. Both refused it, because of its temporary nature, although Plunkett expressed 'his readiness to take [it] in the event of my calling on him to do so for the advantage of Her Majesty's Service.' Gipps thereupon offered it to Alfred Stephen, at the time in private practice in Van Diemen's Land. His acceptance marked the beginning of a long and meritorious career on the New South Wales Bench. As a result of his refusal to accept the appointment Plunkett continued as Attorney-General until his departure in 1841 on leave; had he decided otherwise, those two years could have been the foundations of his career as a judge.

On 14 February 1839 Gipps opened an extraordinary meeting of the Legislative Council. He brought down a Bill to establish a Police Force beyond the settled districts of the Colony. The occasion of the Bill arose naturally from the difficulties that had been experienced regarding protection from, and for, the Aboriginals in the interior. It was clear that if a Border Police was to be financed some new way of raising the money was necessary. It was proposed that a tax be levied on herds and flocks depastured beyond the boundaries, at the rate of 1d. per head for sheep, 3d. for horned cattle and 6d. per horse. Gipps expected that this would raise about £7,000 a year, whilst Licenses to occupy temporarily Crown Lands in the 'wildlands' at £10.0.0 each would bring in another £5,000 to £6,000 annually.

To Gipps' surprise Plunkett was 'opposed in principle to the taxation clause' of the Bill. In his opinion, if it was to be introduced at all then it ought not to be confined to squatters, who had brought a great deal of benefit to the Colony. He said

1. Gipps to Glenelg, 9 March 1838, ibid, 59-60. It is possible that Mrs Plunkett had some influence on her husband's apparent indecisiveness.
2. SH, 15 February 1839, report of Legislative Council proceedings of 14 February 1839. Gipps to Glenelg, 20 February 1839, HRA, 1,XX,6; Gipps to Glenelg, 6 April 1839, ibid, 90-92.
that if he were a squatter he would 'oppose it to the utmost'. He also thought the License fee was unjust. Why should a squatter with 500 sheep be required to pay £10.0.0 when William Lawson with seventy to eighty thousand sheep only paid the same amount? He tried to get an amendment that would make it easier for a new squatter to set himself up before he was called upon to pay 'taxes'. In the event the Bill became 2 Vict., No.27, without any of the modifications proposed by Plunkett. The Herald applauded Richard Jones as the only member of the Council 'representative of its independence', and overlooked Plunkett's stand on principle.

It is understandable that Gipps was concerned about the Aboriginal question. Downing Street continued to impress upon him that he could not 'over-rate the solicitude of H.M. Government on the subject of the Aborigines' and he did his utmost to translate that solicitude into reality. Yet his attempts were thwarted at levels from which he could well have hoped to receive support. The exclusives combined with the squatters to cast doubts on his policy at every turn. When he finally brought out the long delayed Notice on the Aboriginals on 21 May 1839 it was attacked because it contained a section proclaiming it as an offence for a white man to keep a black woman. Plunkett was convinced that such a practice contributed very materially to the conflict between the two races, and he was clearly recognizable as the 'over paid Whiggling' the 'Whiggish pluralist' who inspired the prohibition. Plunkett, however, was more concerned with the legal difficulty into which he constantly ran of convicting Aboriginals for crime upon the whites, or vice versa, because he could not bring Aboriginals into court as witnesses. In May, 1839 he reported that he had five of them in gaol awaiting trial, but because of the lack of an interpreter and the inadmissibility of evidence from

1. SH, 18 March 1839, report of Legislative Council proceedings of 15 March 1839.
2. Ibid., 1 April 1839.
3. Russell to Gipps, 21 December 1839, HRA, 1, XX, 439-41.
4. SH, 31 May 1839.
they could not proceed. He finally went ahead with the case in August, but only on the charge of stealing, for which they were found guilty. He was unable to proceed with the murder charge through lack of evidence.¹

In May 1839 the Reverend William Watson was examined before the Executive Council. He had had a great deal of experience with the Aboriginals and he said that 'the blacks are capable of learning anything as quickly as the whites' and were therefore capable of giving evidence before the Courts. He asserted that they were 'not generally speaking given to falsehood, unless from some powerful motive'.² In July 1839 the Committee of the Aborigines Protection Society sent a letter to Normanby signed on its behalf by John H. Tredgold. In part it read,

'It is evident that the rejection of the Evidence of these Natives renders them virtually outlaws in their Native Land which they have never alienated or forfeited. It seems to be a moral impossibility that their existence can be maintained when in the state of weakness and degradation, which their want of civilization necessarily implies; they have to cope with some of the most cruel and atrocious of our species, who carry on their system of oppression with almost perfect impunity so long as the Evidence of Native Witnesses is excluded from Our Courts'.³

The grounds upon which the Aboriginals were excluded was the alleged lack on their part of a belief in an after life, and thus their inability to take an oath binding them to tell the truth. On 20 September Plunkett brought in a Bill to allow Aboriginals to give evidence in the Courts. He admitted, unwisely, that 'it was the greatest departure from the rules of English evidence ever attempted' but he hoped that it would be passed, as it was

3. Tredgold to Normanby, 30 July 1839, HRA, 1, XX, 303-4.
imperative for the sake of both Aboriginals and whites that their evidence be taken.¹

The Herald thought that Plunkett was, in his private life, a very estimable man, but his Bill on Aboriginal evidence was 'preposterous'.² Normanby had left to the Council the whole question of evidence by Aboriginals, although he thought that 'the ultimate remedy must at the same time be unceasingly sought in an improved system of moral and religious instruction',³ thus following the opinion transmitted to him by Burton through Under-Secretary Henry Labouchere. Burton was prepared to admit statements by Aboriginals as evidence 'where the matter at issue is of minor consideration'. But for other matters of higher importance he thought that 'no alteration in the Law should be made'.⁴

Plunkett managed to steer the Bill through the Council, but a clause was added to it, at the request of Dowling, that it take no effect in the Colony until it had been approved by the Queen. Dowling was 'friendly to the measure' but without the clause he 'would otherwise have felt himself, as probably would also his brother Judges, compelled to remonstrate against the act as repugnant to the Laws of England'.⁵ With these animadversions Gipps transmitted the Act, 3 Vict., No. 16, to London. It is scarcely surprising that it was never seen by the Queen. Russell, constant champion of the cause of the Aboriginal, and ever forthright to impress upon Gipps his duty to improve their

1. SH, 23 September 1839, report of Legislative Council proceedings of 20 September 1839.
2. Ibid.
3. Normanby to Gipps, 17 July 1839, HRA, 1, XX, 242-3; Normanby to Gipps, 31 August 1839, ibid., 302-3.
5. Gipps to Normanby, 14 October 1839, ibid., 368.
lot, was unable to extend his humanitarian views to the degree that he would seem to acquiesce in a matter repugnant to English Law. He referred the Act to J. Campbell, Attorney-General and Thomas Wilde, Solicitor-General who told him not to send it forward because 'To admit in a Criminal case the evidence of a witness acknowledged to be ignorant of the existence of a God or a future state would be contrary to the principles of British jurisprudence'. They thought that the Aboriginals should be sufficiently instructed in these matters beforehand, and that such would be a relatively simple matter as the rules of Law 'do not define the distinctness of Religious ideas or to what degree the belief in a future state is to be fixed to qualify a witness to take an Oath'.

In his attempt to alleviate the Aboriginal in this comparatively simple matter, and at the same time make it possible to bring more of them for trial for the crimes committed by them, Plunkett was unsuccessful. It is probable that had he not been so rash as to admit in public the repugnancy of the Bill, and had he at the same time taken even the slightest pains to compromise and write into the Bill a carefully constructed sentence indicating some attempt at 'instruction' before the witness was allowed to testify, the Bill would have proved acceptable. In any case another emotion besides the reported one of clear annoyance must have been in his breast when seven Aboriginals, charged in November 1840 with cattle stealing, were acquitted. They all, including one named Carbon Mark, pleaded Not Guilty, with the exception of Tommy Boker 'who said that the beef was good'. While Plunkett was engaged in these legal transactions other segments of the community were turning their minds to the steps that ought to be

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1. Russell to Gipps, 11 August 1840, ibid., 755-6; Campbell and Wilde to Russell, 27 July 1840, ibid., 756.
2. SH, 20 November 1840, report of Supreme Court Proceedings of 9 November 1840.
taken for the moral advancement of the Aboriginal. Richard Windeyer, for example, wrote a lengthy manuscript 'On The Rights of the Aborigines of Australia' and concluded forty pages of ingenious explanation why they had no rights in the physical order - for example, to land - by stating,

'the more debased, the more vile, the more wretched we have shown the Aboriginal to be the more imperative is the duty cast upon us by fit means of education to make him conscious of the dignity, the holiness of the Mind he shares with ourselves'.

Windeyer, it will be remembered, was one of the three 'able Counsel' who defended the men of Myall Creek. Others, again, did not take so many words to reveal their attitudes. Francis Murphy, later first Catholic bishop of Adelaide, wrote to Dublin saying that 'The natives are an harmless, inoffensive [sic] race'. The Herald saw the statement, judged it as cant, and asserted that the Aboriginals were 'dirty black savages'.

The education question arose again in 1839 when Gipps tried to bring in a system along the lines of the British and Foreign School Society system. The Irish system, proposed by Bourke in 1836, and passed despite the violent opposition, had been abandoned, and any revival of it was unlikely, given that the same grounds for opposition existed. The Herald warned Gipps early in the year not to think of implementing the Irish system, as its opinion of the Irish had not changed, and Irish convicts were a combination of 'criminality grafted upon ignorance and superstition'. Accordingly Gipps gave lengthy thought to the matter and brought into

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1. R. Windeyer 'On the Rights of the Aborigines of Australia', p. 44, ML.
2. Murphy in Freeman's Journal, Dublin, 13 July 1839. See SH, 27 December 1839. All the early attempts of the Roman Catholic Church to make contact with the Aboriginals proved fruitless.
3. Ibid., 8 February, 15 July 1839.
the Council a proposal along the lines of the British and Foreign system. The Church of England was strongly opposed to it and Broughton was their spokesman in the Council. The objections were religious in their utterance, though perhaps financial as well in their import, given that almost £9,000 was being spent annually on the Church of England Schools while all the rest, Catholic and other Protestant schools, only received £5,370. Gipps withdrew his Minute.¹

Plunkett spoke for the new system and noted that the same objections were being raised as had been mooted against Bourke's Irish system. He said that a national system of some kind was needed, otherwise the youth of the Colony would never be educated. As far as he was concerned he was unable to object to the system because he had been partly educated 'at a Protestant school and ...graduated at a Protestant University', an experience which in his eyes 'subdues hostility and softens aspersities'.² The only other speaker to give effective support to the measure was Sir John Jamison, stalwart and constant opponent of anything that seemed to smack of intolerance. E. Deas Thomson and John Gibbs, the Collector of Customs, also voted for the measure, though 'with some reluctance, as they would probably have preferred that Sir Richard Bourke's plan had not been abandoned'. Gipps told Normanby that given the nature of the Colony, where there were scattered pockets of all denominations throughout, it would ultimately be necessary to establish some form of non-denominational system maintained by the Government.³

Plunkett must have been astonished to find that for once

¹. Ibid., 2 September 1839, report of Legislative Council proceedings of 27 August 1839; Gipps to Normanby, 9 December 1839, HRA, 1, XX, 426-30.
². SH, 2 September 1839, report of Legislative Council proceedings of 27 August 1839. At this time Plunkett was still the only Catholic in the Legislative Council.
³. Gipps to Normanby, 9 December 1839, HRA, 1, XX, 426-30.
the Herald agreed with him. Broughton must have been equally surprised to find it in disagreement with his views. Plunkett said in his speech in the Council 'It is lamentable that religion should be made the stalking-horse for the stoppage of education at every step'. The paper agreed and said that the clergy should be kept right out of the matter, because the whole debate showed that education 'should be made a government and not a religious question' and the sectarian issue proved 'that there should be public schools accessible to all';¹ some kind of compulsory system along the lines of that in Prussia was what the Colony needed; a 'more moral, happy, contented people does not exist' than that in Prussia, it thought.²

Nemo, a constant writer to the newspapers, of which the Sydney people enjoyed the choice of fifteen in 1839, was not pleased with Plunkett. He entitled his letters 'Popery', a subject upon which he held decided views as it was composed of the 'pollutions of a monster' and divers other ingredients. He thought that the only possible good that could come from Plunkett's behaviour was,

'for a Protestant people to take such measures as will relieve the Attorney-General from the duties of his legislative office....Almost every Protestant in the Colony is now feeling that this seat is occupied by a person whose principles are unquestionably dangerous, and who has invariably exhibited these principles whenever Protestantism could be injured'.³

Nemo's attitude had been strengthened by a case which had recently agitated some minds in Sydney. A young lady named Byrne, who some time before had disclosed some of her thoughts on convent life and severed her connection with Roman Catholicism, was attacked by three men at Parramatta. Ullathorne, in a sermon, used some injudicious language regarding Miss Byrne, and some saw his words

¹. SH, 11 October 1839.
². Ibid., 8 February 1839.
³. Ibid., 16, 28 October 1839.
and the attack as a case of cause and effect. Plunkett, probably in order to make sure that no accusation could be levelled against him of treating the matter with levity, brought the three to trial before the Supreme Court on charges of assaulting with intent to ravish, robbery in intent and common assault. Dowling expressed his surprise that such a matter was brought before the Supreme Court, rather than to the Quarter Sessions, and in summing up for the jury gave as his opinion that the behaviour of the men was attenuated by drunkenness.  

Dowling was accused of 'one of his usual displays of forensic balderdash' in his address to the jury and the outcome - guilty of common assault and twelve months in irons - proved how 'villains may escape merited punishment'.  

James Macarthur and Philip King attacked Dowling, in his absence, in the Council and Plunkett defended him saying that Dowling had meant no such imputation as a lessening of guilt through drunkenness, but that the misunderstanding arose through the reporting of a 'factious press', an imputation that the Herald flung back 'with contempt'.  

The matter reached Downing Street and Russell thought Macarthur greatly to blame for his behaviour in the Council, especially in not signifying to Dowling that he was about to expose him to censure.  

If, however, Dowling, was able to escape with impunity it was not so for Plunkett. The Herald attacked the 'Ascendancy of Popery in the Legal Department of the Colony' and with that proved by the fact that Plunkett, Therry and Moore Dillon were all

1. Ibid., 8, 15 November 1839.  
2. Ibid., 13 November 1839. Dowling was defended for his words by the Australasian Chronicle, 12 November 1839.  
3. SH, 15 November 1839 and 18 November 1839, reports of Legislative Council proceedings of 14 November 1839.  
4. Gipps to Normanby, 26 November 1839. HRA, 1, xx, 403-4; Russell to Gipps, 6 June 1840, ibid., 649.
Catholics 'what confidence ought Protestants to have in the impartiality of the administration of the Law?' No reflection was meant on Plunkett, the paper said, but his power was far too great and in any case why ought a Protestant community be governed in criminal jurisdiction by 'Roman Catholic Functionaries' who could not be trusted when religious matters, such as the Byrne case, were involved? Later he was informed in an editorial that 'many Protestants in New South Wales have "no confidence" in Popish law officers', that there was too much 'bounce' about him, which ought to be checked or pulled down so that he be 'taught to demean himself like ordinary persons'.

Another question revived in 1839 was that of the jury system. Late in 1838 Dowling had suggested that Military Juries be abolished immediately, giving the good reason that 'Sound policy dictates that a broad foundation should be laid in this Colony, as early as possible for institutions corresponding with those of the Mother Country'. Burton still retained his reservations on the whole question of juries, especially any-extension that meant that more jurisdiction would be passed into the hands of juries containing emancipists, but Gipps and Plunkett were determined to proceed with the abolition and the

1. SH, 30 October, 27 November 1839. It was also thought that Plunkett ought to have charged Ullathorne in the case because he was 'an accessory before the fact'. Ibid.
2. Dowling to Gipps, 18 December 1838 in Despatches from Governor of New South Wales 1839, p. 1-10, ML.
3. Burton to Gipps, 17 December 1838, ibid., pp.11-70. Burton denied Plunkett's opinions on the satisfactory state of the jury system, ibid., p.22. He did, however, recommend the re-establishment of the office of Solicitor-General as he thought Plunkett had 'exceedingly laborious duties'. At the same time he justified the decision not to appoint Therry as Solicitor-General when Plunkett became Attorney-General not simply on the grounds that both were Catholics but also because the Bar was already weak and it would have been unfair to take from it 'its two best members'. Ibid., pp.14-6
Act went through the Council on 6 August. It was judged by some as a very bad measure because the Colony was still penal in nature, and they thought that it ought therefore retain its forms, or abolish transportation.\(^1\) Jamison in debate had said that some magistrates had deliberately allowed improper persons to remain on Jury Lists in order to disgust respectable persons, and thus bring the whole system of civil juries into contempt, and Plunkett followed up by stating that he would sue magistrates who did not attend Petty Sessions to examine the Jury Lists. By November he was calling for heavy fines against jurors who did not present themselves for service, as with the abolition of the Military Juries the only thing left to rely upon was the civil jury system.\(^2\) It was a continuation of the old argument, and it offered another proof to those who, like Dowling, wanted to prepare a broad foundation for self-government and argued that development and changes in attitudes would have to take place before it was possible.

Those who laid the blame almost totally on the shoulders of Downing Street and the Imperial Parliament for the delay in granting a constitution to New South Wales, misunderstood the true situation in the Colony itself, where many forces continued to work against the development of the very institutions required to make self-government viable.

In his capacity as a Law Officer the main case in which Plunkett was involved in 1839 concerned the claim of Sir Maurice O'Connell, on behalf of the heirs of Bligh, to a large portion of the town of Parramatta. The claim rested upon a grant made by King to Bligh in 1806 and the matter was still argued about until 1827 when it seemed that it had been dropped. O'Connell, however, who had married a daughter of Bligh, revived it, and had a notice of Ejectment, issued on 31 July 1839, served on all the persons who presently occupied the land at issue. The consequence of this act involved the right of the Crown and many private persons to occupy

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1. SH, 7 August, 25 September 1839, reports of Legislative Council proceedings of 6 August 1839.
2. Ibid., 25 September, 9 October, 4 November 1839.
the 105 acres in question. Gipps was quick to point out that part of it was occupied by 'the Female Factory, the property of the Home Government, on which large sums of money have been spent since 1820, the Gaol and the King's School, the property of the Colonial Government, the Roman Catholic Chapel and School', as well as private persons.¹ He said that he had asked his Law Officers 'to defend to the very utmost the rights of the Crown and the interests of the people of the Colony in this matter' but thought that if the matter went to a local jury the outcome could be disastrous. He also reminded Normanby that it was a difficult matter to preserve amicable relations with O'Connell, his senior member in the Executive Council, who would succeed as acting Governor if Gipps died.²

Plunkett was granted an injunction to restrain O'Connell from ejecting the occupiers of the land when the case went to the Supreme Court in October.³ He argued a forthright but simple

¹ Gipps to Normanby, 7 August 1839, HRA, 1, XX, 277-9. See also note of Gipps on a letter from Janet Templeton from Parramatta, 13 August 1839, informing the Colonial Secretary that she had received her notice of ejectment. Gipps wrote 'inform Mrs Templeton that the Law Officers have been instructed to defend the rights of the Crown and the interests of the People of the Colony in this matter; and that the claim of Sir Maurice O'Connell is in no way recognized by the Govt.' Colonial Secretary's Papers re Claims of Bligh's heirs, 1839, NSWA, 4/7013.
² Gipps to Normanby, 7 August 1839, HRA, 1, XX, 279.
³ The documents concerning the case together with draft versions of Plunkett's plea are found in Colonial Secretary's Papers re Claims of Bligh's heirs, 1839; NSWA, 4/7013. Broadhurst and a'Beckett helped Plunkett on his drafts of the Crown case for which Broadhurst received four guineas and a'Beckett seven, ibid. Plunkett's plea is given in HRA, 1, XX, 558-71, and there is a report of the matter in SH, 14 October 1839.
case, that

'if any such grants exist, the same were obtained by the said William Bligh by fraud and by unusual and undue means, and by collusion with the said Philip Gidley King, and that they were made contrary to law, and ought not to be binding upon Her Majesty'.

He set out to prove his assertion in a number of charges which can be summarized intelligibly once the legal formulae have been interpreted. Bligh arrived on or about the 6 August 1806 and his arrival revoked the Commission given to King. But Bligh waited six days before taking office whilst he entered into 'an unauthorized, clandestine and fraudulent arrangement' about the grants with King. King had no power as governor on 10 August when the grants were made, and in any case Bligh by his own Commission was debarred from accepting any grants, whilst King was debarred by his Commission from making them. Furthermore the grants were made in blank on the day in question as the land was not then surveyed and the description of the land was not added until several months later. Bligh at no time made any claim to the land nor objected to its use, nor was the right to the land by the Crown disputed even though O'Connell managed Bligh's affairs as his agent. Again, even if the grants were valid, which Plunkett denied, Bligh had forfeited the land because he had not fulfilled a condition by which it was to be held, namely to build a private residence on it. Finally, on 5 August 1819, Macquarie put a notice in the Government Gazette declaring the grant 'absolutely void and of no effect in law or equity'. On these grounds Plunkett asked for a writ to restrain O'Connell and the other Bligh heirs, and to subpoena them to appear before the Supreme Court to answer the questions he thought ought to be directed to them.

In his case Plunkett included another grant of land made to Bligh by King of 240 acres at Petersham. He joined both grants in

1. See Plunkett's Information, HRA, 1, XX, 559.
2. Ibid., 558-71.
his argument, so that if Bligh's heirs lost in the Courts they stood to lose not only the land that they had never occupied at Parramatta, but also that at Petersham which they had held in peace and which they now wanted to sell. In the event a compromise was reached by which O'Connell on 24 February 1841 surrendered to Plunkett all claim to the Parramatta land together with the deed signed by King. His wife, Mary, Bligh's daughter, joined Sir Maurice in the surrender. They then sold the Petersham property for £26,000. When Edward Stanley, who became Secretary of the Colonial Office in 1841, replied to Gipps he approved of the stratagem used to defend the right of the Crown at Parramatta and hoped that no more would be heard of the claim, a hope that was in the event realized.

The uneasy relations between Gipps and O'Connell were just one example of the tension that existed in a small community amongst men whose interests, social, political and economic, were frequently in conflict. The rights of the Crown were defended by men who had little or no stake in the Colony other than the salaries they received for their office. Those rights were often assailed by others who served in an honorary capacity on the Councils of the Government; they saw their own and their families' futures bound up with the development of independence from a distant Crown and the right to the disposal of land, in particular, according to the various personal ideas of the individual land-holder or seeker. It was therefore inevitable that there would be some conflict between the groups. On his Executive Council the only member upon whom Gipps could consistently rely for support was the Colonial Secretary E. Deas Thomson. Broughton, O'Connell and Riddell were never in anything like real harmony with the

1. For the deed and other papers see Colonial Secretaries Papers re Claims of Bligh's heirs, 1839; NSWA, 4/7013.
2. Gipps to Russell, 21 April 1841. HRA, 1, XXI, 338.
3. Stanley to Gipps, 15 November 1841, ibid., 582.
Governor's ideas, which in the main were shared with or initiated by the Home Government. In the Legislative Council he could count normally upon the active support of Plunkett, Jamison and Thomson, but the others fluctuated according to their own interests, private or political. In 1839 Philip Parker King became Resident Commissioner of the Australian Agricultural Company just a few months after Gipps had appointed him, unwillingly, to the Legislative Council.¹ Gipps indicated that his choice of a new appointment in the event of King being unacceptable to the Colonial Office, would be between James Macarthur and W.C. Wentworth, although the former had recently acted in England as the agent of the exclusive party, 'which already has a great majority in the unofficial part of the Council', while Wentworth was 'a person whose appointment would undoubtedly be very obnoxious to that party'. Russell thought it improper for King to continue on the Council, given his position in the Australian Agricultural Company, and submitted Macarthur's name to the Queen, despite the fact that Hannibal Macarthur, a cousin of James, was already a member.²

The appointment of another Macarthur indicated the difficulty that the Colonial Governor had to prevail upon men to undertake an office that entailed considerable personal sacrifice through the necessity of absenting themselves from their properties. It was inevitable that only men of substantial means could afford to do so. It was likewise inevitable that the majority of such men, an exception to the rule being John Jamison, were more of an exclusive than an emancipist bent. As a consequence Gipps was rarely able

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¹ Gipps to Glenelg, 5 March 1839, ibid., XX, 54-5. Gipps had approached two pastoralists before appointing King but both had refused on the grounds of their domestic duties. He was unwilling to appoint King because Hannibal Macarthur was married to King's sister, ibid.

² Gipps to Glenelg, 3 April 1839, ibid., 81-2; Russell to Gipps 24 October 1839, ibid., 372. Russell ignored Wentworth as a candidate despite Gipps' assurance that he was now 'moderate in his politics'. Gipps to Glenelg, 3 April 1839, ibid., 82.
to make the progress he thought desirable with legislation, and it is doubtful whether the granting of a Constitution in the late thirties would have made any appreciable difference to this set of circumstances, given that the same difficulties would have arisen. That Gipps turned more and more to the few men, almost all officers of his own government service, upon whom he could rely, is understandable. The dislike of the exclusive element began to settle more on Gipps personally, once it was clear where his own sympathies lay.¹ This at least meant that Plunkett, who since the departure of Bourke had been the main butt of criticism, was able to proceed with his work relatively unimpeded by the blasts of adverse public criticism; a change that became clearer in 1840.

That his work was excessive was obvious not only to Plunkett, but also to men like Alexander Berry, who suggested in a debate in which Plunkett was defending the appointment of two Crown solicitors, that Kinchela ought to be given more employment; perhaps he could even edit Plunkett's *Magistrate*, a task the author had not time to attend to, and thus be 'a sort of Coke upon Littleton'.² Plunkett was plaintive in his complaints about the labours that had 'nearly laid him in his grave', Dowling conceded that the office of Attorney-General had never been more satisfactorily filled, and spoke about Plunkett having been 'at death's door', while Gipps complained realistically that he constantly found it difficult to get an opinion from Plunkett with the promptness he desired.³ Plunkett's complaint must be seen against the background of a man who was already on a salary of £1,200, had no children and no establishment of any grandeur to keep up, and yet

1. See *SH*, January to April 1839.
3. Ibid. Plunkett said that when he became Solicitor-General the work of his office was five years in arrears and that he had never recovered from his exertions in rectifying the situation.
found time to engage in private practice. Work was clearly his escape and if he wanted to work Downing Street saw no reason why he ought to be prevented from doing so, for, ultimately, no reason why he should gain any special recognition for his work. For Plunkett, as for other Irishmen who had managed to win a small place in the ranks of the public service, to serve England and her Queen and, through his service, to foster the development of British institutions in a Colony, seemed sufficient reward.

Early 1840 saw the return of the current Jury Lists. The Sydney list contained 977 names of which 99 were struck off 'for various causes'. Of the remaining 878 there were 145 emancipists and 153 publicans. If they were omitted there would still be 580 left, and the conclusion to this exercise in subtraction was that there was thus no reason to continue to have 'these classes', that is, publicans and emancipists, on the list at all. The recommendation that publicans be excluded together with emancipists was directed at Plunkett who had narrow ideas on the aptitude of publicans in matters requiring a degree of responsibility towards the community. In May 1839 he had prosecuted in a case in which a convict, after being given too much to drink by a publican, had then gone out and murdered a man. Plunkett objected as each publican was called on the jury acting on 'a conviction that it is my duty to do so'. He then moralized on one of his favourite topics - drunkenness, which he considered responsible for 'at least three fourths of the cases which come into this Court' and was 'the crying vice of the Colony' to the extent that anyone who failed to attempt to put down 'this curse of the land' was lacking in humanity and patriotism. The Herald was not slow to pick up this flaw in Plunkett's ambiguous attitude to publicans, although he had never extended it to embrace all publicans, but only in the matter in question when they were called upon to decide the

1. SH, 20 January 1840.
2. Ibid., 17 May 1839.
responsibility of one of their number. It pointed out, however, that if his successor decided to challenge emancipists then 'No one...would exclaim more loudly...than Mr Plunkett himself.' When it asked for the exclusion of both emancipists and publicans it admitted that in session after session 'gentlemen of respectability' were fined for non-attendance as jurors 'because they do not like certain associations in the jury box'. These 'associations', besides emancipists and publicans, included a negro, born in England, who was admitted to jury service in 1840. 'Is it not revolting to go into a British Court of Law and see negroes sitting in a jury box?' the Herald went on; there could be 'no confidence in their intelligence and discrimination'. The whole jury system was summed up as 'corrupt from top to bottom' and it was regarded as the most objectionable aspect of the legal system that had hitherto been seen in New South Wales; effectively it was simply part of a 'liberal' theory that bade fair to wreck colonial society.  

Yet if the opinions of the conservative theorists had been followed the system would never have approached, even remotely, the concept of trial by jury that had become the linchpin of British justice, and in fact the Herald was committed to the proposition that English law should not be taken over 'holus bolus' into the colonial legal system. Juries could be objected to insofar as it was inevitable that in certain circumstances some jurors would not be capable or willing to exercise their duty with responsibility. Plunkett was the first to recognise this, but the

1. Ibid., 20 May 1839.
2. Ibid., 22 January 1840.
3. Ibid., 13, 22 January, 16 March, 24 April 1840.
4. Gipps held to the same view, at least in regard to a Grand Jury which he did not feel could be 'advantageously established in the Colony. Gipps to Russell, 1 January 1841, HRA, 1, XXI, 155-7 and SH, 24 April 1840.
alternative was to deny the very basis of British justice by which every man had a right to be tried by his peers. In any case there were other situations in which objections could be raised to undesirable elements in the Courts. It frequently happened that witnesses also were open to objection. In May 1840 two surgeons were called as witnesses in a case. One appeared, and was so drunk that he was incoherent, whilst the other preferred to remain before the other bar where he was found by the police completely intoxicated. The business of the Court was disrupted and both surgeons were sent to gaol. Two days later another incident occurred which, if extended on the Herald's principles of admitting only the worthy and respectable elements of society to the Courts could have resulted in the exclusion of the public also, and thus the introduction of a type of Sydney Star Chamber.

On Monday forenoon while a trial was going on before Judge Willis, a person in a state of intoxication fell asleep on the middle row of seats and thinking he was in a grog shop, suddenly shouted out, "Bring us another pint you B----r". He was instantly placed on the floor of the Court and sent seven days to gaol.  

Yet the possibility of any real extension of freedom being extended to those who transgressed the norms imposed by a society that sought to foster in New South Wales the values then being formed in England, depended upon an understanding of the transportation system as reformation besides punishment. Perhaps this was best illustrated in the case of Captain Maconochie. His appointment to Norfolk Island as Superintendent was first mooted from London, although Normanby did not want Sir John Franklin upset by the appointment. Maconochie wanted to try a new system of reformation as distinct from the old one of repression and punishment of convicts, and both Downing Street and Gipps approved of his ideas.

1. Ibid., 4 May 1840.
2. Ibid., 6 May 1840.
in the main. He was therefore appointed and immediately set about implementing his ideas on the island. It was not very long, however, before news reached Sydney of the way in which he intended to reform his charges and his system was attacked as a 'tissue of undigested absurdities'.

Even Gipps, who asserted his undiminished desire to see Maconochie's system 'tried in a fair and proper manner' became alarmed when he heard that a few days after his arrival, on the occasion of the Queen's Birthday, Maconochie 'regaled with Punch and entertained with the performance of a Play' a 'thousand persons of the most reckless character' who were guilty of 'the commission of crimes for the most part of the deepest dye'. The Play Bills, when circulated at Sydney, gave 'rise to loud expressions of dissatisfaction', and at least raised eyebrows in Downing Street to the extent that permission was given to Gipps to remove Maconochie, if he considered it necessary for 'the good of the Public Service' although it was never quite clear how that body rather than Maconochie's charges on the island were in need of 'good'.

In the Legislative Council Plunkett defended Maconochie and his work on the island. He saw the whole attack as bound up with the transportation question and the Molesworth Committee. He gave credit to Molesworth 'for being industrious in picking up all who had anything to say against the Colony' and he thought that if Maconochie's system could be made to work then it would contribute

1. Normanby to Gipps, 11 May 1839. HRA, 1, XX, 155; Gipps to Normanby, 23 November 1839, ibid., i 400-3.
2. SH, 29 April 1840. Australasian Chronicle, 2 July 1840, thought Maconochie's system was excellent and asked that it be given a fair trial.
5. Russell to Gipps, 12 November 1840, ibid., XXI, 73.
greatly to benefit the total convict system, which in his opinion 'has reformed more than any penitentiary or any other system of punishment that has hitherto been discovered'. These remarks, as indeed the whole reaction to Maconochie's system, took place in the context of the official notification of the cessation of transportation to New South Wales.

It was not until 20 October 1840 that Gipps announced officially in the Legislative Council that transportation had ceased as from 1 August of that year. The statement caused no surprise as it was known as early as a year before that it was about to cease when 'This welcome fact' was proclaimed. Before the Order-in-Council determining the places to which convicts could be transported was known, it was thought that New South Wales would receive convicts who had completed their sentence on Norfolk Island. This resulted in two successful motions, moved in the Council by James Macarthur, that strongly rejected the supposed proposal that New South Wales would remain 'the receptacle of Convicts, and therefore will in no way be freed from the stain which Transportation has impressed on it', whilst it would cease to benefit from the forced labour of Convicts. Plunkett agreed with these motions, but he was not prepared to see the whole system condemned simply because it contained defects. To the end he would not admit the system was bad or that it tainted the country to which convicts were sent. He held that it was a good system that could have been made much better had ideas like those of Maconochie been given greater rein. He held firmly that both the convicts

1. SH, 8, 9 October 1840, reports of Legislative Council proceedings of 6, 7 October 1840.

2. SH, 21 October 1840, report of Legislative Council proceedings of 20 October 1840; SH, 9 October 1839. For the Order-in-Council of 22 May 1840 see HRA, 1, XX, 701-3. In the Australasian Chronicle, 11 October 1839, 'the dawn of a bright and glorious era for Australia' was proclaimed.

3. Gipps to Russell, 8 October 1840, HRA, 1, XXI, 41.
sent to New South Wales and the Colony itself benefited through transportation. To many it was not an acceptable view then, but in the light of Australia's history it may have been proved a reasonable one.

The cessation of both transportation and the assignment system in 1840, with the consequent loss to the Colony of its hitherto main source of labour, threw the spotlight onto immigration as the hope of the future. Immigration began to grow considerably in and after 1840, with 6,697 immigrants brought into the Colony in 1840 at the public expense, to the amount of £111,000.¹ The main argument was whether the Bounty system, through which a certain sum was paid to those who brought in migrants of their own choice, or the Government system, through which the whole thing rested with the Government both as to selection and finance, was the better. A subsidiary argument revolved around the type of migrant that came to the Colony, and in particular whether Irish migrants were a bane or a blessing.

Early in 1840 the number of Irish convicts caused some disquiet. They were papists and the result of their being allowed entry would result in the future in 'a liberal colonial constitution' and thus 'The just influence of the property of Protestant Emigrants will be nullified by the number of Popish voters.'² By August the argument was changed to an attack on 'Roman Catholic...

¹ Gipps to Russell, 14 September 1841, ibid., 508-11. Gipps was happy to be able to report that 'A rapid improvement in the Social and Moral condition of the People is very evidently taking place. The old distinction between Free Settlers, and persons who have been Convicts or are of Convict Origin, is still preserved, but the virulence, with which it was formerly marked, is very happily subsiding', ibid., 510.

² SH, 24 February 1840.
Immigration* and Plunkett was charged with defending the southern Irish when his real intent was simply to land as many papists' as possible in the Colony in order to elect 'a liberal assembly'. He was unable to redeem himself when he opposed a motion to admit colonial youth to the bar unless they had had English training,

'There is no profession which exercises greater influence over the public than the bar.... The bar will of course direct the jurisprudence of the country, which he hoped will always be upon the model of English institutions and in order to properly estimate their beauty they must be seen in the pure atmosphere of England'.

He protested in the Council against the 'Anti-Irish feeling which is raised in this Colony' to be told by Broughton that it was not the Irish race but their religion and their increasing numbers that the protest was levelled at, because they threatened 'the toleration and freedom of their own religious worship and rights'; although the Bishop did not clarify those whose worship and freedom was in jeopardy. James Macarthur agreed with the Bishop but conceded that the Irish were at least better than Asiatics. One thing was granted to Plunkett. He made a far more manly speech in the Council than George Gipps who proved himself no more than 'a time-serving, trimming Protestant' in that he did not oppose the Irish for their religion. Nonetheless the Catholic graduate of Trinity College, Dublin, was told that New South Wales was no place to defend the 'hordes of ignorant, unskilful, priest-ridden Catholics' from Ireland, because they were 'ignorant, turbulent, mentally debased and totally unqualified for the elective franchise ...' and, despite Plunkett's advocacy of them they would and must

1. Ibid., 31 August, 6 October 1840.
2. SH, 10 October 1840, report of Legislative Council proceedings of 8 October 1840.
3. Ibid., 26 October 1840, report of Legislative Council proceedings of 23 October 1840.
4. Ibid., 12 November 1840. The paper was disappointed that more was not done in the Council to obtain 'Coolie' labour. All the Session was simply a 'dreary, desolate, heartless aspect of Whig misrule'. Ibid., 29 October 1840. The Australasian Chronicle was vehement in its denunciation of any attempt to introduce 'Coolies' who would 'depreciate the value of labour'. 25 February 1840.
be stopped from coming into the Colony.  

When the Legislative Council opened on 28 May 1840 Gipps introduced a Bill to continue once again the Bushranging Act. Plunkett was then asked by Hannibal Macarthur would he implement the Act, to which he replied that he would have nothing to do with it and would not prosecute under it because of the section that related to the execution of convicted bushrangers within forty eight hours of sentence. He considered it 'illegal and unconstitutional'. It was an unpopular stand given that bushranging at the time was rife. The murder of John Kennedy Hume, brother of Hamilton Hume, at Gunning in January, alarmed the local community, and outraged Sydney, where the impression was widespread that 'Rapine and murder stalk through the land'. The government was accused of being 'essentially a talking government', the police were too poorly paid with the result that they were open to bribery, and in any case they were 'a miserable rabble' and as a result the interior was left in a state of disorder. These reports, and the conclusions drawn from them, were undoubtedly exaggerated, as it was never suggested that the ordinary person had to go constantly in fear of his life or belongings. At the same time in some districts the situation was acute, and fifty separate outrages took place in the Bathurst district in a period of a few months. Plunkett, despite the outcry, refused to budge from his stand on the nature of the Act, and insisted that he was as well able to prosecute under heads that would not make a convicted bushranger liable to a penalty that he thought was

1. Ibid., 8 December 1840. Hannibal Macarthur allegedly called the Irish immigrants 'strumpets and vagabonds' at a meeting of the Immigration Committee. See Australasian Chronicle, 15 December 1840.
2. SH, 29 May 1840, report of Legislative Council proceedings of 28 May 1840. See also Australian, 2 June 1840.
3. SH, 15, 27, 29 January, 16 March 1840.
4. Ibid., 29 May 1840.
iniquitous. He was able to make good his statement in the following February when twelve bushrangers stood trial for murdering John Graham at Brisbane Water. Six of the twelve were condemned to death under the ordinary processes and hanged.¹

Two major pieces of legislation proposed to the Council in 1840 were the Municipal Corporation Bill and the Census Bill. The first was seen as a necessity in that without it the whole maintenance of Sydney in particular would remain a burden on the Colonial Government.² With it there was a concomitant Bill, called the Highway Bill, that was intended to lighten the burden of government in the building and maintenance of roads. When the Municipal Corporation Bill came into the Council Plunkett was in favour of it because he thought that besides the apparent usefulness of the Bill it ought also be implemented 'in order that the natives of this Colony might serve a political apprenticeship to fit them for the duties of free electors hereafter'.³ The very nature of the Bill brought up the question as to who was a fit and proper person to vote in elections, and also who was fit to act as a councillor. On this a division of opinion naturally arose.

Soon after the Bill was brought down Counsel was heard for the emancipist case, and it appeared that the Bill would go through even with the addition to clause 30, not originally in the text of the Bill, that those who had come to the Colony as convicts were eligible for election as Town Councillors provided they had been free for seven years from the completion of their sentence. Two months later, when the Bill had already been through most of the

¹. Ibid., 25 February 1841 and Australasian Chronicle, 18 March 1841.
². In four years to 1840 Sydney cost the Government £111,418 to maintain. See Gipps to Russell, 26 August 1840, HRA, 1, XX, 777.
³. SH, 10 August 1840, report of Legislative Council proceedings of 6 August 1840.
committee stages, the anti-emancipist party, led by James Macarthur, got up a petition against clause 30 and asked that Counsel be heard on it.¹ The petition was signed by 485 people with prominent names like Terence Aubrey Murray, Henry O'Brien, Robert Campbell and Charles Throsby, five clergymen and 55 magistrates on it.² Gipps was naturally worried that hearing Counsel would only tend to stir up the old animosities that he fondly hoped had been laid to rest with the cessation of transportation and the increasing influx of free immigrants into the Colony.³ Plunkett, although he expressed himself clearly in favour of clause 30, said that he would vote for Counsel to be heard on the principle that it had been heard for the other case. A vote was taken with seven for a hearing and six against; and Gipps spoke again, wondering whether he ought to withdraw the Bill as he feared the dissension that would be caused. He used the argument that no Counsel had been heard against the Catholic Emancipation Act, and did not think it right to hear Counsel pleading for any restriction of the just rights of citizens. This was clearly directed at Plunkett, who agreed, but thought that in fairness Counsel ought to be heard.⁴

The following day Gipps returned to the Council to announce that he was going to withdraw the Bill. He said that he was amazed at those who had voted for Counsel to be heard, by which he meant that he was amazed at Plunkett, as he knew that the other six would naturally have voted for Counsel. Plunkett replied that he acted only in justice, but that if he had thought that his vote

¹. Ibid., 10, 19 August 1840, and ibid., 14, 17 August 1840, reports of Legislative Council proceedings of 6, 18 August 1840.

². Ibid., 17 August 1840.

³. Ibid., 19 August 1840, report of Legislative Council proceedings of 18 August 1840; Gipps to Russell, 26 August 1840, HRA, 1, XX, 777-82.

⁴. SH, 19 August 1840, report of Legislative Council proceedings of 18 August 1840.
would have resulted in the Bill being dropped he would not have so voted, thus choosing the lesser evil. He made it clear that he thought the exclusion of emancipists was unconstitutional, and, although he knew none of them except officially, he would have voted to have them eligible for office as Councillors even if they themselves had petitioned to the contrary.\(^1\) Gipps then withdrew the Highway Bill, to which Plunkett commented that the Council was proving itself 'unfit, and incompetent to Legislate for the Colony' and that nothing would be rectified until the people were prepared to 'come forward to tax themselves'.\(^2\) In the event it was another instance of how New South Wales society continued to impede its own progress towards responsible government, because the exclusives were prepared to suffer any number of disabilities rather than to admit practical equality. A week after this occurrence Plunkett was not unnaturally irked when James Macarthur insinuated that official members of the Council were bound in the way they voted. He retorted that he would vote 'freely and fearlessly and to the best of his ability and judgment for the general welfare - and not unwillingly, or under constraint'.\(^3\)

The other Bill, called the Census Bill, was, in view of the impending granting of a Constitution to the Colony a necessity in order that a correct estimate might be known of the number and condition of the population. As was the custom, all Bills were sent to the Attorney-General for his opinion on their legality. Plunkett replied to the Colonial Secretary that the section in it that asked parties whether they were free by servitude or free by pardon was 'inquisitorial and illegal as tending to degrade and

\(^1\) Ibid., 21 August 1840, report of Legislative Council proceedings of 19 August 1840.
\(^2\) Ibid.
\(^3\) Ibid., 28 August 1840, report of Legislative Council proceedings of 27 August 1840.
disgrace parties'. The Bill was amended, by which the householder could be asked how many persons in the home 'arrived free' and then 'how many other free persons'. It was a bad Bill and Plunkett knew it, but it went through the Council on 23 October. When it went to the three Judges, Dowling, who had been petitioned by W. A. Duncan, H. M. MacDermott and others on the matter, and Stephen, declared it repugnant to the laws of England. A rider was attached to the Act which forbade the collectors to ask of anyone the question 'Whether or not he had been transported' and left it to the householder to ascertain the number of those bond or free in his household. In this form as 4 Vict. No.26, the Act was confirmed by the Queen.

The Census Act, in which Willis dissented from Dowling and Stephen, and did so publicly in Court, brought to a head a conflict that had smouldered for a long time between the Chief Justice and Willis. Willis, as early as 1839, was agitated about the legality of Dowling's position because he acted as Judge of the Vice-Admiralty Court as well as Chief Justice. The point at issue was that the 7th Section of the Charter of Justice forbid the Chief Justice acting in any other capacity from which he received an emolument. Dowling wrote to Willis to say that he would ask the Governor to look again into the matter so that he, the Governor, may 'take such steps as he may be advised, to guard against the forensic discussion of a point, which has not been hitherto agitated

1. Ibid., 21 October 1840, report of Legislative Council proceedings of 20 October 1840.
3. Ibid. 'Good God! are these Macarthurs lost and dead to every sentiment of human kindness' commented the Australasian Chronicle, 20 October 1840, and it thought that Dowling's and Plunkett's conduct in the matter would be 'quoted in the annals of this colony with praise', ibid, 12 December 1840.
4. Russell to Gipps, 26 August 1841. HRA, 1, XXI, 484-6.
by any but your own acute and intelligent mind'. 1 Willis was quick to refute the exclusive possession of such a mind, on the grounds that Forbes had been concerned about the point and consequently had not taken fees for his work in the Vice-Admiralty Court. 2

In the event the Colonial Office, which had already decided that the objection was unfounded, was unable to set Willis's mind at rest: he said it was an 'opinion I cannot assent to'. 3 Gipps therefore had to go through the whole process again of bringing the matter to the notice of Russell. The two judges were no longer on speaking terms and Willis wrote to regret that no communication could take place between them 'save those of official courtesy'. 4 Plunkett meanwhile had been drawing up a new set of Supreme Court rules in which task it was imperative that the three judges give their assistance, but Willis again refused to consult with Dowling. 5 In the middle of May Willis turned his guns on Stephen, giving as his opinion that he ought not be a judge at all, as he had been Attorney-General in Van Diemen's Land. 6

The major source of difficulty between the judges, however, was the question as to who was to act as equity judge. In England Willis had been a Chancery Barrister, whilst the other judges had been Common Lawyers, so that by a private arrangement it was agreed

1. Dowling to Willis, 6 February 1840, Dowling's Letter Book, vol. V, NSWA, 2/3474. Dowling also wrote to Stephen to say that he would ask Gipps to 'have the matter submitted to the Attorney-General and have it set at rest'. Ibid., 5 February 1840.
2. Willis to Dowling, 7 February 1840, ibid.
3. Willis to Dowling, 13 May 1840, ibid., Gipps to Russell, 21 June 1840, HRA, 1, XX, 683-4.
4. Willis to Dowling, 12 February 1840, Dowling's Letter Book, vol. V, NSWA, 2/3474. A month later he wrote, 'The tone your correspondence has assumed of course prevents all further intercourse in any matter where consistently with public duty it can be avoided', ibid., 10 March 1840.
5. Dowling to Willis, 6 March 1840, ibid.
that Willis would take the equity side. Stephen felt himself unsure in equity cases, and Dowling had at no time made any pretension to competence. 1 The Act, 2. and 3. Vict., C.70 passed in the session of the Legislative Council of 1840 gave legal sanction to this practice of charging one of the judges with the duty of presiding in the first instance in equity proceedings, and Gipps thought that it was taken for granted that Willis would be the judge. 2 Dowling seemed to concede this point and even wrote to Willis that 'as long as I am retained in the Legislative Council, it will be impossible for me to accept the appointment of Equity Judge'. 3 Such an explanation was not sufficient for Willis who wanted Dowling to admit his own incompetency, with the result that, to Gipps's astonishment, Dowling put himself forward as the judge in equity. 4 Willis was similarly astonished and wrote to tell Dowling how incompetent he thought he was, whilst Dowling explained to Stephen that he was 'a placable person but even a lamb will flinch against the knife' and that it was time to make 'a stand'. Willis insisted that there be a meeting between the three judges and Plunkett to iron the matter out, and he approached Plunkett in the street about it. 5

Willis asked Plunkett whether, if applied to, would he give his opinion 'as to the manner in which Equity Business had been done in the Supreme Court before his arrival'. Plunkett said that he would decline being mixed up in any 'squabble' between the judges 'but if at the proper time, and place, and asked by competent authority, he would not decline giving his opinion - but he suggested

1. Stephen to Dowling, 10 June 1840, ibid.
2. Gipps to Russell, 1 January 1841, HRA, 1, XXI, 155-7. Willis wanted to hold the position as judge in equity with the title of 'Chief Baron', ibid.
5. Dowling to Stephen, 1 December 1840; Willis to Dowling, 1, 5 December 1840; Memorandum of Dowling, 16 December 1840, Dowling's Letter Book, vol. V, NSWA, 2/3474.
to Willis the expediency of having no such question put to him.\(^1\)

In the event Dowling was officially appointed Equity judge on 8 December, whilst Willis' removal to Port Phillip as judge, engineered by Plunkett, and agreed upon by Gipps, delighted everyone, including Willis.\(^2\)

Plunkett had long been exercised about the deficiencies of the administration of justice at Port Phillip so that the Act, drawn up by him, 'to provide for the more effectual administration of Justice in New South Wales and its dependencies', 2 and 3 Vict., C.70, contained as its first main provision that there be resident judges at Port Phillip and in New Zealand. Once the Act was passed Plunkett wanted immediate action, but it was another matter to find a suitable appointment for the position as judge at Port Phillip. Gipps wrote to Dowling in November asking him to attend a meeting of the Executive Council at which Plunkett would be present. Plunkett wanted an immediate court held at Port Phillip and, Gipps wrote, 'he will go there himself to conduct some important cases between Blacks, and Whites, which ought to be disposed of'.\(^3\)

The meeting came to no firm conclusion, but Dowling later met Plunkett on the street where, incidentally, a good deal of the higher affairs of the Colony seem to have been conducted, and impressed upon him the expediency of doing nothing at Port Phillip until a resident judge was appointed, although he admitted 'the necessity of a speedy investigation of the Aborigines' Cases'.\(^4\) At the same time the Executive Council had decided that

1. Memorandum of Dowling, 16 December 1840, ibid., Plunkett reported the street conversation, held on 7 December, to Dowling.
2. Dowling to Kinchela, 10 December 1840, ibid. See also Gipps to Russell, 3 January 1841, HRA, 1, XXI, 160-5.
4. Dowling to Plunkett, 2 December 1840, ibid.
a sitting of the Supreme Court would be held in Melbourne and that the Attorney-General would go to conduct the cases on the part of the Crown. This communication was addressed to the three judges in the expectation that they would decide which of them would preside at Port Phillip for this purpose.  

Dowling got in touch with Gipps and managed to persuade him that action at Port Phillip at that stage was premature, and Plunkett agreed in a letter to Dowling in which he seemed quite relaxed about a matter he had previously seemed to have his heart set on. Plunkett knew by this time that the situation between the judges had become intolerable, not only for themselves, but for Gipps who was fed up 'with the unfortunate differences between' them. The solution was obvious, so Willis went to Port Phillip bringing about a separation of the judges and resulting in Russell writing to Gipps one of his rare letters of mild congratulation on such a judicious decision. Both Government House and Downing Street ought to have known that they would hear more of Willis from Melbourne which he 'kept in a state of continued excitement'. Plunkett however thought that a satisfactory solution had been reached in that anything 'short of a principle' should be sacrificed in order to secure 'perfect harmony' between the various departments of Government.

Throughout 1840 Plunkett seems to have been able to maintain

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1. E. Deas Thomson to the judges, 2 December 1840, ibid.
2. Dowling to Gipps, 3 December 1840; Plunkett to Dowling, 4 December 1840, ibid.
4. Russell to Gipps, 22 June 1841, HRA, 1, XXI, 406.
5. Gipps to Stanley, 13 October 1842, ibid., XXII, 320-4.
6. Opinion of Plunkett in Enclosures to Despatches of Governor of New South Wales, 1838, pp.2185-92. ML.
more amiable relations with the burgeoning Sydney press which in that year obtained its first daily when the Herald began on Wednesday 30 September to come out every day except Sunday. He had become accustomed to criticism, even though the quality of colonial invective may have been initially a shock to him, so that he was able to advise Hannibal Macarthur, who claimed that the Australian had misrepresented him, not to be 'too thin skinned' as it was 'one of the public blessings of a free press, that it brought all the measures of the Government more fully and more prominently before the people'. At the same time there were limits when others were concerned, or when it was a case of an attack on the administration of justice. In April 1840 the Sydney Gazette published an attack on Captain James Nias of H.M. Herald, in which he was referred to as a 'mean-souled abortion of humanity'. Plunkett thought that this was an excessive use of freedom and, although the Herald warned him to leave the matter alone, he filed an ex officio information against the editor, G. W. Robertson, who was fined £200 and sent to Newcastle Gaol for twelve months for his pains. In September 1840 the Herald was rash enough to assert, in one of its customary attacks on the jury system that 'noted thieves' get off while free persons found themselves invariably convicted. It further stated that it would prove the assertion or contradict it. Plunkett departed from his usual practice and wrote to the paper asking for the facts. The editor replied that he had none. Plunkett then asked for the opinions of W.M. Manning, Chairman of the Quarter Sessions and Francis Moore the Crown Prosecutor, who both denied the assertion. Manning even went as far as to say that in his experience the free juror was more likely to convict the free than the emancipist was.

1. SH, 30 September 1840; its circulation at the time was about 2,500, ibid., 24 April 1840.
2. Ibid., 19 June 1840, report of the Legislative Council proceedings of 16 June 1840.
3. Sydney Gazette, 14 April 1840.
4. SH, 20 April, 15 July 1840.
Plunkett sent these letters to the Herald indicating that unless they were printed he would feel it his duty 'to vindicate the administration of justice in another shape'. The letters were printed without hesitation. A month later the Herald was sorry to hear that Plunkett was about to go on leave because he was 'one of the very few really working government officers'.

In early 1841 Plunkett continued to work in the Supreme Court and at the same time make ready to depart. A public dinner was announced, and a letter writer asked that the humble as well as the high might be given an opportunity to prove their respect for him because he had endeared himself 'to the great mass of the people'. The public gave him a tea service, the Barristers of Australia presented a cup with his motto Festina lente engraved on it, whilst society, with Dowling in the chair and Gipps in attendance dined him at Sydney College Hall at £2.10.0 a head. Gipps said that he had had to meet Plunkett almost daily and that he was a 'great public servant' won by 'neither favour nor flattery nor threat'. Plunkett paid his own tribute to the colonial press when he said that 'public men are amenable to public opinion for their acts as servants of that public which employed them'. He thought that such was a good thing, and that he had learnt a great deal from it. He concluded by hoping that he was tolerant in matters of religion and perhaps that was the one thing that marked him off from so many of his colonial contemporaries in those still turbulent times.

1. Ibid., 2, 25, 31 September 1840.
2. Ibid., 30 October 1840. See also Australian, 31 December 1840 for similar views.
3. SH, 25 December 1840, 1 January 1841.
4. Sydney Gazette, 25 February 1841; SH, 5 March 1841; Australian, 4 March 1841; Australasian Chronicle, 4 March 1841. The latter paper thought the dinner was the grandest and most respectable ever given in the Colony' but was much displeased that it took place in 'The Season of Lent'. Ibid.
His very tolerance probably made his last public appearance painful to him. On St Patrick's Day his sister Kate Amelia, who had arrived with him as a girl almost ten years before, married Francis L. Merewether. The marriage was announced to take place at St Mary's 'and afterwards by the Lord Bishop of Australia at St James'.\(^1\) In fact the second ceremony did not eventuate, as Merewether was wearied of making affirmations after the first. Plunkett nonetheless looked drawn and worried at the ceremony at St Mary's, although Kate was seen looking radiant in the streets a few weeks later. But by that time Plunkett had left for London on the barque Kelso that sailed on 24 March 1841.\(^2\) Perhaps he had decided that his days in New South Wales were over as before he left he sold almost all his personal belongings, his piano, violin and law books as well as a britschka and a double bodied phaeton.\(^3\) He was to find that almost ten years in the Colony had already bound him to it to the extent that he would give cheerfully of his service in its development for the rest of his days.

\(^1\) Australian, 18 March 1841.
\(^2\) Sydney Gazette, 25 March 1841.
\(^3\) Australasian Chronicle, 11 March 1841.
CHAPTER FIVE

FROM NEW SOUTH WALES TO DOWNING STREET

While Plunkett was away on leave, between March 1841 and August 1843, the Colony of New South Wales was passing through the worst stages of a depression that took its toll of all classes of society. Speculation in land and a protracted drought combined with the recession of 1839 in England to so effect the economy that by November 1841 the question was not how the colonists would be governed but 'What shall we eat?', although it was still customary to look to England as the cause of 'that fitful, imbecile, and disastrous manner of government' which seems inseparable from the policy of our British dictators.'

Gipps, naturally, saw the roots of the problem in another light and attempted to explain to Secretary Russell that the commercial embarrassment of the Colony was caused by the same factors that brought about cycles in the British economy, namely 'an excess of speculation or over-trading, or from the undue extension of Credit, and the facility with which our Banks have been in the habit of discounting mere accommodation paper'. To this confidential despatch Russell replied with a severe reproof. Russell thought that the unwonted encouragement that Gipps had given to immigration into the Colony was 'in some sense responsible for these evils' but he asserted that he would do all he could 'to counteract the mischievous effects of your improvidence, for which you alone are responsible'. This letter, when its contents became known in Sydney, was rejected as undeserved on the grounds

1. SH, 1 November 1841. We are overtaken by a 'financial typhoon' said the paper.
2. Gipps to Russell, 1 February 1841, HRA, 1, XXI, 198-200.
3. Russell to Gipps, 16 July 1841, ibid, 429-32.
that Gipps had simply responded to the clamour for labour that pressed upon him from all sides with the cessation of transport-
ation. Gipps himself told the Legislative Council that he would have resigned had not the 'general opinion of the colony' been in his favour. He was able to prove that the Treasury of New South Wales was not bankrupt, as had been asserted in England, but that during 1841 there had been an excess of approximately £35,111.0.6 in revenue over expenditure and 'though my measures have been most harshly censured I cannot but feel that they have been imperfectly understood.'

Yet if drought and a depressed economy were potent factors in the early forties that seemed to retard the development of the Colony, there were other things that worked to shape it towards a pattern of stability and social progress. The demand for labour was intense, especially on the part of the large landholders, and their inability to obtain labour from convict sources turned the minds of some to solutions that could have resulted in the sub-
stitution of convict with coloured labour. When a petition was presented to the Legislative Council in July 1841 asking for the introduction of coolie labour it was significant in that it was signed by the 'most influential and respectable individuals in the colony'. Gipps had already expressed his attitude to the question when he said that he knew of no other matter 'upon which the future character of the Colony is more dependent' and warned

1. SH, 29 January, 3 February 1842. Russell's despatch of 16 July 1841 was printed in ibid, 29 January 1842. It is indicative of some degree of incipient national spirit that public opinion, including the Herald, stood firmly behind Gipps in rejecting the reproof to the Governor.
2. Ibid., 20 May 1842, report of Legislative Council proceedings of 17 May 1842.
3. Gipps to Russell, 10 February 1842, HRA, 1, XXI, 686-8. At the same time it is clear that the rebuke administered by Russell in 1841 made Gipps extremely cautious in matters of finance during the remaining years of his administration.
4. SH, 21 July 1841, report of Legislative Council proceedings of 20 July 1841. Of the 202 persons who signed the petition 60 were magistrates, ibid.
that in England the introduction of coolie labour into the Colony would be viewed only as another form of 'slave labour'. The petition, presented by James Macarthur, whose intention was to allow debate on it rather than foster it, as he was personally opposed to the proposition, was withdrawn when it was apparent that there was no real support for it in the Council. The Herald was incensed with Macarthur and called him 'The Cicero of the Cow-pastures' because it thought that he had agreed with the arguments that had been brought forward requesting the introduction of coloured labour, one of which was the curious plea that bringing hill coolies to New South Wales would provide an opportunity to make Christians of them. The rejection of the petition resulted in the abandonment of the scheme, on any official level at least, and the attention of both government and colonists reverted to white immigration from the British Isles as the most readily available solution to the labour problem.

Between 1831 and 1840 slightly over a million pounds had been received by the Land Fund, less than one half of which had been spent on immigration. The real cry was that almost half a million had been spent on the Police and Gaols and it was argued that this money was being alienated to pay for the control and detention of English refuse. It was further observed that even the little that was given to immigration was being wrongfully used in that far too many Catholics from Ireland were being brought to New South Wales. Lang, with reckless disregard of the facts,

1. Ibid., 7 July 1841, report of Legislative Council proceedings of 6 July 1841. Gipps rejoiced that 'here we are all whites at present' and amongst us there is no 'degraded classes', ibid.
2. Ibid., 21 July 1841, report of Legislative Council proceedings of 20 July 1841. Broughton in debate argued forcibly on economic grounds against coloured labour, ibid.
3. Ibid., 24 July, 2, 3, 7 June 1841.
4. Ibid., 10 April 1841. The Herald calculated that if all the fund had gone to immigration 34,000 more labourers could have been brought in.
pointed this out in his *Question of Questions* and earnt the gratitude of the *Herald* that warned the Committee of the Australian Immigration Association, made up of 'nearly the whole body of our Protestant landholders' to start decisive action and bring out more Protestants.¹ A month later the paper graciously admitted that Lang's pamphlet was grossly exaggerated because it was revealed that over the previous three years the proportions were 72% Protestant to 28% Catholic. At the same time it was noticed that the scale was swinging in favour of the Catholics and caution was thereby urged.²

Perhaps the most significant fact in 1841 that tended to dissipate some of the prejudice of the past by revealing the ascendancy of the free colonists, was the census. It was published in September and revealed that the free made up 80% of the population, whilst the bond were only 20%. In Sydney itself the proportions were even more gratifying with only 7.6% bond and 12.1% emancipist. Even the proportion of Protestant to Catholic was reassuring with 72% to 27% being the relative figures for both the Colony and Sydney itself. The only really discordant note was struck by the disproportion of male to female, there being 87,298 males to 43,558 females, as a result of which 39,000 males were doomed to pine in the 'horrors of incurable celibacy'. Rightly, transportation was seen as the cause of this imbalance because 5.85 males had been transported for every one female.³ An examination of the census results brought in its wake opposition to any cry for a renewal of transportation, an increase in the demand for self-government both on the local municipal level and

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1. Ibid., 14,20,22,24,27 April 1841.
2. Ibid., 13, 15 May 1841.
and the colonial level, and, more importantly, the conviction that New South Wales had begun to recover from the slur of Botany Bay and move towards the state of a respectable Colony in the Empire. All the humanitarian talk and action of the emancipist party of the past had been unable to do what the cold figures of a census helped to achieve: the lessening of the rigidity of the exclusive element towards that segment of the population that had seemed to threaten stability, prosperity and even the basis of British civilization. The census did it simply by proving in an incontrovertible manner that the era of convictism was waning, even though its shadow was still present. In the immediate future the question that would be asked was not what past a man had, but what he was worth in the present, and thus the emphasis on human value would shift from character to cash, which indicated the ability of New South Wales to slough off the characteristics of convictism and take on those of capitalism.¹

Towards the end of the year some of the larger landholders like James Macarthur and his 'convict-shepherd-loving friends' were toying with the idea of the reintroduction of transportation. Their principles were modified by their needs, and the latter, as far as labour was concerned, were acute.² But the climate of the local opinion was firmly against any such retrogression. In January 1842 the contents of a letter by Russell to Gipps dated 21 July 1841 were made public. Russell dealt principally with the

¹ W.A.Duncan said that the financial crisis of the early 1840's staved off any argument between 'aristocracy and democracy' for the time being. In W.A.Duncan Notes of a Ten Years' Residence in New South Wales, Pages extracted from Hogg's Instructor, 1849, p.147. In May 1841 the Herald said, 'there is scarcely a man among us who, if called instantly to account, could pay twenty shillings in the pound', SH, 6 May 1841.

² As an example the 'Settler' who wrote 'I have sixteen convicts due, and have not received one the last three years', ibid., 7 April 1841. Assignment ceased in May 1841. See ibid., 22 December 1841, report of Legislative Council proceedings of 21 December 1841 and for opinion on reintroduction of Transportation, ibid., 25, 29, 31 December 1841.
Municipal Corporation Bill that Gipps had withdrawn in the Council in 1840. He hoped that the Bill would pass without mutilation and in fact recommended that Gipps ought to withdraw it again rather than suffer its amendment. He concluded by saying,

'I trust that the wish to create invidious distinctions between one class of the local Society and another will yield to argument, or at all events to time.

The danger which a few years ago might be apprehended from the preponderance of an Emancipist interest, if it may be so termed, even if it were real then, will soon become entirely visionary.

Nothing can now give a separate importance to that Class but the attempt to proscribe them'.

The Herald, with the census results as proof that the vision of the past was no more than a chimera, wrote an editorial on Russell's despatch in which it formally renounced the attitudes that it had fostered for the previous decade. It admitted that the 'two castes' division had been the running sore of New South Wales society, and thus caused the lengthy deprivation of political independence. The emigrant party had said in effect 'that they would rather forego all the rights of self-government for an indefinite number of years, than accept them on the terms laid down by the Emancipists'. This had to stop, the distinction between emancipist and the rest had to be cancelled, and cancelled for ever.

It was all very well to call for unity; it was another thing to implement it. Russell had informed Gipps that he had not found it possible during the parliamentary session of 1841 to get any measure through for the improvement of the government of New

1. Russell to Gipps, 21 July 1841, HRA, 1, XXI, 440-2.
2. SH, 11 January 1842. It is possible that financial as well as political and social considerations helped to bring about the change in editorial policy.
South Wales. As a result 9 Geo. IV, cap. 83, which had expired initially on 31 December 1836, was renewed, as it had been each year, to the cry 'O shame upon British statesmen'. But on 31 August the Melbourne ministry fell and Stanley again took the Secretaryship in the Colonial Office under Peel. The Whigs had been in office for ten years in England, and now New South Wales looked to a fondly designated Tory government as the source from which a degree of greater political independence would spring. As a result of this expectation a public meeting was held in Sydney to formulate the opinion of the colonists on what form the new government of New South Wales ought to take. To the urging of 'Up and At Them' 2,000 people assembled under the chairmanship of William Hustler, the Sheriff, who observed, when the meeting degenerated in uproar, that 'such conduct would almost make him believe that the Colony was not fit for a Representative Assembly', and caused another speaker to thank, ironically, those present 'for having postponed a Legislative Assembly for at least ten years'.

The disorder sprang from the fact that there were those present, like Henry Macdermott who 'if he could not obtain his privileges as a free man he would not have them at all; he did not wish to see representation guided only by acres, and sheep and cattle'. This score of low fellows led by Macdermott thought that if the Herald and its party had its way 'the colony would have a pure oligarchy'. Eventually the Loyalists, who were designated a combination of 'conservatives and liberals' won the day against the Jacobites who were 'democrats of the deepest dye' and for the present the constitution, the monarchy and Magna Charta were preserved from the inroads of the rights of man, republicanism and Tom Paine. A Commission was set up, upon which James Macarthur

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1. Russell to Gipps, 21 July 1841, HRA, 1, XXI, 440-2.
2. SH, 2 September 1841.
3. Ibid., 15, 16, 17 February 1842.
4. Ibid., 17 February 1842.
refused to sit if Henry Macdermott were elected. Macdermott was excluded, the Commission met in a desultory fashion, and eventually died a natural death with the epitaph 'Peace to its manes'.

The proceedings in Sydney did not deter a quiet group of men in their offices in Downing Street from undertaking that effort at gradualism that was eventually to result in a Legislative Council for New South Wales. Helped by a man whose motto was Festina Lente, the Constitution was shaped principally by D.W. Hope, the parliamentary under-secretary for colonial affairs. Together Hope and Plunkett, home ostensibly on leave, worked away at the document that was submitted to the Imperial Parliament in 1842 and became law in New South Wales in December of that year.

The principal feature of the Act of 1842 was that it provided for a majority of elected members in the Council. The Crown held the right to nominate twelve members of whom no more than six were to be salaried officers of the Crown. The other twenty four were to be elected and the district of Port Phillip was to elect six of them. The franchise was to be based on a £20 annual freehold or leasehold, but the actual implementation of the Act insofar as the forthcoming elections were concerned was largely left in the hands of Gipps and the present Legislative Council. When he transmitted the Act to Gipps on 5 September 1842 Stanley told him 'I have also gladly availed myself of the presence in this country of the Attorney-General of New South Wales, to obtain the benefit of his local knowledge and experience in the arrangement of many points of detail. Under these circumstances the Bill has passed without a dissentient voice through both Houses of Parliament'.

1. Ibid., 17, 21, 28 February, 1 March, 20 June 1842.
2. The Act, 5 and 6 Vict., c.76 was printed in full in SMH, 5 January 1843. The SH changed to SMH on 1 August 1842.
3. Stanley to Gipps, 5 September 1842, HRA, 1, XXII, 238-43. Stanley hoped that henceforth 'Her Majesty may have the high satisfaction of witnessing, as the result of Her gracious boon to the Colony, its continued advance in religion and morality; its steady progress in wealth and social improvement; and the
Plunkett had arrived in England in July 1841 and immediately reported his presence to Russell. In January 1842 he was asked by Stanley through Hope to supply information on house rent and the proportion it bore to income in the Colony. Plunkett replied stating that, as the exhorbitant rents in Sydney were so general a topic of conversation, he had no difficulty in supplying the information requested. Those who had an income of £2,000 and more, the 'Wealthier Merchants and Landed Proprietors' paid from £200 to £350 in rent. The 'Superior Officers' of the Government, on salaries of £800 to £1,500, paid £150 to £250, whilst other classes of retail dealers paid £120 to £250. All of the foregoing paid their rents quarterly. Other classes paid weekly rents of from 18s. to 30s. a week, whilst some few houses, with only two rooms, let for from 8s. to 10s. a week. On the back of this letter Stephen wrote to Stanley 'Perhaps it may be as well to let Mr Plunkett see the Bill rel. to the Constitution for N.S.W. before it goes to you in order that you may have his remarks when considering it'. When Stanley saw Plunkett's letter he noted on it 'I think this suggests the necessity of excluding weekly occupants. If we do not it is evident that even a £20 qualification will be almost universal suffrage in Sydney'. The weekly occupants were eventually excluded, but the £20 qualification remained on a freehold or leasehold basis, and this, to the

permanent happiness and contentment of Her people, ibid. To the Australasian Chronicle the 'gracious boon' was 'far from satisfactory' with 'its thoroughly oligarchical tendencies', Australasian Chronicle, 8 October 1842.

1. Plunkett to Russell, 29 July 1841. Original Correspondence Secretary of State N.S.W. C.O. 201/314, National Library microfilm.
3. Plunkett to Hope, 2 February 1842, ibid., C.O. 201/329.
5. Ibid.
Herald, was 'universal suffrage'.

Over the next few months Plunkett was 'employed and consulted by Mr Hope in drawing up the N.S. Wales Act'. In fact he successfully used his commitment to this work to argue for an extension of leave, which Stanley did not hesitate to grant. He was consulted by Stanley himself on various aspects of the Bill, on one occasion in conjunction with the Bishop of London about the payment of clerics from the provision of £30,000 made by the Act for Public Worship, and he generally contributed materially to the final form of the Act itself. On the evidence available it appears certain that Plunkett made a major contribution to the 1842 Act, as he himself later claimed, and others asserted.

Whilst the moulders of Empire with their assistants in Downing Street were occupied in framing the guidelines for democracy in Australia, the citizens of New South Wales were themselves taking some preliminary firm steps towards the implementation of its ideals. On 10 May 1842 the Legislative Council opened and Gipps again presented the Municipal Corporation Bill that had met disaster in the previous session. There was again a degree of opposition to the Bill on the grounds that, as the Council was

1. SMH, 8 October 1842.
2. Stephen to Stanley, 3 October 1842, Original Correspondence, Secretary of State, N.S.W. C.O. 201/329, National Library.
3. Plunkett to Stanley, 12 April 1842; Hope to Stanley, 26 June 1842, and note from Stanley to Hope, 26 July 1842, ibid.
4. Stephen to Stanley, 3 October 1842 and note of Hope to Stanley 6 October 1842, ibid. In the Plunkett Papers there is an undated letter, probably written early in 1842. It is from E.G. Wilbraham to Plunkett expressing Stanley's regret that Plunkett was kept waiting for him 'so long today but he was unavoidably detained at Windsor'. Plunkett was invited to come the next day to Stanley's office to meet him and Sir John Graham.
5. Australasian Chronicle, 9 August 1843, said that for a good deal of 'the sound and liberal features' of the Act the Colony was indebted to Plunkett. The Weekly Register, 23 September 1843, said Plunkett 'was repeatedly consulted by the Secretary of State...relative to the Bill' and 'Mr Plunkett is decidedly liberal in his political opinions'.
a nominated body, it had no powers of taxation. Wentworth, assisted by Bland and Macdermott got up a petition to this effect, but it was withdrawn after presentation by James Macarthur in the Council.\(^1\) A meeting, attended in the main by the working class, approved of the Bill and asked that it be passed, whilst another group thought that the £10 qualification was too low.\(^2\) The *Herald*, on the grounds that 'property is the best political schoolmaster', agreed with this last group, and when Jones presented a petition that the qualification be raised to £30, Therry seconded it with the observation that a £10 franchise 'would indeed be nothing more or less than universal suffrage', which was 'a doubtful good' at home, and 'a positive evil' here in New South Wales.\(^3\)

The debate on the Bill continued at great length through the Council during June, and in its progress the new groupings of the future were foreshadowed. As yet it was not a question of democracy versus plutocracy, nor indeed was it any longer the old exclusive versus emancipist argument. But when Therry moved in the Council on 28 June that the qualification for a Councillor be £1,000 instead of £2,000 it took the casting vote of Gipps to win the motion. Only John Jamison voted with the Governor and the officials of the Government for the motion, whilst the Collector of Customs, John Gibbes, joined with Campbell, Berry, Jones, Hannibal Macarthur and Blaxland to oppose it.\(^4\) Outside the Council Wentworth continued to agitate, and at a meeting attended by 700 persons 'of whom a tolerable sprinkling were respectable' he again formulated a petition against the Bill.\(^5\) Two persons, of

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whose lack of respectability the Herald was never in any doubt, caused uproar at the meeting by moving that Sydney be incorporated. Duncan and Macdermott were odd bedfellows of the Herald whose editorial policy was firmly committed to Sydney becoming a city, but it was an association of the moment only.

Sydney itself had become excited about the prospects of becoming a city, with much argument about whether its inhabitants were to be called citizens or burgesses. As a consequence the irritation caused by the idealists like Wentworth was unwelcome, and in the Council of 12 July his last petition was rejected. John Jamison, that 'hospitable knight' and constant promotor of any cause that favoured the development of a free society, perhaps reflected the confusion that his years and infirmities had brought upon him by this time voting for Wentworth's petition. The Bill was passed on 20 July, to become law on 1 January 1843 and Sydney set about preparing for its first elections. Men like James Macarthur and William Bland, whom the Herald hoped would be amongst those from the 'Respectable Classes' to stand, did not do so, probably with the thought in mind that they would soon stand in another more important election, as the news of the passing of the New South Wales Act came through in early October. The elections took place on 1 November, a Tuesday, and 'one of the most important [days] in the annals of the colony'; when for the first time 'the exercise of the rights of freemen' was permitted in New South Wales. By the following day 'the evil consequences of

1. Ibid., 20 June 1842.
2. Ibid., 13 June 1842, report of Legislative Council proceedings of 12 June 1842. Jamison took his stand on the same constitutional grounds held by Wentworth. By this time the latter was committed to a policy of opposing Gipps whenever possible as a result of his defeat over the New Zealand land deals. Weekly Register, 2 September 1843.
3. Ibid., 21 July 1842, report of Legislative Council proceedings of 20 July 1842.
4. SMH, 17, 26 September, 7 October 1842.
5. Ibid., 1 November 1842, and Australasian Chronicle, 1 November 1842.
the low franchise' were allegedly apparent 'in the great number of uneducated men who have been elected'. A merchant, John Hosking, was elected by his fellow councillors as the first mayor of the city, and although he was not of the quality sought by the Herald he was in nowise as obnoxious as that 'rampant Dictator' Macdermott, who was also elected.¹ The franchise had been settled at the occupancy of a house or building worth £25 annually, which resulted in 3,202 registered electors being qualified out of a total population of 27,688 free persons in the City; scarcely a 'universal suffrage' even allowing for women and children. Gipps reported that the elected councillors, of whom eleven were tradesmen and eight were merchants out of twenty four, were not 'gentlemen most conspicuous for their wealth or station' and he seemed to regret that the choice of their fellow citizens did not fall upon more worthy subjects. He recommended, however, that the first citizen of a City that so early in its democratic existence proved its disregard for the conventional values of the old world, should be known nonetheless as 'Right Worshipful'; but the reason he gave was Sydney's 'prominence among the Towns of the Australian Colonies'.²

The elections for the City were only an introduction to the greater business that was to follow of electing a majority for the new Legislative Council. The old Council went out with a whimper. Its last session was called for 21 February 1843, but a quorum could not be gathered as the weather was inclement, so it met for its final session on 24 February, at which Broughton declined a seat in the new Council. Gipps rejoiced, rightly in the main, that the old Council 'had never legislated for a class'.³

¹. SMH, 2, 10, 22, 29 November, 31 December 1842.
². Gipps to Stanley, 27 November 1842, HRA, 1, XXII, 376-7.
³. SMH, 22, 25 February 1843, reports of Legislative Council proceedings of 21, 24 February 1843.
The Colony itself was still suffering from the depression. In 1842 there had been six hundred insolvencies, and early 1843 saw the Bank of Australia, the Sydney Bank and the Savings' Bank all in financial difficulty.¹ The Herald looked with hope to the new Council as 'there is a deeper despondency, and a more harrowing anticipation of ruin to the colony, than ever before existed'.² Wentworth addressed a meeting called to consider the state of the Colony, and said that its present position was caused by the immense amount of money spent on immigration, the sudden cessation of transportation and the mania for land speculation. Macdermott assured the meeting that the workers were happy, and that in his opinion only the extensive land and stockholders were embarrassed by the depression. A motion was, however, passed calling for the rapid convention of the new Council.³ That the Colony was indeed in a parlous condition is testified to by a despatch that Gipps sent to Stanley in August on the occasion of the meeting of the new Council. He saw insolvency and the fall in prices as the principal features affecting the economy, and gave as an instance of the latter that sheep and horned cattle were selling at a half or a third of their 1840 price, whilst real property was almost unsaleable. He asked Stanley to take note of the fact that 'From a penal Colony [New South Wales] has become a free one' and he rejoiced in good seasons now prevailing, together with political and religious harmony, all of which augured well for the future despite the present difficulties.⁴

Campaigning for the elections began in a speculative

¹. Ibid., 6 May 1843. The financial position had steadily worsened since 1841 when Gipps wrote 'Our Banks are I believe perfectly safe', Gipps to Russell, 1 February 1841, HRA, 1, XXI, 198-200.
². SMH, 6 May 1843.
³. Ibid., 9 May 1843.
⁴. Gipps to Stanley, 19 August 1843, HRA, 1, XXIII, 84-7.
fashion as soon as the New South Wales Act arrived, and the first opposition to a prospective candidate was levelled at Robert Cooper 'the father of the most abominable of all abominations, Colonial Distillation'. The real cause of opposition to Cooper stemmed from the fact that he was an emancipist and, apart from Bland, who was considered to be in another class, he was the only emancipist to stand. The test of genuine reformation of the emancipists was their proving that they were 'modest, retiring men, taking no part in politics' and Cooper was blamed for awakening the old divisions. Cooper was 'coarse and untutored' and Wentworth indicated that he would not sit in the same Legislature with him. Cooper was defeated, retired from any further ventures in politics, and devoted his attentions to his business interests and his family of twenty eight children.

The other candidate to whom the Herald took strong exception was Roger Therry. Therry was still acting Attorney-General in Plunkett's continued absence, and he had been unable to secure the appointment to Port Phillip that was confirmed on Willis - an appointment that all parties had occasion to regret. It was thought that the eventual nomination of Plunkett to the Council would secure 'an eloquent partisan' for the Governor, and as such Plunkett would be more than sufficient without the addition of Therry, who would be, in any case, a violent politician. The other factor causing concern was Therry's standing for Camden, where his opponent was Charles Cowper. James Macarthur lived in the district, but decided not to stand there because he thought that if he left the electorate to Therry there would be no division

1. SMH, 5 January 1843.
2. Ibid., 27 January, 23 May, 16 June 1843.
3. Ibid., 6, 10 January 1843. At the same time the Australasian Chronicle was doing its best to support Therry's candidature; see Australasian Chronicle 17, 28 January 1843.
amongst Catholics and Protestants in what was judged to be a strongly Catholic electorate. Macarthur had not only his own opinion to go on in this, but he was also told by his brother William that even Cowper thought that Irish Catholic influence would predominate in Camden. Despite this Cowper stood against Therry and he was defeated by ten votes. He then stood against Macarthur in Cumberland and won the seat.

Therry remained an unwelcome addition to the Council in the eyes of the Herald, despite the fact that he won its applause by conducting and winning the first prosecution in New South Wales for an obscene publication, whilst at the same time directing his campaign for Camden. Three gentlemen published a document known as the Satirist which contained 'a supposed dialogue between a number of lewd women, of a most obscene and disgusting description' in which the alleged secrets of the brothel were revealed. The editor, Thomas Revel Johnson, was given two years and his associates twelve months for their literary efforts, whilst the lament was raised that 'This brands us more deeply than ever with the odium of Botany Bay depravity...the direct effect [of which] must be to discourage immigration to our shores [from] virtuous England'.

The Sydney election on 15 June was marked by 'mild riots' and the loss of one life. In Port Phillip the only noteworthy feature, apart from a riot, was the election of Lang, and the defeat of Major Mitchell who, together with Charles Windeyer, was the other public servant rejected by the electorate. Therry was,

1. William Macarthur to James Macarthur, 28 December 1842, Macarthur Papers, vol. 38. ML.
2. 'Well done, honest men of Camden!' said the Australasian Chronicle, 27 June 1843.
3. SMH, 27 June, 4 July 1843.
4. Ibid., 17, 19 April 1843.
5. Gipps to Stanley, 18 July 1843, HRA, 1, XXIII, 42-5.
therefore, the only public servant returned. James Macarthur was offered a seat in the Council by Gipps, but refused it on the grounds that since he had been beaten in an election he could not act as a Nominee of the Crown, either with advantage to the Public or satisfaction to himself. By 8 July Wentworth was already styling himself 'The Honourable', an appellation judged as 'an absurdity so egregious that we trust we may not have any further occasion to notice it'.

The new Legislative Council met for the election of a speaker on 1 August. Dowling had applied for the speakership, but had been refused it by Gipps who did not nominate him to the Council. The two candidates were the elected member, Alexander Macleay, and Edward Hamilton, a nominated non-official member. D'Arcy Wentworth, ungraciously, but appropriately enough, given the position in question, pointed out that Macleay was now seventy seven years old, that he was deaf and that he 'wanted distinct utterance'. Wentworth did not need to say that Macleay, formerly Colonial Secretary, was an opponent of his brother, William Charles, as early as 1828, an old Darlingite, strongly anti-Bourke and the leader of the old exclusive faction. The voting however revealed the unspoken. Two of Gipps's public officers, O'Connell and Gibbes, together with two of his private nominees, Berry and Icely, joined with thirteen others to vote for Macleay, whilst the opposition, on this occasion at least, contained Therry, Bland, E. Deas Thomson, the Wentworths, Lang and Riddell. Gipps refrained from comment when he conveyed news of Macleay's election as speaker.

1. Ibid.
2. SMH, 8 July 1843.
3. Gipps to Stanley, 29 June 1843, and enclosures, HRA, 1, XXII, 810-16. Wentworth also sought the speakership but did not stand for it. He was thought to lack 'Temper and Industry' SMH, 4 July, 2 August 1843, reports of Legislative Council proceedings of 1 August 1843.
4. Ibid.
5. Ibid.
to Stanley. He formally opened the Council on 3 August and hoped, in vain as it happened, that there would be no rivalry between the three classes of elected members, salaried servants of the Crown and other nominated members.  

On 5 August the Euphrates, under the command of Captain Christmas, arrived in Sydney 'after a dangerous and stormy passage'. Plunkett and his wife were aboard. George Barney, the Colonial Engineer, had been appointed to the Council by Gipps on the understanding that he would resign when Plunkett arrived. Plunkett took his seat in the Council on 8 August, unaware that it was an illegality as the Act had stipulated that, if a salaried officer resigned, his seat had to be filled by his successor. Thomson explained that the Governor had not submitted any measures to the Council in the expectation of Plunkett's imminent arrival. It was then left to Lang to initiate the business of the new legislature. Perhaps his dubious situation as minister of the Church of Scotland made him anxious to ensure that his influence in religious matters would be pervasive in at least one field. He proposed that there should be prayers before each sitting. Plunkett opposed the motion on the grounds that as prayers were not said with either attention or decorum in England it was unlikely that the members of the colonial legislature would act differently. Therry moved 'the previous question' and business went forward without a public cry to the Deity for assistance.

In Plunkett's absence there had been developments in the legal department of the Colony that had their effect upon his own future. Burton arrived back in Sydney in March 1841 and settled

1. Gipps to Stanley, 9 August 1843. HRA, 1, XXIII, 74-5.
2. SMH, 4 August 1843, report of Legislative Council proceedings of 3 August 1843.
4. SMH, 9 August, report of Legislative Council proceedings of 8 August 1843.
down to the production of a timely work, *The Insolvent Law of New South Wales*, which was published in 1842. Willis, a 'learned and Honourable oddity' continued to trouble both the respectable and disreputable citizens of Melbourne until agitation against him finally reached a peak in June 1843 with his removal from office by Gipps. He was replaced by William Jeffcott who brought both stability and dignity to the office that had been so capriciously exercised by Willis. Port Phillip, even before the gold rushes, was not an easy place in which to preside over the dispensing of justice. It had already begun to show its 'filial irreverence' for the Mother Colony by claiming its own independence from New South Wales and until it was finally cut off from N.S.W. in 1850 the legal department there was always a source of concern to the Governor and his legal officers in Sydney.

Chief Justice Dowling was ill early in 1841 and applied for leave after 'above thirteen years of incessant Judicial labour never once relaxed'. Gipps, in transmitting the request pointed out that as Plunkett was absent and Therry was acting as Attorney-General there was no one else whom he could 'feel perfectly satisfied to place on the Bench'. Stanley was unmoved by the reasonable plea of Dowling as he feared that any change in the Bench would mean an additional charge to the Government. Dowling

1. SH, 26 March 1841.
2. SMH, 17 May 1843. Willis had begun to attack La Trobe and Lonsdale for 'gambling in private speculation', declared the Melbourne Corporation Act invalid and generally made his removal imperative, *ibid.*, 27 March, 19 June 1843. See also Gipps to Stanley, 26 June 1843, *HRA*, 1, XXII, 796-7.
was thus forced to remain on in office despite his health, and
the toll of overwork eventually overtook him in 1844 when he died
just prior to sailing for his long awaited leave. The only person
who seems to have benefited by the removal to Port Phillip of
Willis, a matter that so grievously worried Dowling, was Alfred
Stephen. His appointment to take the place of Burton whilst on
leave was confirmed when the vacancy arose by Willis' departure.1
He was thus in the key position to move up the ladder of promotion,
and he was eventually rewarded for his patience when he became
Chief Justice upon the death of Dowling.

The main development in the legal department in these years
was the long awaited setting up of Circuit Courts in 1841.
Bathurst, Berrima and Maitland were the places chosen, although
Burton initially queried the legality of the Act on the grounds
that each court had jurisdiction over the whole Colony.2 The courts
were soon working well, and the opening of the Bathurst Court in
April 1841 gave Burton an opportunity to engage in one of his
customary Homilies from the Bench. He admonished the local
magistrates, who had gathered for the occasion, by stating that 'no
drunkard, no sabbath-breaker, no whoremonger, ought to be, or is
fit to be, a Magistrate'.3 It is not recorded whether his remarks
were directed specifically at any of those present. That the
dispensing of justice needed to be extended beyond the boundaries
of Sydney was well illustrated by a case that Gipps reported to
Russell in November 1841. A convict named William Hayes had been
given a Free Pardon in 1837. The pardon was not made effective
until 1841 through a series of official derelictions of duty in
Sydney. Meanwhile Hayes was twice flogged for petty offences,
40 lashes for 'telling a wilful falsehood' and 36 lashes for
'disobedience of orders'. He also received a year in a chain gang

2. SH, 13 April 1841.
3. Ibid., 1 May 1841.
for theft. As Gipps pointed out none of these punishments would have been effective through summary jurisdiction had the pardon been made effective in time.¹ Before the Circuit Courts began to operate the justice of the bush had been harsh, and their sittings perhaps did more by example to lift the tone of legal proceedings on all levels than any other factor.

If, however, justice was frequently meted out with harshness, it would be an exaggeration to state that it was applied with partiality either to the free or the bond. This precise accusation was made by John Bede Polding in London in 1841, in respect of the Catholic minority in New South Wales. On 13 May, in the presence of several dignitaries, ecclesiastical and lay, amongst whom Daniel O'Connell was numbered, Polding spoke to a meeting of the Catholic Institute. Polding said that he had come from a country where 'persecution had prevailed in its direst form'. He told his audience that 'In this country, when a wrong was done they were able to obtain redress, but such was not the case in New South Wales'. Furthermore, 'If they suffered wrong and sought redress, it was only after a long time that they could receive an answer to their expostulations, and, unless someone was on the spot to support the remonstrance, they had little reason to expect a favourable result'. He alleged that convicts had been flogged for their religion, that priests had suffered indignities and that O'Flynn had been confined in a cell to await his deportation.²

The Herald replied, 'This, surely, is not the way to

¹ Gipps to Russell, 17 November 1841, HRA, 1, XXI, 582-4.
² SH, 27 September, 21 October 1841; P.F. Moran, History of the Catholic Church in Australasia, Sydney 1895, pp.220-1. Polding, apparently, was unmindful of the fate of the Church in 'Catholic' Spain, France and part of Italy during the previous fifty years. In Rome in 1950 an Italian archbishop told me that he was convinced that the Catholic Church had always been treated with greater justice in the British Empire than anywhere else in the world. This judgment is supported by an impartial reading of the history of New South Wales.
conciliate Protestant charity for the future; it is rather the
way to disgust, to provoke, to exasperate, even that large
portion of our Protestant community who have hitherto regarded
their Catholic brethren with the kindliest feelings and the most
open-handed generosity\(^1\). It went on in following issues to
refute the charges made by Polding with a mass of documentary
evidence that the *Australasian Chronicle* was quick to reject for
its part.\(^2\)

Allowing for the heady atmosphere of the London meeting
and the hyperbole that it may have engendered in Polding's oration
it is nonetheless true that Polding himself had been treated with
dispassionate impartiality by the very authorities whom he was so
ready to berate. Whilst he was in London he kept up a steady
stream of correspondence with the Colonial Office on matters
relating to his mission in New South Wales. He was replied to
with promptness, courtesy and generosity.\(^3\) He was not prevented
from assuming the title of Archbishop on his return although it
was inevitable that such an assumption in a Colony where the
Anglican bishop lacked that title would cause bitterness.
Broughton objected to it by issuing a notarial declaration, dated
'The Festival of the Annunciation', which surely must have offended
some of Broughton's flock as much as Polding's title offended him.
Gipps was mild in tone when he transmitted Broughton's protest to

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2. Ibid., 3, 11, 15 November 1841; *Australasian Chronicle*, 23
October 1841, 'We know of nothing we owe to the *Herald* and
its friends but forgiveness for oppression, calumny, hatred
and all uncharitableness.'
3. See Original Correspondence, Secretary of State, New South
Wales, 1841-2 passim, C.O. 201/329, National Library.
P.F. Moran, *History*, p.226, makes much of the fact that
before his departure for Sydney, November 1842, Polding was
entertained 'in splendid manner' by Lord Stanley. He did
not notice any incongruity in this fact.
Stanley,

'Bearing in mind the very advantageous position, in which the Roman Catholics of this Colony were placed by the Church Act of 1836 (7th Wm.IV, No.3), I cannot but consider the recent proceedings of Dr. Polding, or rather of the See of Rome, to have been very indiscreet; and I fear they may have the effect of reviving animosities, which, since the passing of the Local Act referred to, have been gradually subsiding. I shall take care however to keep the Government as clear as possible from any participation in them'.

When Stanley replied he simply said, 'You will acquaint the Bishop of Australia that his letter has been received, but that I must decline a discussion of the questions which it raises'. Stanley and his assistants had spent a good deal of time in the previous two years in consultation with the chief legal officer of the very Colony in which Polding alleged there was grave discrimination in justice. John Hubert Plunkett, neither then nor later made any attempt to conceal the fact that he was a practising and loyal member of Polding's Catholic community and his and Therry's position, combined with the attitude of the home and colonial officials to them, was as good a refutation of Polding's assertion as any that could be had, although it was not made use of at the time. Stanley at least gave credit to Plunkett for being a man who would afford 'good counsel, assistance and protection' to those in need, irrespective of their religion.

Whilst in England Plunkett applied for an appointment in Ireland or England but it is not known whether his request was granted or refused, or whether he withdrew it. His journey to

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1. Gipps to Stanley, 28 March 1843, HRA, 1, XXII, 598. SH, 27 March 1843.
2. Stanley to Gipps, 12 September 1843, HRA, 1, XXII, 125.
3. Stanley to Gipps, 2 June 1843, HRA, 1, XXII, 766-7.
4. Under Index K - Z, dated 26 September 1842, the letter requesting the appointment is noted. C.O. 201/330. The letter itself cannot be located in the P.R.O.
England and Ireland was his last and he never again applied for leave. No trace remains of any contact he kept up with the head of his family, Lord Fingall, in Ireland. It is possible that Plunkett felt that he had returned to New South Wales at a time that was to be decisive for its future development.

1. Letters to me by the present Lord Fingall, 13 October, 1 December 1969.
CHAPTER SIX

BAR AND BENCH

The aspirations of all sections of the community in New South Wales during 1843 were directed in some measure towards the new Legislative Council. In a year pervaded by gloom, anxiety, apprehension and alarm, the fond hope of legislative enactments as a palliative mitigating the ravages of drought and depression inspired the high, like Governor Gipps, and the humble, like the unemployed workers of Sydney. Yet hope had to be tempered by reality, and a central fact of democracy was quickly evident in the Council where, with the lack of declared party alignments, the imbalance of forces made for instability in government. This situation was exacerbated by the additional peculiarity that the Government itself was in a minority, whilst the opposition quickly adopted obstructionist tactics, perhaps as a result of its lack of any cohesive and constructive policy for legislation.

In the opinion of Gipps the very absence of Plunkett prior to the first session weakened the Government. The formulation of legislation required the practised ability of a legal mind, and Dowling tended to retire to the purer regions of the Bench after his bid to become speaker had failed, whilst Stephen had earlier made it clear that he did not wish to have a hand in framing legislation. This meant that the Government looked to Plunkett to advise on the legality of Bills introduced by it; indeed he was

1. SMH, 1 January 1844. On the other hand the Weekly Register, 6 January 1844, thought that things had begun to improve by early 1844. During 1842 and 1843, 9,775 people left the Colony, which indicates its state of depression, SMH, 20 June 1844.
2. Gipps to Stanley, 1 January 1844, HRA, 1, XXIII, 309-11. Thomson was ill for some weeks and his absence from the Council was also felt, ibid.
frequently called upon to draft them, and at the same time he had to act as vigilator in the Council in respect of the Bills introduced by the elected members. In the early months, however, this latter task was not especially onerous given the behaviour of the opposition. The Herald assured the Council 'that a very strong feeling of disgust has been excited by the reckless manner in which the opposition is conducted'. This opinion doubtless stemmed from the repeated forays led by Wentworth against the Government, which had already been dubbed by him 'the other side'.

The pressing problem of unemployment in Sydney was met by some opposition members with motions to cut back the salaries of government officers, including Gipps himself. Windeyer pointed out that Polding's salary was only £500, as compared to the governor on £5,000, an anomaly rendered even more striking by the fact that Polding 'possessed the greatest share of dignity and commanded the greatest respect and influence in the colony'. Plunkett was not prepared to deny this latter assertion, but he quickly pointed out that given Polding's vow of poverty it was unlikely that he would want to burden the revenue of a Colony which held him in such esteem. A few days later Windeyer was quick to seize the advantage given to him and proposed that Plunkett's own salary be cut by half - to £600. In his reply Plunkett gave a detailed outline of his duties, which included a denial that he augmented his salary in any appreciable manner by private practice. He stressed that he had to confine this to 'Special Jury and Equity cases' and the facts were, that after his return to the Colony in 1843, he rarely appeared in the Courts as a private barrister, and the newspapers made no more attacks on those grounds. He also asserted that 'the Magistrates always

1. SMH, 4 November 1843.
2. Ibid., report of Legislative Council proceedings of 3 November 1843
3. Ibid., 2 October 1843, report of Legislative Council proceedings of 30 September 1843.
applied to him for advice; and in no case had a verdict been given against the Crown'. This assertion he attempted to modify by stating that he did not claim to have been invariably right, 'but he had never been proved to be wrong'. In the event both his own salary and that of Gipps remained unvaried, although a Bill was passed to reduce the salary of future governors by £1,000.

The opposition to the Government in the Council was led by Wentworth, Windeyer and Cowper, with Lang vacillating between the two sides. In essence it was ill-liberal, conservative and representative of what remained of the wealthy classes after the recent depression. Wentworth was able to present himself as the champion of colonial liberalism in this period simply because he constantly represented the view that all would be well if the Council were allowed to abolish the Schedules, obtain complete control of the revenue, and direct the disposal of Crown Lands. All of this comprised in his eyes 'responsible government' and the model for such government was allegedly the Canadian experiment. Gipps, together with some of his Government officers, notably E. Deas Thomson and Plunkett, held to the view that in the present development of the Colony the Schedules and some control over the revenue had to be retained by the Crown, whilst to allow the Council to direct the disposal of Crown Land would do no more than augment the holdings of the wealthy and squatting elements, to the detriment of overall development.

Plunkett was convinced that he and Gipps would eventually be judged by 'the impartial historian, by whom the course of events would be fairly unmasked, and the actions of himself and his

1. Ibid., 14 October 1843, report of Legislative Council proceedings of 13 October 1843.
2. Ibid., 15 June 1844, report of Legislative Council proceedings of 14 June 1844.
opponents fairly weighed. He said that he did not know what Wentworth meant by responsible government and he doubted whether Wentworth knew himself. He thought it likely that Wentworth would have taken an entirely different view of Gipps had it not been for the New Zealand land affair, and that in the end Gipps would be vindicated rather than Darling who was alleged to have won friends by his liberal land grants. It was a quirk of fate that made men like Gipps, Thomson and Plunkett appear to be the upholders of entrenched authority, conservatism and privilege whilst Wentworth, Cowper and Lang were able to curry favour with sections of colonial society by proposing measures that appeared to foster progress and social advancement. At the same time there were occasions when both sides were able to show their true colours.

One of the measures that Wentworth and his followers introduced to cut down government expense was the curtailing of a paid magistracy at places like Goulburn, Yass, Illawarra and Windsor. When it was known that such a measure was likely to succeed petitions were presented to the Council from several places requesting that it be not proceeded with. The petition from Windsor contained the names of several ticket-of-leave holders and some of the opposition members objected to it on those precise grounds. Plunkett defended both the petition and its signers and said, regarding the ticket-of-leave petitioners, that 'they had a perfect right to do so...their signatures to such petitions ought to have as much weight as those of any other person'. In the

1. Ibid., 20 December 1844, report of Legislative Council proceedings of 19 December 1844. One contemporary commentator, Robert Lowe, thought Plunkett was 'a political old woman, full of obsolete prejudices and predilections, and easily startled at innovations of any sort', Atlas, 9 September 1847. His opinion of Gipps was much the same, Atlas, 26 July 1845, 4 July 1846.

2. SMH, 20 December 1844, report of Legislative Council proceedings of 19 December 1844.


4. Ibid., 2 November 1843, report of Legislative Council proceedings of 1 November 1843.
event the police magistrates in several places of some importance were relieved of their positions, to the chagrin of Plunkett who warned that such a step would eventually lead to chaos. 1 Again it was Plunkett who moved with Lang to double an appropriation of £500 to send some of the Sydney unemployed to localities where there was work. In his opinion many of them were deserving of relief because they had been duped into coming to the Colony by the false reports that had been circulated in England and Ireland about its prosperity. He saw good immigration as the solution to the labour problem, rather than the renewal of transportation which he resolutely refused to entertain. 2

The question of Aboriginals' evidence arose again in 1844. Stanley had communicated to Gipps an Act of Parliament authorizing the passing of laws admitting unsworn testimony in civil and criminal cases. The purpose of the Act was 'to provide for the admission of the Evidence of Aboriginal Natives'. 3 This Act was clearly the result of Plunkett's submissions on the matter whilst he was in London, and he accordingly attempted to steer a Bill through the Council in 1844. He pointed out that it was notorious that murder was frequently committed by both races with impunity, stemming from the lack of available evidence. The measure he proposed was, if anything, moderate in that it allowed unsworn testimony from Aboriginals only as corroborative evidence to sworn testimony. 4 Plunkett himself was convinced both of the necessity


2. SMH, 19 August, 27 September, 16, 30 November 1843, reports of Legislative Council proceedings of 18 August, 26 September, 15, 29 November 1843. There were about 1,240 unemployed adult males in Sydney in late 1843. See Gipps to Stanley, 9 December 1843, HRA, 1, XXIII, 247-8.


of the measure and the capacity of the Aboriginals to understand
the morality of murder, whether committed by or against them. In
the previous September he had prosecuted at the Circuit Court at
Maitland where six Aboriginals were found guilty of the murder of
a white man and he had made a point in his plea that they under­
stood the serious nature of their crime, although he must have
been taken aback when one, Therramitchie, shook his head after
hearing the sentence and said to the Court at large, 'bail me'.

The first to speak against the Bill was Robert Lowe.
Gipps had appointed him to the Council after the insolvency of
Richard Jones had necessitated his retirement in October 1843. The Governor was sanguine that Lowe would be able to offer valuable
support to the government side in the Council, but it was a hope
that was to be constantly misplaced. In the judgment of Lowe
the Bill would place the white man at the mercy 'not of man - of
savage and blood-thirsty cannibals'. Mitchell and Nicholson spoke
on the same side on the grounds that no Aboriginal could ever be
trusted to tell the truth. It was Wentworth, however, who made
the most forceful speech against the Bill. He suspected the very
quarters from whence the Bill arose, and made it clear what
quarters he meant when he said that the Myall Creek hangings were
legal murder. He thought that 'the whole life and habits of these
blacks were the practice of falsehood' and that 'It would be quite
as defensible to receive as evidence in a Court of Justice the
chatterings of the orang-outang as of this savage race, and he for
one would as soon vote in favour of a Bill for that purpose as for

1. Ibid., 18 September 1843.
2. Gipps to Stanley, 10 November 1843, HRA, 1, XXIII, 216.
Gipps was correct in estimating Lowe as 'a man of first rate
abilities and a forcible speaker', ibid. See also Ruth
Knight, Illiberal Liberal (Melbourne 1966).
the present measure*. Lang, who wanted to do justice to his 'sable brethren', spoke forcibly for the Bill, as also did Windeyer who deemed it contrary to British justice to be against it. In the event the Bill was thrown out by fourteen votes to ten.¹

Plunkett found himself invariably at conflict with Lowe and by mid-1844 a series of events both within and without the Council led to Plunkett's calling upon Lowe to resign his seat: he thought that as the Governor had nominated him Lowe ought to follow government policy or resign.² Lowe did resign, doubtless to the relief of Gipps who had written to Stanley that 'Mr Lowe's appointment to the Council is one of the acts of my Government, which I have had most reason to be sorry for'.³ One of the public acts of Lowe that most seriously upset Gipps was his joining the Pastoral Association that Wentworth formed to oppose the Governor's squatting regulations. It was naive of Gipps to suppose that a man with Lowe's indiosyncratic brilliance and intellectual independence would conform on all matters to government policy. It was equally naive of Plunkett to imagine that Lowe would share his own view that a public servant ought to accept and work for the implementation of policies that did not conflict with his conscience, precisely because they issued from the authoritative spokesman of government itself. Whatever his opinion about public issues, Plunkett managed to make it clear, however, that he would not use his position as Attorney-General to preserve Lowe's own

¹. SMH, 21 June 1844, report of Legislative Council proceedings of 20 June 1844; VPLC, 1844 p.45. The Weekly Register, 22 June 1844, deplored the sentiments expressed by some speakers and thought the loss of the Bill 'another of the many injustices which the colonists of New South Wales have to account for in their [the Aboriginals] regard'.

². SMH, 8 August 1844 report of Legislative Council proceedings of 7 August 1844. Lowe's resignation was tabled on 4 September, ibid., 5 September 1844.

³. Gipps to Stanley, 27 July 1844, HRA, 1, XXIII, 708-9. Gipps said that Lowe had 'distinctly pledged himself to resign his seat when he could no longer support the Government'. ibid.
opinion of his dignity and breeding. The occasion presented itself after Lowe tried to bring Henry Macdermott to trial for allegedly calling him cut and violating the privilege of Parliament, because Lowe had spoken disparagingly of Macdermott in a debate. Plunkett was 'wholly opposed, in his official capacity, to the prosecution' but, forced to go ahead with it, allowed it to be brought into Court in such a way that the judges discharged it on legal technicalities, perhaps to their own satisfaction as well as Plunkett's. Plunkett was of the opinion that Macdermott could also feel himself aggrieved, but he did not approve the belligerent manner in which he had expressed his outrage, when Lowe said, 'Do you think that I, a man of family, should explain [myself] to Mr Macdermott, who came here a sergeant of a marching regiment?'.

The attitude Plunkett adopted regarding Lowe's position must have been difficult to maintain in the Council in 1844, because it was found that his own position as a nominated member was rendered illegal and void because of a mistake in interpretation of the Act setting up the Council. When Plunkett returned in 1843 he had taken his seat as the successor of Barney, the Colonial Engineer, who had been appointed merely to keep the vacancy for Plunkett, as it was understood that he would resign on Plunkett's return. It is probable that Plunkett himself, having studied the Act, pointed out the illegality of his position, because the Act specified that only a person holding the same office could be appointed to a vacancy brought about by the death or resignation of his predecessor. Plunkett, therefore, as Attorney-General, could not succeed to Barney and he gave it as his opinion to the Executive Council that his position was thereby illegal and his

1. SMH, 4 July 1844, report of Legislative Council proceedings of 3 July 1844; Queen versus Macdermott, ibid., 26 October, 2 November 1844. Duncan regarded Lowe as a 'foul-tongued libeller' for his remarks on Macdermott, Weekly Register, 4 October 1844.
appointment void. This decision clearly threw the Executive Council into confusion and 'after long deliberation' they wisely decided to defer action upon it. When the matter became public there was talk of a dissolution of the Legislative Council, although the Herald hoped that no such step would be taken because of the expense involved in an election. In fact Gipps had decided to ignore the majority opinion of his Executive Council advising him to dissolve the Legislative Council. He clearly feared that an election at that time would further weaken his own position through reducing the strength of the government supporters in the Council. He himself had again become 'the object of universal censure' after a period during which his opponents had viewed him with considerably greater favour than in his early days as Governor, and he knew that his squatting regulations could scarcely be maintained without strong members to plead his cause in the Council.

The other, apparently more serious question that arose, was whether the Council proceedings had been rendered invalid by Plunkett's presence in the Council. Accordingly, on the advice of Plunkett, a Bill was introduced into the Council by Thomson to validate its proceedings. It was thrown out without ceremony as totally unnecessary, and Windeyer remarked ironically on the obvious pique of Plunkett who 'had not come within half a mile of the House since he found he had no right to a seat in it'.


2. Ibid., The Weekly Register, 1 June 1844, thought it would be harmless but 'somewhat incongruous and ill-sounding to the ear' to invest Plunkett with the title of Colonial Engineer!

3. SMH, 27 May 1844.

4. Executive Council Minutes 15, 20, 25 May 1844, pp.431, 450-1, NSWA, 4/1521. Broughton was opposed to the dissolution. Ibid.

5. SMH, 11 April 1844. The new squatting regulations were published in the Government Gazette, 2 April 1844. They required a separate licence for each 20 sq.m. held or for every 4000 sheep or 500 cattle.

6. SMH, 6 June 1844, report of Legislative Council proceedings of 5 June 1844.
remained out of the Council until Gipps received the confirmation of his appointment under the Sign Manual, whereupon he asked whether he could now send Plunkett back to his seat in the Council.¹ Lang remarked, with typical verve, that all the members wanted Plunkett in the House, and asked them to 'leap their studs' over the legal barriers. Only Wentworth and Windeyer spoke against the proposal, and left the room before the vote, which was then unanimous.²

Two other matters that preoccupied Gipps and the Legislative Council during 1844 were the Church Act, and the formation of District Councils. Plunkett had been involved with the drafting of the New Constitution Act when in England in 1842, and he advised Stanley not to interfere with the Church Act drawn up in the time of Bourke on the grounds that it was 'the most popular of all the Colonial Acts'.³ In fact he had gone as far as warning Stanley orally that by any interference with the Church Act he was 'taking a course of certainly very doubtful policy, if not of doubtful legality'.⁴ As a result Stanley had allowed Gipps to proceed with the former measures by which the sum appropriated to the denominations had been divided up according to formulae established since 1836.

The two main denominations, Anglicans and Roman Catholics, were the main recipients of aid and stood most to lose by any change in established practice. As a result Polding argued that

¹ Gipps to Stanley, 9 July 1844, HRA, 1, XXIII, 671-2; The appointment of Plunkett to the Council read 'the Attorney-General, or in his absence, the Colonial Engineer' which Gipps took as vindication of Plunkett's position. See Stanley to Gipps, 4 January 1844, ibid., 311-2.
² SMH, 14, 15 June 1844, reports of Legislative Council proceedings of 13, 14 June 1844.
³ Memorandum of Plunkett to Stanley, 8 October 1842, HRA, 1, XXIII, 734-5; Stanley to Gipps, 24 August 1844, ibid., 732-4.
⁴ Ibid.
if there was to be a change, numerical proportion should be the basis for distribution and, at a meeting on 1 January 1844, Polding, Plunkett, who was not present, and McEncroe, were deputed to interview Gipps and press for such a distribution.¹ This was the first occasion on which Plunkett acted publicly towards the Government as a member of the Catholic community. He acted on a principle that he later enunciated to the Legislative Council when he warned its members not to stop money appropriations to the Courts of Justice, and thus deprive the public of that protection to life and property to which it was entitled. He said that Roman Catholics had learnt the lesson of 'loyalty and submission' and by frequent appeals for redress managed to obtain their rights in the long run.² It was a lesson that he had watched being worked out in Ireland, and he was convinced that it was the only proper manner to act in New South Wales. It was one however that he would not find easy to teach to his fellow countrymen and coreligionists in respect of the education question. When a public meeting was held in September 1844 on the question of General Education it had to be dissolved because of 'the disorderly and disgraceful conduct of a mob of illiterate persons, principally Irish'.³ The main instigator of the disorder was Father McEncroe with whom Plunkett had been on terms of close friendship without, it appears, managing to impart his own dearly won wisdom to the priest. Plunkett was surprised at the opposition of the Catholic community to the scheme of General Education and publicly regretted that Polding did not support it. He pointed out that in Ireland

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1. SMH, 2 January 1844. Gipps was able to iron out the difficulty with the result that the status quo regarding the Church Act was maintained; Gipps to Stanley, 21 January 1844, HRA, 1, XXIII, 346-52. He did however feel that in a case such as this 'a distinction made in favor of the Established Religion of the Empire' could be made 'without injustice to the rest'; ibid.

2. SMH, 30 August 1844, report of Legislative Council proceedings of 29 August 1844.

3. Ibid., 4 September 1844.
itself only John MacHale, archbishop of Tuam, was against it and that Rome itself allowed freedom of choice in the matter, even down to the level of the parish priests.\footnote{Ibid., 11 October 1844, report of Legislative Council proceedings of 10 October 1844. In September Polding chaired a meeting of Catholics held to express opposition to General Education; Morning Chronicle, 11 September 1844. W.A. Duncan writing in the Weekly Register was clearly in favour of General Education; see editorials 20, 27 July, 7 September, 5 October 1844. Plunkett was a member of Lowe's Select Committee which recommended General Education, \textit{ibid.}, 22 June, 7 September 1844.} Plunkett thus gave a lead which the Catholic Church in this country was unwilling to follow for the next one hundred years. On the matter of education the Roman Church in Australia adopted a position more Roman than Rome itself; and it is only in our own day that the attitude of a Catholic like Plunkett has begun to be understood and accepted by some Catholics.

The long discussed question of the formation of District Councils came up again in 1844. They were clearly a premature aspiration given the nature of the Colony with its widely dispersed population, and it is remarkable that Gipps was unable to draw the lesson that if it was difficult to find a suitable body of men able to give their attention to the affairs of the Colony on the level of the Legislative Council, how much more difficult would it be to find men in sparsely populated areas ready and willing to spend time on the seemingly less significant level of local government. If it was necessary for the Council to adjourn for weeks and even months, from September to November annually, for the 'sheep-shearing holidays'\footnote{SMH, 12 October 1844 report of Legislative Council proceedings of 11 October 1844.} it was scarcely likely that many men would put themselves out to attend regular meetings of District Councils, even at less demanding periods of the year. However, by the end of 1843, Gipps was able to write to Stanley with the comforting information that he had issued Charters for twenty eight District Councils, 'one nearly in every Police District'. He was sensible enough to realize however that...
as a result of the depression it would be difficult to enforce the 46th clause of the Act by which each District was required to defray half the cost of the Police of the said District. The operation of that clause was consequently postponed until 1845.\footnote{1}

The 'ruinous state of the monetary interests of the colony' was the main objection of Charles Cowper to the formation of the District Councils, and his objection was given point a few days later when John Hosking had to resign as Mayor of Sydney 'on account of the embarrassment of his private affairs'.\footnote{2} When the question was debated in the Legislative Council in 1844 Plunkett adopted an ambivalent attitude, perhaps in the knowledge that he was free to speak in their favour because it was already certain that they would be rejected by the majority of members. He thought that the Councils ought to be given an opportunity to prove themselves, or otherwise 'the country would be looked upon as unfit for representative government'.\footnote{3} With this opinion the Herald agreed, on the grounds that it would be 'discreditable to the colony' to reject them.\footnote{4} Neither Plunkett nor the Herald was prepared to face the real objection to the Councils that resided in the money clauses, and when Plunkett spoke in the Legislative Council Wentworth interjected with the remark that 'the colony never called for a Council such as the present', by which he meant that he did not regard the Constitution of 1842 granted by Westminster as one which concurred with his ideals of responsible government. Plunkett pleaded that 'This constitution has been given to the colony as an experiment' and by implication would be further developed when it was proven that the Constitution had been

\begin{footnotes}
2. SMH, 30 August 1843, report of Legislative Council proceedings of 29 August 1843; \textit{ibid.}, 18 September 1843.
\end{footnotes}
successful. In the event the Legislative Council voted against the District Councils Bill by fourteen votes to seven, and Gipps had to go to some lengths to explain to Stanley how it was that 'in a Council in which there are twelve Crown Nominees, the Government could on so important an occasion muster no more than 7 votes'. If anything the Despatch ought to have convinced Stanley that District Councils were undesirable to the Colony at large and that their implementation was unlikely. When Plunkett replied to Wentworth's taunt that they had a local Government that achieved little or nothing, he remarked that 'the Government could not on the most trivial occasion command a majority in the House'. Yet he must have known that the fundamental good sense of the legislature had evidenced itself in the rejection of the District Councils, a proposal regarded neither by the Home Government nor by the Legislative Council as 'trivial'. District Councils were little more than an administrative dream of the Downing Street gradualists and they were never to become effective in the period. Their rejection by the Legislative Council also mirrored in a negative manner the other aspirations towards full responsibility for the affairs of the Colony that Gipps so forcibly repudiated when he said in the Council at the end of 1844 that the changes his opponents wanted were 'such as never will be granted - such indeed as never can be granted, unless it be the pleasure of Her Majesty and Parliament fundamentally and entirely to alter the relations on which this country now stands to the British Empire'. It was both the strength and misfortune of Gipps, Thomson and Plunkett that they had to uphold those 'relations' in a period in

1. Ibid., 10 August 1844, report of Legislative Council proceed- ings of 9 August 1844.
3. SMH, 14 October 1844, report of Legislative Council proceed- ings of 11 October 1844.
4. Ibid., 31 December 1844, report of Legislative Council proceed- ings of 30 December 1844. Gipps was clearly concerned at the opposition to his measures evinced in the Council, and in fact
which it seemed to many that the future and progress of the Colony depended upon fundamental changes. On the other hand it is probable that Plunkett did not attach the same definitive force as Gipps to the word 'never'. Wentworth and John Coghill were in a position to show what they thought of Gipps's remonstrance. They left the Chamber before he spoke.¹

Whilst the new Legislative Council was groping towards stability, Plunkett, besides his almost constant attendance at its sessions, had to attend to the affairs of his legal department, be present at most sittings of the Supreme Court and go on circuit at least twice a year to the sittings of the Court either at Bathurst, Maitland or Berrima. It was a round of activity that gave him little freedom for domestic or social purposes. His home life was rendered less complicated than that of some of his contemporaries like Dowling or Stephen, given the fact that he had no children; but his social life seems similarly to have been curtailed because his name rarely appears amongst those attending functions such as theatrical performances, balls and the like. His attendance at the Council and his constant speeches in debates perhaps did something to improve his oratory. It is recorded that in July 1844 he addressed a jury in a murder trial with such vigour that the accused fainted and died on the following day.²

The state of the magistracy and the application of the law

very little useful legislation was passed in the Session of 1844. Duncan summed up his attitude in a poem which began

'Ye Senators of Sydney
Who legislate for sheep'

Weekly Register, 14 December 1844.

1. SMH, 31 December 1844, report of Legislative Council proceedings of 30 December 1844.

was a constant preoccupation with Plunkett since the days when he judged it necessary to write his book as a guide to their work. That some members of the magistracy had a merely perfunctory view of their responsibility was well illustrated in 1844 by the report submitted on a case by Dowling to the Executive Council. Plunkett was present at Maitland at the sitting of the Court as prosecutor when Mary Thornton and Joseph Vale were tried for the murder of Mary's husband, John, by poisoning. The evidence was thin and circumstantial but notwithstanding this 'At the close of the case, the Jury (seven of whom were magistrates) intimated to the Court, that they did not wish to have the notes of evidence read over, as their minds were made up'. Dowling, however, 'directed them on the law of the case, and recapitulated the leading circumstances'. The jury forthwith 'retired for a few minutes and found both prisoners Guilty', upon which Dowling 'passed sentence of death, and awarded execution according to law'.

It must have been some relief to Broughton that he did not attend the meetings of the Executive Council until after they had decided issues such as these. On his return as bishop he had come to the conclusion that his presence at such deliberations was not in keeping with his episcopal rank, so remained out of the room until final judgment had been passed. From Norfolk Island Captain Maconochie wrote to the Executive Council on a matter that Broughton assuredly would have considered himself well free of, but on which the Council had to consult with Plunkett to arrive at a decision. Four English prisoners had been 'indicted Capitally for the Commission of an unnatural offence'. Two of them had been sentenced to death, but Maconochie wanted them punished with a lesser deterrent. He gave as his reason, 'Of all the Crimes and offences directly forced on Prisoners by the circumstances in which they are at present placed, none seems so peculiarly the creation

of these circumstances as this one: and it may be doubted, therefore, I think, whether the State has even a right to visit it in them with the last penalty'. Maconochie further pointed out that penetration had to be proved, for which reason the offence was constantly committed face to face thus 'expressly avoiding it [penetration] and merely creating illusion'. The difficulty was that evidence was often given only on what was heard rather than seen; and with some justification Maconochie observed that 'the noise caused by the one, might, I think, entirely resemble that by the other'. ¹ Plunkett was not prepared to admit any argument curtailing the right of the State in the matter of the penalty, but he had no hesitation in conceding the validity of the argument against its application in this, as in other similar cases.

The endless round of Court activity engaged in by Plunkett as prosecutor by virtue of his office as Attorney-General was varied, though burdensome. Once he had made up his mind that the evidence before him warranted a prosecution, he pressed it home with all the mastery he could summon; in one day he had to prosecute in matters as varied as horse stealing, cutting and maiming, murder and perjury.² Obviously he required considerable skill and a wide knowledge of the law. He committed all his resources, physical and mental, to this arduous work: it often made great demands on his conscience once he had read the evidence. The total pressure led him to begin to speak out in favour of the Grand Jury system.³ But it was too late to turn the tide of opinion. Even the Herald, implacably opposed to Plunkett and his powers a few years earlier, was now against the system, which, the newspaper

¹. Maconochie to Colonial Secretary, 27 November 1843. Enclosure A to Executive Council Minute 1, 1844, pp. 321-2. Ibid.
². The day in question was 15 January 1844, and throughout January Plunkett was constantly in Court with similar prosecutions. SMH, 16 January 1844 and passim.
³. Ibid., 18 October 1843, report of Legislative Council proceedings of 16 October 1843.
argued, was questionable and unnecessary; in any case Plunkett, himself, did the work eminently well.¹

In other ways, however, Plunkett was reluctant to see any curtailment of his powers, especially when he was convinced that he could use them to the benefit of society. In 1843 the judges came to the conclusion that he was acting beyond his powers when, having decided that there was no case against a prisoner awaiting trial, he certified this to the Sheriff who then directed that the prisoner be discharged. He pointed out in the Supreme Court that if the judges did not allow him this power then innocent people would suffer grave injustice, because they would have to await perhaps for months in gaol, until they could be released 'by proclamation at a Court of Gaol delivery'.² The judges were not impressed, so Plunkett appeared in the Legislative Council within a couple of days with a Bill giving the requisite powers to the Attorney-General. It was passed a week later in a compromise form in which the Attorney-General, one of the judges and the Sheriff were involved to safeguard the rights of innocent prisoners.³ In much the same way Plunkett was a prime mover for the 26th Clause of the Insolvency Act passed by the Legislative Council in 1843.⁴ This Clause abolished, in most instances, imprisonment for debt; and it was opposed by the judges and by Gipps himself. The governor thought that regardless of whether it was a barbarous law by which debtors could be imprisoned, it was still the Law of England, and 'in a matter of such importance

¹. Ibid., 1 November 1844.
². Ibid., 18 October 1844, report from Supreme Court of 16 November 1844.
³. Ibid., 19, 26 October 1844, reports of Legislative Council proceedings of 18, 25 October 1844.
⁴. Ibid., 21 December 1843, report of Legislative Council proceedings of 20 December 1843.
a Colonial Legislature ought scarcely to take the lead of Parlia-
ment'. Gipps was ultimately swayed by the consideration that
the public were in favour of the measure, a consideration that
rarely counted with Plunkett unless he thought that the aspirations
of the same public could be framed in suitable legislation.

The years 1843 to 1845 saw changes in the judiciary in the
Colony that finally shaped the remaining course of Plunkett's
career. In July 1843 William Jeffcott took the four oaths required
of him on his appointment as judge at Port Phillip and also 'made
and subscribed the Declaration against Transubstantiation [and] then
withdrew' from the Executive Council's presence. He then repaired
to Melbourne to suffer the tortures of conscience reserved to
those unhappy few who wield the sword of justice uncertain of their
authority to do so. Within a year he was writing about what
Stephen was pleased to call a 'scruple', but to Jeffcott it was
of such magnitude that it brought him to the border of insanity.
His anxiety was that, if Willis had been illegally deposed from
office, then, by the same token, he himself may have had no legal
authority, and as a result may have been improperly condemning
people to death. A few months later, despite all the efforts made
by Gipps and Plunkett to dispel his fears, he felt bound to resign
his position and return to Europe. Gipps graciously told Stanley
that throughout the whole matter Jeffcott had 'acted in this matter
from the purest and most conscientious motives'.

1. Gipps to Stanley, 1 January 1844, HRA, 1, XXIII, 279-93.
2. Executive Council Minute 12, 19 June 1843, and 1 July 1843,
   pp.268-75, NSWA 4/1521.
3. Executive Council Minute 23, 16 September 1844, p.488, ibid;
   Enclosure C to Minute 23, 1844, pp.84-6, ibid., 4/1449.
4. Gipps to Stanley, 28 December 1844, HRA, 1, XXIV, 149-50.
   The resignation of Jeffcott after Willis' erratic behaviour was
   a loss to Port Phillip. "He was a vast improvement upon the
gentleman he succeeded and the Court business was no longer a
series of gratuitous farces for public amusement. From a bear-
garden it became a decent, well-behaved place", quoted by
R.M. Hague in Australian Dictionary of Biography, vol.2,
Melbourne 1967, p.15.
In June 1844 Burton left for a higher appointment on the Madras Bench; Dowling was so ill at the time that only one effective judge was left in Sydney, Justice Alfred Stephen. It was noted that only Plunkett and Therry were fit to sit on the bench but that both 'have at different times declined the honour' which was the Herald's way of saying that they ought not be offered it again. Gipps found himself again in the position of being obliged to appoint an acting or temporary judge, and 'on the joint application of Mr Justice Stephen and the Attorney-General' appointed William A'Beckett, the Solicitor-General, to act until Burton's successor was appointed. A'Beckett later claimed that he was urged to take the appointment by Plunkett who had declined it himself. Plunkett had also assured him that if he were officially nominated in place of Burton he would resign in a'Beckett's favour.

The temporary appointment of a'Beckett necessitated the appointment of a temporary replacement to the office of Solicitor-General. On 3 August 1844 Gipps filled this position with William Montagu Manning, son of the then infamous John Edye Manning, and brother of Edye Manning whose pecuniary situation and financial interests had caused confusion in the mind of Gipps and others. Gipps assured Stanley that William Montagu had been in no way involved 'in the pecuniary transactions either of his father or his brother', thus leaving his reputation unsullied in the Colony.

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1. SMH, 9 July 1844.
2. Gipps to Stanley, 18 July 1844, HRA, 1, XXIII, 684.
4. Gipps to Stanley, 6 September 1844, ibid., XXIII, 760-1. John Edye Manning was 'the late Registrar of the Supreme Court, whose defalcation in 1841 was productive of...disastrous effects', ibid. Manning's 'infamous conduct' was as much a result of ill fortune as ill will. That it was regarded so seriously in the Colony says much for the probity of the public officials of the period who were expected to be beyond suspicion.
This new appointment, however, left the Government with a Bench and a legal department the nature of which must have appeared uncertain and fragile in the eyes of even a cursory observer. Only Stephen and Plunkett seemed in sure possession of their office, the one as Senior Puisne Judge and the other as Attorney-General. In Port Phillip Jeffcott writhed on his dubious bench. John Dickinson, already appointed to succeed Burton, was still at sea, whilst a'Beckett and Manning quickened their hearts with hopes of a transition from their temporary to permanent roles. Dowling lay dying at Woolloomooloo, hoping still to take his long awaited leave at home, and return invigorated to his Chief Justiceship. In the wings stood Roger Therry, back now at his Court of Requests, but trusting that his terms as temporary Solicitor-General and Attorney-General would bring him his due reward.

The position of the major actor in this minor drama was not long in doubt. On 27 September 1844 Chief Justice Sir James Dowling after a long, diligent and courteous service, departed this life for another Tribunal. Gipps did not overstate the case when he told Stanley, 'It is my pleasing duty to state that marked respect has been paid to the memory of Sir James Dowling by all classes of person in the Colony, and his loss is very generally regretted'. His death left the office of Chief Justice vacant and the Herald feigned much surprise when it was known that Plunkett had laid a rival claim to Stephen's obvious one to the position. Plunkett's arguments were summed up as 'all moonshine' and 'We need hardly say that our lucky friend Mr R. Therry is to

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1. Gipps to Stanley, 6 October 1844, ibid., XXIV, 6. One wonders whether, when his own time came Dowling recalled his words to a convicted murderer at Berrima. After his conviction the prisoner proclaimed his innocence. Dowling said 'If guilty you know that you deserve the fate that awaits you. If innocent it will be a great gratification to feel that you are hanged without such a crime upon your conscience - but in either case you will be delivered from a very, very troublesome world', Bell's Life in Sydney, 9 October 1847.
be Attorney-General, if this plan succeeds'.  

Both Stephen and Plunkett claimed the office on one mutual ground, their long service to the Colony. Stephen however could also boldly claim that he had 'looked forward to Judicial advancement' and that he had accepted his initial position on the Bench with that in mind. This was an argument Plunkett could not use, and which told against him for, if anything, he had been constant in refusing opportunities for such advancement. Stephen's main claim however was his seniority and permanency on the Bench, one which in all the circumstances appeared the strongest and most valid. Plunkett, besides his long service to the Colony as a law officer, used the precedent prevailing in England and Ireland by which the Attorney-General had a right to a vacancy on the Bench, whether of a Puisne Justiceship or a Chief Justiceship. He also thought that he had a stronger right to the position than Stephen 'from length of Service' although he was gracious enough to admit that Stephen, before coming to Sydney, had 'formerly filled very ably the office of Attorney-General in Van Diemen's Land.'

The other complication that bedevilled the situation was the knowledge that Dickinson's arrival in the Colony was imminent. A'Beckett knew that if Stephen became Chief Justice he had a reasonable expectation of filling the vacancy left open by Stephen's advancement. If, on the other hand, Plunkett were successful in his bid the Bench would then be filled by Plunkett, Stephen and Dickinson and he would be forced to retire to the bar either as Solicitor-General, or, as he hoped, Attorney-General. He therefore wrote

1. SMH, 4 October 1844. Duncan in his Weekly Register made no reference to the rival claimants. Not surprisingly the Morning Chronicle, unofficial Catholic organ as it was, said 'Detur digniori' meaning Plunkett, but made no further reference to the matter, Morning Chronicle, 5 October 1844.
2. Statement by Stephen, 4 October 1844, HRA, 1, XXIV, 8-11.
3. Plunkett to Gipps, 4 October 1844, ibid., 12.
a letter to Gipps which was little more than a series of involved arguments why Plunkett should not be made Chief Justice, but, in the event that he were appointed, then A'Beckett claimed the position of Attorney-General. His language was such that even Gipps must have wondered at his motives: 'I am sure the Attorney-General is too honourable a minded man to do any thing which savors of unfairness or uncandidness to others; but...!' and so on in a vein reminiscent of a Mark Antony.¹

Not to be outdone, Therry also wrote: staking his claim for the office of Attorney-General, based it upon his 'standing as senior at the Bar to any other candidate' and he was followed by Manning who asked to be made permanent as Solicitor-General.² It is scarcely to be wondered at that this flood of correspondence should have perplexed Gipps who decided that he was unable to make the initial appointment of an acting successor to Dowling without the advice of his Executive Council. He therefore called a meeting of the Council, before which he placed the various letters he had received.

The Council met on 5 October 1844 with all members present. After long consideration a vote was taken and the Commander of the Forces, the Bishop and the Colonial Treasurer voted for Stephen, whilst Colonial Secretary Thomson asked that his dissent be recorded. He did not hold that Stephen was ill-fitted for the office, but 'Mr Plunkett has by a long course of meritorious public conduct in the Colony, for a period now of more than twelve years, acquired superior claims...I am indeed of opinion that these could not be passed over without great injustice to that officer'. He also feared that others would come to the conclusion that good service merited no reward.³ When Gipps relayed this decision to Stanley,

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¹. A'Beckett to Gipps, 3 October 1844, ibid., 12-15.
². R. Therry to Gipps, 5 October 1844; W.M. Manning to Stanley, 7 October 1844, ibid., 15, 16.
³. Executive Council Minute No. 28, 5 October 1844, pp.504-8, NSWA, 4/1521.
by which Stephen was made acting Chief Justice until the pleasure of the Crown was made known, he stated that had there been an equally divided vote at the Council, thus calling upon him to give a casting vote he would have 'given it in favour of Mr Plunkett'. He considered that Plunkett had earnt the position through his 'good service to the Government and the Colony'.

A brief editorial appeared in the Herald on the Monday following the Saturday on which the Council had made its decision:

'Mr Plunkett's [claim to the position] was referred by the Governor to the Executive Council, and on Saturday the claim was disallowed, and Mr Justice Stephen was informed that he would be appointed. If it had been otherwise, we should have been much astonished; and we are rather surprised that the attempt to deprive Mr Stephen of the succession to the office should have been made'.

On 21 October Stephen was sworn in as Chief Justice, together with John Nodes Dickinson who had arrived on 13 October, and A'Beckett who was reappointed to act temporarily until London had decided on whether Stephen's appointment was to be permanent.

In the meantime Plunkett had communicated his disappointment at not being appointed. He wrote to Stanley, through Gipps, requesting that he still be considered for the office. He anticipated however that his wish might not be fulfilled, in which case he asked for 'promotion to some place of Equal Emolument out of this Colony, in any climate not absolutely unhealthy', but he was prepared to take a drop in salary for 'any situation in the Mother Country'. The reason he gave was that he would find it 'a great humiliation' to have Dickinson, 'a barrister of only a few Years' standing' put over his head; he also resented the preference shown to Stephen who only came to the Colony in 1839. Stephen also wrote

1. Gipps to Stanley, 6 October 1844, HRA, 1, XXIV, 6-8.
2. SMH, 7 October 1844.
3. Gipps to Stanley, 23 October 1844, HRA, 1, XXIV, 42.
4. Plunkett to Stanley, 7 October 1844, ibid., 21-3.
to Stanley asking him not to lay any other name before the Queen until he had allowed his friends to testify to his 'legal attainments, efficiency and character'. Therry too wrote to Stanley when he found that a 'Beckett had been again appointed. He pointed out that his long service entitled him to a seat on the Bench before a'Beckett, and at the same time he was not loathe to introduce a note that hitherto had not been sounded, at least publicly. He acknowledged that he was a Roman Catholic but 'To regard the accident of my religion as a bar to professional preferment, to which I might otherwise be entitled, would be not only a most inequitable rule of judgment, but it would be virtually to revive in my regard those penal enactments which Your Lordship bore so prominent a part in removing from the Statute Book of England'. Gipps admitted that he had only appointed a'Beckett after long consideration and after taking the advice of Stephen. He went on,

'Indeed, My Lord, in the two cases which have grown out of the death of the late Chief Justice, I mean the cases of Mr Plunkett and Mr Therry, it has been most painful to me to be forced by circumstances to pass over the claims of men, who, during a long course of years, have rendered essential services to this Colony, and to give (at least in appearance) a preference to others, who, however great may be their merits, have not equal claims on me or on this Government'.

By this time Plunkett was saddened by the whole affair with that despondency that only men can suffer who expect their own meticulous principles of honour and justice to motivate others. He wrote to Gipps on 23 October in terms of such unusual bitterness in regard to the behaviour of a'Beckett that it is evident that he felt that he had been sorely let down by those in whom he had placed his trust. He made one enlightening admission that, in view

1. Stephen to Stanley, 9 October 1844, ibid., 28.
2. Therry to Stanley, 21 October 1844, ibid., 43-6.
of his constant behaviour, comes as a little surprise, and leads to the conclusion that his application for the Chief Justiceship was made through the urgent prompting of another, perhaps his wife. He admitted that he had told a'Beckett that his 'personal ambition to get on the Bench was not very great' but that his not having been offered the seat given to Dickinson could only be attributed to his being a Roman Catholic, and that he would have been satisfied had he been given the opportunity to refuse it. In regard to a'Beckett's letter, which so seriously offended his sense of honour, he concluded, 'The letter in question was written behind my back, and at a time I least expected it; it was calculated to do me injury and I had no knowledge of it until it succeeded in its object. I shall say no more; but I solemnly declare that, if it were to procure me the Office of Lord High Chancellor of England, I would not use such means to accomplish it, as Mr a'Beckett has descended to, in order to obtain the Seat he now fills'.

The wearisome business dragged on for month after month. In December 1844 Jeffcott resigned and Therry took his place as resident judge at Port Phillip. It was alleged that Gipps appointed Therry without reference to the Executive Council 'for it is pretty well known that Bishop Broughton, who rules the roast [sic] in the Executive Council, has openly declared that he will never, while he has a voice in the matter, permit a Roman Catholic to obtain a seat on the bench'. Whatever about this accusation, it is certain that Gipps had serious misgivings about the course of events, because,

1. Plunkett to Gipps, 23 October 1844, ibid., 48-50. Plunkett's letter is included as Appendix 1. See pp. 331 - 34 Plunkett and a'Beckett corresponded over the latter's letter that had aroused Plunkett's ire. Plunkett asked a'Beckett for a copy of the letter. He was sent a much milder version. 'I regret you should have thought it necessary to address me in the tone of your note today', wrote a'Beckett, but he sent Plunkett the true version which Plunkett used to construct his reply to Gipps. See a'Beckett to Plunkett, 14, 17 October 1844, Plunkett Papers.

2. Port Phillip Patriot, quoted in SMH, 13 January 1845. The Herald refuted the accusation.
in a Separate Despatch on the same day as he notified Stanley of Therry's appointment, he told him 'in preferring the claims of Mr Alfred Stephen and Mr a'Beckett to those of Mr Plunkett and Mr Therry, I had done violence to my own feelings'. Gipps was clearly relieved that at least in regard to Therry he had been able to redress the balance somewhat.

Plunkett was offered the seat on the Bench formerly held by Stephen when Stephen's appointment as Chief Justice was confirmed. He ultimately declined the offer, allegedly on the grounds that he did not wish to undertake the Equity work that Stephen refused to take for himself. Stephen did not want him in Sydney in any case, and recommended that if he did accept the seat he be sent to Port Phillip, on the incredible grounds, given that Plunkett had spent twenty years in and about the Courts in Ireland and New South Wales, that he would suffer from 'the extreme inconvenience of having a new and inexperienced Judge introduced at the commencement of an unprecedentedly heavy Term'. For this reason, and the alleged competence of a'Beckett in Equity he 'humbly yet earnestly' advised Gipps to send Plunkett to Port Phillip. Stephen at the same time was pointing out to Plunkett that if he came to the Bench he would have to take the Equity Judgeship because 'You, on the contrary, studied Equity, and in this Colony have always had more of Equity, than any other practice'. A couple of years later Stephen made it clear that in 1845 it was Plunkett rather than Equity that he did not want.

1. Gipps to Stanley, 28 December 1844, HRA, 1, XXIV, 151. Lowe was disgusted at Therry's appointment because the new judge in his estimation, had 'ever been the prostrate adorer of the powers that be', Atlas, 25 January 1845.
2. Gipps to Stanley, 5 March 1846, HRA, 1, XXIV, 803-5.
He wrote to Manning, 'I have personally no desire to decline the Equity business. And I conceive that a state of things may hereafter arise, to render my discharge of the Equity duties very expedient, if not necessary'. A few months later he again pleaded that 'the Chief Justice (if qualified by previous habits and knowledge in that peculiar jurisdiction) was the proper person to take Equity', although he declined to 'engage in an unpleasant controversy' with Therry regarding it.

At the same time, in 1845, the Herald did its best to make sure that neither Plunkett nor Therry went on to the Sydney Bench. In an editorial it said that 'nothing can justify the placing of Mr Plunkett or Mr Therry in the office of Mr Justice a'Beckett', because to do so would only be a species of 'quid-pro-quo-ism' the result of which would be that the public would lack 'for their Judge, a man who can give proper decisions'. Therry was, in any case, no more than a felons' lawyer who had best stay in Port Phillip because a distance of six hundred miles was deemed safe. Plunkett was doubtless a hardworking gentleman, but had become so much out of touch that he was now incapacitated for the 'labours of a Judge of the Supreme Court'. In the event Therry returned to Sydney to take his seat on the Bench, and a'Beckett, as Therry's junior, went reluctantly to Port Phillip. The Bar gave a'Beckett a farewell dinner at which its leader, Plunkett, was not present. Stephen remarked, 'He could not but own that the departure of Mr Justice a'Beckett was as distasteful to himself, and he believed he might say to his colleague, as it was detrimental to the interests of the learned Judge himself'. In reply a'Beckett said 'He had never sought promotion to the Bench'. Therry was sworn in on

1. Stephen to Manning, 26 November 1847, ibid., no pagination.
2. Stephen to Colonial Secretary, 14 January 1848, ibid, no pagination.
3. SMH, 19 September 1845.
4. Ibid., 27 January 1846.
27 February 1845, took his seat for the first time as Equity Judge on 3 March, and went with Plunkett, still Attorney-General, to Maitland for the Circuit Court where they both attended a service in the Roman Catholic Church before the opening of the Court.¹

The whole episode was a dismal drama in which few of the actors seem to have emerged with their honour unscathed.² Plunkett had vacillated for years as to whether he would go on the Bench, and, in the end, he seems to have decided that he would not do so unless as Chief Justice. His failure to achieve this ambition did not stem from his lack of either merit or capacity, nor, indeed, from the fact that he was a Roman Catholic, but from a combination of ill-fortune and misjudgment. His ill-fortune consisted in being opposed in his bid by a candidate as worthy and influential as Stephen, while he misjudged the situation when he imagined that the English party system of appointments would apply in the colonial context. It is possible that Plunkett personally was not unduly disappointed at his failure. He certainly had never shown any real desire to go onto the Bench, and his ultimate failure to do so left him free to engage in activities that would have been curtailed by an appointment to it.

¹ Ibid., 27 February, 17 March 1846.
² In London, one person at least was determined to emerge with his integrity unsullied. James Stephen was permanent under-secretary of the Colonial Office from 1836-1847. When he saw Gipps's Despatch, 6 October 1844, outlining the steps he had taken to fill the vacant Chief Justiceship Stephen wrote on it 'Perceiving that the interests of a near kinsman of mine (he is my first cousin) are deeply involved in the question debated in this Despatch and in the answer to it I have not read them and shall, of course, offer no remark or suggestion on them'. See note signed J.S. dated 29 March in Stephen's handwriting on Gipps to Stanley, 6 October 1844, C.O. 201/350 microfilm in National Library.
CHAPTER SEVEN

GIPPS AND PLUNKETT - YEARS OF TRANSITION

The year of 'horror' in 1843 gave way to one of 'convalescence' in 1844, but its legacy was still felt in financial circles. Land prices had fallen, restocking was difficult after the drought, and with the upset price of land fixed at £1 per acre, expansion was slow. One novel idea to overcome the difficulty of the creditors of the Bank of Australia was to dispose of all its real and personal property by lot. When Wentworth proposed this Plunkett tried to hide his true feelings by holding that such a procedure was 'repugnant to the law of England'. He showed something of his own mind however in the Council when he said that the Bill for a lottery had 'an immoral tendency', although he admitted that he was opposed to it with 'very great regret' because it was clear that many anticipated relief in their financial affairs through the lottery. When the Bill went to a vote only Lang and Robinson voted with him so it was passed by seventeen votes to three. This did not deter him from advising Gipps to withhold his assent to the Act. Gipps accepted his advice with reluctance because he agreed with the Board of Directors that the Bank's position was one of the causes of the 'continued depression of the Mercantile and monetary interests of the Colony'.

1. SMH, 31 December 1844.
2. William Elyard to Plunkett, 24 December 1844. Copies of letters to the Judicial Establishments 1844. NSWA, 4/3751; Plunkett and Manning to Colonial Secretary, 28 December 1844, in SMH, 1 January 1845.
3. Ibid., 24 December 1844 report of Legislative Council proceedings of 23 December 1844. Plunkett thought 'the precedent would be a most dangerous one'. See also ibid., 20 November 1844.
5. Gipps to Stanley, 1 January 1845, HRA, 1, XXIV, 164-72.
When Stanley replied to Gipps he applauded his 'sound discretion' in reserving the Bill. He did not agree with Plunkett's stated reason for withholding assent, but he did not hesitate to subscribe to his unstated reason when he wrote, 'The temporary advantage is gained at the expense of the morality and the permanent interests of Society at large'. Stanley also remarked on the fact that the Chairman of the Committee that proposed the Bill, Wentworth, was one of those 'for whose benefit the Law is made'. Wentworth was a shareholder in the Bank, but a relatively minor one amongst some 180 others, and it is probable that Wentworth had those also in mind when moving the Bill. Plunkett was certainly aware of the hardship suffered by many through the crash of the Bank, but he would not allow personalities to affect his judgment of the case. Like the men in England whose spiritual home was Exeter Hall, Plunkett always regarded gambling and intemperance as twin evils that had to be resisted at any cost; and in this case the advantages that would allegedly accrue were outweighed in his mind by the probable evil effects of legalizing a practice with 'an immoral tendency' and thus making a precedent that would certainly be used in the future.

It was this streak in Plunkett's nature which, if he had been born into other than an Irish Catholic family, could lead to the conclusion that he was a nineteenth-century English evangelical with a burning desire to serve his God and his Queen without much regard to the human consequences. As it was, his attitude stemmed from his background as a Catholic young man, with an education in Protestant institutions of lower and higher learning, who had come to see the rule of law as the guiding principle upon which a society must be based if it were to survive and prosper. By 1845 he was more than ever convinced that the rule of law for the English Colony of New South Wales had to be that system that had been originated and nurtured by the Mother Parliament and the British Common Law

1. Stanley to Gipps, 17 May 1845, ibid., 350-1.
2. Ibid.
over centuries. He was prepared to see if modified in certain restricted circumstances, but in the main his purpose was to induce the Legislative and Executive Councils to adopt it, and the Courts to enforce it. Personal commitments, whether to his own religion or to his fellow-colonists, simply did not enter into the matter. That his course of action did not endear him to many of his co-religionists, or to certain sections of colonial society, was never a deterrent. In the long run, he saw the things for which he had fought vigorously, adopted and accepted without protest as the best method of action in the circumstances.

In the legal system the main thing for which he had worked for some years was the adoption of the English Jury system, and he had his reward when Stephen said at Maitland, 'in no part of the world were the responsible duties which devolved upon jurors more faithfully fulfilled', while the Herald stood back and applauded the statement warmly, unmindful that the man whom its editorial writers had so roundly berated years earlier on this very question was still the same Attorney-General who guided the realization of the system.¹ Later, when some amendments were proposed for the Jury Laws, Plunkett was happy to remark that the question 'did not now excite the feelings which in former years prevailed respecting it.' He moved the Bill and spoke in favour of its clauses except for clause 29, which in civil cases, or in assessment of damages trials, allowed a three-quarter majority verdict, or, if after twelve hours no verdict had been reached, the jury was to be discharged. To him 'unanimity in a verdict was the very essence of the trial by Jury', and he thought that if the practice were adopted for civil cases it would soon be demanded in criminal cases.² He was upbraided for the way in which he clung 'with lawyer-like tenacity' to 'this absurd, odious, wicked law', and that 'a Christian

1. SMH, 22 March 1845.
2. Ibid., 2, 22 July 1847, reports of Legislative Council proceedings of 1, 21 July 1847;
barrister' could do so brought the exclamation, 'Ohe! Jam satis!'\(^1\)

The clause was passed through the Council, and its implementation does not seem to have warranted the forebodings of Plunkett, although the principle upon which he argued needed to be defended.

In his attempt to bring local law into line with English law he had some difficulty in making distinctions in order to accommodate the changes to the conditions of the Colony. Whilst he had no hesitation in introducing a Bill to abolish the death penalty for forgery and for embezzlement, he was in favour of its retention for rape, although both penalties had been abolished under English law.\(^2\) Robinson and Lowe pointed out that the Judges in New South Wales had not given the death sentence for rape for several years, but Plunkett replied that this had only been by default, given the uncertain application of the law to the Colony. He said that if the Council gave a clear expression of its mind the judges would act upon it. The Council voted for the retention of the penalty by twenty votes to two,\(^3\) and Therry, with Plunkett as prosecutor, was the first judge to again pass the death penalty for the crime in question.\(^4\) In those days Plunkett still believed that the death penalty was a deterrent to some forms of crime, and he thought that rape was too frequently committed in the Colony, and Gipps agreed with this opinion.\(^5\) In later years he was to change his mind on the death penalty, and before the end of his life was a vigorous opponent of it.

1. Ibid., 5, 23 July 1847.
2. Ibid., 6 August, 2 October 1845, reports of Legislative Council proceedings of 5 August, 1 October 1845. The Morning Chronicle adopted a forthright view for a Catholic organ. It professed itself an advocate 'for the total abolition of punishment by death'. 3 September 1845.
3. SMH, 2 October 1845, report of Legislative Council proceedings of 1 October 1845.
4. Ibid., 17 April 1846. Lowe kept up his attack on Plunkett over the death penalty. He called him 'a barbarous Attorney-General' and thought his ideas totally 'retrogressive', Atlas, 9, 23 September 1848. On the issue in question Lowe was ahead of public opinion although by 1848 he was also supported by Bell's Life in Sydney. See ibid., 7 October 1848.
5. Gipps to Stanley, 23 November 1845, HRA, 1, XXIV, 635-41. I am sorry to say the crime of Rape is still frequent in the Colony' Ibid., p.638.
During the latter years of Gipps's term as governor Plunkett showed greater deftness in both the framing and application of legislation, although he did not deviate from his customary firmness. He prosecuted a magistrate for assault and had him fined £100, and bound over to keep the peace for twelve months, hoping thereby that the example would not be lost on others.¹ He threatened to prosecute Lowe for challenging Edward Broadhurst, but waited in vain for official notification of the event, and thus was unable to proceed with a prosecution.² He brought down a Bill on the Law of Apprentices which was drafted with a view to the reinforcement of English law on the matter, and later was able to push through a Bill to imprison masters who did not pay their servants' wages, but failed with one that made stock and sheep liable to be appropriated for servants' wages.³ At the same time he was not convinced that an economic motive was sufficient to deter from crime, and spoke against a Bill introduced by the Colonial Secretary to reduce by half the duty on spirits. The Bill was designed to help defeat illicit distilling in the Colony. Plunkett wanted to punish the owners of illicit stills because in his view it was not simply cheap liquor that made drunkards.⁴ Drunkenness was a constant preoccupation with him and anything that would help to reduce it effectually he was prepared to foster. He told a

1. SMH, 11 January 1845.
2. Ibid., 18 July 1845. Lowe was probably sincere when he wrote 'it is some consolation to us to know, that if we have a base and servile press, we have, at the same time, an honest and independent Attorney-General', Atlas, 7 June 1845.
3. SMH, 5 July 1844, 4 October 1845, reports of Legislative Council proceedings of 4 July 1844, 3 October 1845. See Gipps to Stanley, 5 January 1845, HRA, 1, XXIV, 174-81. Gipps explained that Plunkett brought in the Bill because the Sydney Justices refused to act in cases between Master and Apprentice.
4. SMH, 9 October 1845, report of Legislative Council proceedings of 8 October 1845. Gipps was clearly in favour of the Bill which was in fact passed. Plunkett wanted to retain the higher duty as well as punish illicit stillers more heavily.
meeting of the Temperance Societies in 1846 that it was to
"[intemperance] rather than to convictism that the crimes and
horrors [spoken of in the Molesworth Committee hearings] were
mainly attributable". To illustrate his point he gave figures
showing that in the year 1836 there were 196 deaths in the
Colony attributable to intemperance, whilst ten years later,
between June 1845 and June 1846, with a trebled population, there
were only 43 deaths.¹

Gipps's last years in the Colony were difficult, both for
the Governor himself, and those who had the unthankful task of
defending him within the Legislative Council and before the public.
The main source of contention centred around his attempt to
control the development of squatting, coupled with the rise in
the upset price of land to £1 per acre. In a community that saw
little development in manufacturing, at least prior to 1850, the
pastoral industry was paramount. The Herald put it succinctly in
1849 when it avowed that wool was to New South Wales 'what the
potato is to Ireland. It is our LIFE'.² Anything that restricted
the development of the pastoral industry was thus regarded as a
misfortune and, if it could be shown that the misfortune was man-
made then those responsible for it were automatically regarded as
the enemies of colonial prosperity. In New South Wales the squat-
ing element included 'many of the most educated, the most intelli-
gent, and the wealthiest of the Inhabitants of the Colony'.³ Furthermore, this same body was able to rely upon the most influential
organ of public opinion, the Herald, for support. The Herald, by

1. Ibid., 29 June 1846. The meeting was held to honour Gipps.
Father McEncroe, who had suffered from alcoholism, spoke warmly of the example that Gipps 'a temperate Governor' had given the community.
2. Ibid., 1 January 1849.
3. Stanley to Gipps, 30 January 1845, HRA, 1, XXIV, 218-22. Stanley also realized that the squatting interests within Gipps' Legislative Council were 'paramount', ibid., p.218 This Despatch clearly reveals that the Colonial authorities in London totally approved Gipps's policy in regard to the squatters.
1845, was adopting the same favourable attitude to the squatters that it had adopted towards the exclusives; and this policy was reflected in the odium that it began to pour upon Gipps and his advisers, just as in the early thirties it had attacked Bourke and his advisers.

In the opinion of Stanley the object of Gipps could be succinctly summed up as a combination of 'a due regard and allowance for the interest of the Licensed Occupier of Crown Lands, with that consideration which your duty demands from you for the interests of the Colony and of the Empire at large'.¹ In this object Stanley wholeheartedly agreed, and gave Gipps his full support, to the chagrin of the Herald, which found Stanley 'imperious and arbitrary as ever'. Gipps was seen as a Governor who wanted to turn New South Wales into 'one vast feudalism, of which the Crown is to be supreme head, and the squatters the unresisting vassals', and it was foreseen that he would come into the Council 'radiant with the approbation of a couple of red-tape clerks; (for it is a joke to suppose that Lord Stanley, regular attendant as he is, both at the Opera and the House of Commons, reads, digests, and answers, Sir George's despatches)'.² In fact Gipps was wise enough to go into the Council on 31 July 1845 and make 'a peace offering to the Squatters' that consisted in a slight enlargement of runs, from 20 to 25 square miles, and two other minor concessions regarding the size of flocks. He was bolstered in his major stand both by the approbation of Stanley and his judgment that the majority of the inhabitants of the Colony were in his favour.³ As a result, however, of the conciliatory tone of Gipps, and his report that, for the first time in

¹. Ibid.
². SMH, 30 June, 10, 25 July 1845. This was the reaction to reading Stanley's Despatch of 30 January 1845 which was printed in ibid., 30 June 1845.
³. Gipps to Stanley, 2 August 1845, HRA, 1, XXIV, 426-8.
the history of the Colony, exports in 1844 exceeded imports, the Legislative Council was induced to bide its time over the Crown Lands question and turn to matters more amenable to solution.

Charles Cowper began proceedings with the normal petition regarding saying prayers before each Session. Plunkett was equally swift to move the previous question, but this time he shifted his argument from one of decorum, perhaps on the grounds that the Council had now proved it could behave itself, to one of religious equality. He pointed out, as was well known, that as a Roman Catholic he could not participate in the proposed prayer session and, why, indeed, should he be forced to? 'No part of the British dominions was so free from religious differences as this Colony — no part, he would venture to say, in which religion was so flourishing. And why? ... Because all were on equality'. 1 Again he narrowly won the debate, but it was a strange argument for a Roman Catholic to use in the 1840's in New South Wales, when many of his co-religionists were anything but convinced that they stood on terms of equality with their fellow citizens. It was one, nonetheless, that Plunkett was to reaffirm constantly in the period, and one which bears a testimony of its validity when seen with hindsight.

A few days later debate began on a proposal to institute a general cemetery in Sydney. Plunkett was in favour of the cemetery, although he knew that his own clergy, and many of the laity, would be opposed to it on technical religious grounds. 2 Lang said that he did not anticipate objections from Plunkett on the matter, 'Although they were at the antipodes with respect to religious matters'. In reply Plunkett agreed with Lang and allowed himself a

1. SMH, 6 August 1845, report of Legislative Council proceedings of 5 August 1845.
2. Ibid., 14 August, 1 November 1845, reports of Legislative Council proceedings of 13 August, 31 October 1845.
brief burst of levity, a facet of his character that seems to
have revealed itself only in reference to ultimate realities
such as religion and death. He said, 'For himself, he had no
wish as yet to try the experiment, but as the honourable member
and himself had gone on tolerably well together within these walls,
he should not be disposed to fear much evil from their remains
hereafter being deposited within the walls of the same burial
ground.'

When the matter came up again two years later he
insisted that he was not the representative of the Roman Catholic
body in the Council, and, although, he had had no communication
with its leaders he trusted that they would act reasonably and
consecrate the ground offered to them. When the question arose
as to whom authority ought to be granted to veto inscriptions
over graves, Plunkett again let his peculiar wit run away with him.
He quoted from an inscription he had seen at Liverpool, and left
the impression that no authority should be allowed to interfere
with such whimsical banalities,

Underneath this stone lies Margaret Greg
Who never had issue, save one in her leg:
This woman withal was so wondrous cunning,
 Whilst she stood still on one leg the other kept running.

On another level entirely Plunkett showed that his tolerance
extended beyond the confines of the Christian community, of whatever
denomination. Wentworth, in October 1845, moved in the Council that
the Governor be asked to allot from Schedule C the sum of £1,000
to the Jews of Sydney for the debt they had incurred on building a

1. Ibid., 14 August 1845, report of Legislative Council
proceedings of 13 August 1845.
2. Ibid., 6 August 1847, report of Legislative Council
proceedings of 5 August 1847.
3. Ibid., 16 July 1847, report of Legislative Council proceed-
ings of 15 July 1847. The Bill finally went through in
1847 becoming Act II Vict., No.11. To the end Broughton was
opposed to it. See FitzRoy to Grey, 16 December 1847,
HRA, 1, XXVI, 89-101.
Thomson spoke against the motion on the grounds that the Governor could not touch Schedule C. Plunkett, however, spoke forcibly for the substance of the motion, but pleaded with the Council not to proceed with the course proposed because to do so would only defeat the purpose of the motion. He asked, as an amendment, that the Governor be petitioned to place the sums in question on the estimates for 1846. Lang as a voluntaryist said that he would vote for the motion, knowing that it would achieve nothing, and the amendment was lost by eleven votes to four. The motion went through by eight votes to five, although Cowper took decided objection to it on the grounds that 'it was the duty of the Government to support the truth and the truth only'. In spite of his opposition to the motion Plunkett was asked by the Council to present the petition to the Governor in the company of the Speaker, Wentworth and William Lawson. Gipps of course replied that he had no authority to endorse such payments from Schedule C. The following year, when Plunkett was absent on Circuit at Berrima, Wentworth brought in a motion on exactly the same terms as those suggested by Plunkett in 1845. This time it went through by eleven votes to five although Cowper was still opposed to such an unchristian suggestion, whilst Lowe voted against it because he would not assent to a grant to religion over and above the Schedule. FitzRoy acceded to the request for the £1,000, but refused the salary on the grounds that, as it would be a permanent charge on

1. SMH, 25 October 1845, report of Legislative Council proceedings of 24 October 1845. Israel Getzler, Neither Toleration nor Favour, Melbourne 1970, has examined the whole question of aid to the Jews and constantly gives Plunkett credit for his liberal views although he over emphasises Wentworth's contribution to their struggle for civil liberties.

2. SMH, 25 October 1845, report of Legislative Council proceedings of 24 October 1845. W.A. Duncan hoped that the Jews would learn that Plunkett, not Wentworth was their true champion, Weekly Register, 18 October 1845.

3. Gipps to Stanley, 13 November 1845, HRA, 1, XXIV, 612.

4. SMH, 16 September 1846, report of Legislative Council proceedings of 15 September 1846.
the Crown, the permission of the Queen must be sought.¹ When Earl Grey replied to FitzRoy's despatch on the matter he regretted that the request had been acceded to at all, refused the salary, and said that any further payments had to come by an extension of the Church Act provided the Council and the colonists wanted to help the Jews.²

In one other matter Plunkett endeavoured to uphold the rights of the public, fighting as usual on a technical legal ground. Patrick Grant, the elected member for Northumberland, was alleged to hold his seat invalidly because his property qualifications were insufficient. The question of the violation of privilege was raised by Cowper, who was head of the Committee appointed by the House to look into the matter, and it was proposed that the House ought to declare the election invalid. Plunkett held that privilege did not enter into the affair at all, and in any case, referring to the Macdermott affair, there had been a question of privilege before it on another occasion 'which he feared had not raised the character of the House in the estimation of the public'. He contended that the House could only act in a matter such as this on the basis of a petition from the electorate concerned because 'The House had no right to set aside the election of a member on its own mere motion, had no right to deny the people who had sent in a representative, representation by a man of their own choice'. Lowe, back in the House as member for St Vincent, 'trusted that the threats of the Attorney-General would not prevent the House from the performance of their duty', and a motion to refer it to the Governor was passed.³ Gipps referred it back to the Council, asking it to decide whether Northumberland 'be still

¹. Ibid., 26 September 1846, report of Legislative Council proceedings of 25 September 1846.
². FitzRoy to Gladstone, 1 October 1846, HRA, 1, XXV, 202; Grey to FitzRoy, 13 April 1847, ibid., 484-6. Earl Grey took over the Colonial Office from Gladstone in 1846.
³. SMH, 24 October 1845, report of Legislative Council proceedings of 23 October 1845.
vacant'; the Council debated it, with Cowper calling for Grant's expulsion, and Berry calling Cowper the 'member for the Church of England'. On Plunkett's motion, the matter was sent back to Gipps, who called for another election; and Grant was re-elected unopposed, giving some point to Plunkett's argument about a petition.

In at least one matter Plunkett was prepared to acknowledge that his opposition to an Act on legal grounds, if successful, would have resulted in 'great injury' to the Colony. The Act, 7 Vict., No. 3, was the Lien on Wool Act, which meant that owners could give 'a preferable lien on wool from season to season, and to make mortgages of sheep, cattle, and horses, valid, without delivery to the mortgagee'. In the distressed state of the economy during and after the drought, some such arrangement was necessary if there was to be any recovery; the only real property that owners could offer as surety for loans was that hoped for from their wool, or already there in the shape of stock but, which, given the state of the market, was in some senses valueless except to themselves. Plunkett freely recognized that the Act had been a beneficial one, 'although it was a deviation from the English law'. Stanley, when he first heard of the Act in 1844, was appalled. He thought it 'a measure...irreconcilably opposed to the principles of Legislation immemorially recognized in this Country', it tended to encourage fraud and 'the speculative spirit which it is so important to discourage'. He therefore called for its repeal.

When Gipps received this despatch he notified the Legislative Council which set up a Select Committee to deal with the matter insofar as

1. Ibid., 29, 30 October 1845, reports of Legislative Council proceedings of 28, 29 October 1845.
2. Ibid., 26 November 1845.
3. Ibid., 8 August 1845, report of Legislative Council proceedings of 7 August 1845.
4. Ibid.
5. Stanley to Gipps, 28 October 1844, HRA, 1, XXIV, 57-9.
the removal of the objectionable sections were concerned.\textsuperscript{1} Plunkett sat on this Committee and helped it draft new legislation in a field which, despite the misgivings he initially shared with Stanley, has proved one of the most beneficial measures ever taken for the development of Australia's pastoral industry.

In the days before anything like the modern party system of politics had been developed, and especially when, before 1856, a third of the members of the Legislative Council were nominated by the Crown, the development of legislative proposals could only come from either a private member, or from a nominated member acting on behalf of the Government. Even though there was some cohesiveness between groups of private members acting together on the basis of their communal interests, there was nothing like the modern caucus system at which legislation is proposed, debated and decided upon for action on the floor of the House. That in the five years from 1843 to 1847 during which it sat for 376 days the Council was able to get 140 bills through the House,\textsuperscript{2} says something for the energy and ability of its members acting as private individuals, but it says a great deal more for the development of the system of Select Committees that sat regularly, took evidence from wide sections of the community on the matters proposed for consideration, and prepared legislation for the consideration of the House. When such legislation was proposed the House knew that it came from informed sources, normally representing differing views within both the community at large and the House itself, with the result that in most instances the proposals of the Committees were accepted, although frequently changed or modified before becoming law. The contribution of the Select Committees to the development of the Colony can scarcely be exaggerated, and to read their findings, printed in the \textit{Votes and Proceedings}, is in some senses to read the history of New South Wales in the period. The

\textsuperscript{1} Gipps to Stanley, 23 November 1845, \textit{ibid.}, 621-3.
\textsuperscript{2} \textit{SMH}, 6 October 1847.
contribution of Plunkett to these Committees had, of necessity, to be immense. He was the senior government member after Deas Thomson in the House, and he was a respected member of it for his personal qualities of judgment and moderation. Further than that he was the chief Crown Law officer in the Colony, with a great deal of experience in the framing and application of law, greater indeed than anyone else in the Colony. As a result he found himself constantly appointed to Select Committees, as, for example, in 1844 when he attended regularly at the sittings of ten Committees between May and December and in 1845 when he sat on six of the nine Committees appointed by the House.\footnote{Ibid., 29 July, 16 August 1845} Given the other duties that devolved upon him in his capacity as Attorney-General, the fact that Plunkett never refused to sit on a Committee in which he thought his presence was required, and once appointed rarely missed a sitting, is the best proof that he was dedicated to his belief that the then available democratic process of legislation was the best means to build a free society in New South Wales.

The other means by which the democratic process became known to the public, educating and forming the concepts vital to its development, was the press. Perhaps one of the most beneficial negative aspects of this issue was the fact that Hansard did not begin until 1879. As a consequence, in the years when it was imperative that the Legislative Council be open to the scrutiny of the public, for the sake of its members as well as the public, its proceedings were known not simply to that small group who could avail themselves of the opportunity to attend its sessions, but also to the wider reading public who could follow its debates and activities in the press. In this respect the Herald deserves the thanks both of historians who have relied on its reports for their knowledge of the period, and the colonists of New South Wales who read them daily year by year. As far as can be judged, the reports were accurate, full and unbiased. It rarely happened that, even
in the House, objection was made to the reports of debates in the Herald. When Lowe and Wentworth called for a Select Committee in 1845 to enquire into the reporting of the Herald the project came to nothing precisely because there was so little true cause for complaint. Indeed the examples of erroneous reporting given by Lowe were trivial, and the Herald justly retorted that neither Peel nor Prince Albert complained when the Morning Post reported that the former was 'enjoying the company of a few fiends at Drayton' and the latter 'had shot four hundred and twenty-seven peasants' at a battue. Plunkett constantly upheld the freedom of the press as he judged it fundamental to the development of a free society.

The Governor was the other single influence that most directly affected the development of the new society and, in some senses, it can be said that Gipps was the last Governor to wield powers of significant magnitude over the Colony. His successors, FitzRoy and Denison, were respectively restricted in territorial jurisdiction with the establishment of Victoria in 1850, and in constitutional authority with the granting of responsible government in 1856. Furthermore, by the time FitzRoy arrived in August 1846, two of the most important questions of colonial development had been settled, at least in principle, although the details had still to be worked out. The guidelines Gipps laid down for the disposal of the Crown Lands were not significantly altered, and public opinion had hardened to the extent that no attempt to revive transportation could have succeeded. Again, since the experiments in gradual implementation of democratic government on the English model had proved both acceptable and workable to the public, no attempt to depart from that model in principle, or to cut the bonds with the Mother Country and establish a republic, were likely to receive much of a hearing in the future. Thus the legal, legislative and administrative patterns laid down by 1846 were to be the framework

1. Ibid., 13 September 1845, report of Legislative Council proceedings of 12 September 1845.
upon which the Colony would develop in the future. Gipps, and together with his closest advisers, Thomson and Plunkett, were mainly responsible for this framework for the simple reason that they bore the brunt of maintaining it against the heady attempts of sections of the Legislative Council to bend and shape development during the years before 1850.

Before his departure Gipps was accused of being 'the boasted Liberal in political creed, the unbending Autocrat in political government'. This statement ignored both the personal ideals of Gipps and the political facts by which his administration was tempered. Personally Gipps was not the kind of man who could read with equanimity judgments of him such as 'Sir George Gipps has been the worst Governor New South Wales ever had', who has 'bequeathed to our adopted country, to our children and our children's children a legacy of thraldom which...will cause generations yet unborn to rue the day he ever set foot upon our shores'. Gipps could not know that at least one later historian, Frederick Watson, after reading his despatches and seeing them in the light of contemporary and later events, would conclude that 'he was a capable administrator, a brilliant statesman with great breadth of vision, a strong governor, fearless of public opinion, and a man with an almost uncanny foresight.' With Watson's judgment, rather than with the Herald's or Lowe's, Plunkett would have wholeheartedly agreed, because he knew that 'it was under the present administration the colony had received free institutions' and thus

1. Ibid., 1 January 1846. In 1845 Lowe was asking for Gipps's recall. By July 1846 he said that Gipps would only be remembered for fostering a 'debasing despotism' in New South Wales, Atlas, 26 July 1845, 4 July 1846. To the Sydney Chronicle the Herald and the Atlas were Arcades ambo for their attacks on Gipps, Sydney Chronicle, 15 July 1846.
2. SMH, 4, 6 July 1846.
3. Frederick Watson in his Introduction to HRA, 1, XXIV, xvii. K. Buckley would not go that far. To him 'Politically, Gipps was an innocent: an honest man fallen amongst the big graziers of New South Wales'. See K. Buckley 'Gipps and The Graziers of New South Wales', HS Selected Articles, 1, Melbourne 1964, p.102.
he was happy to leave to a future historian, as he said, the judgment of the administration of Gipps.  

Plunkett of course fully understood something which the *Herald* and Gipps' other critics were unwilling to recognize, namely, that the Governor was subject to many other influences besides his own alleged autocratic will. His activities were constantly subjected to pressures from public opinion, the directives of the Colonial Office, the judgment of his close advisers, amongst them Plunkett, the members of the Executive Council and finally the legislation and petitions of the Legislative Council. No governor before Gipps had to contend with such a forceful array of conflicting pressures because, in his time, the nature of both public opinion, with the cessation of transportation and the increase in immigration, changed. Moreover, in 1842 the Legislative Council had been granted wider powers without relieving the Governor of the necessity of holding ultimate power over such central matters as finance and the appointment of most of the colonial public service. FitzRoy had the advantage of being able to follow the guidelines laid down by Gipps, and he found it difficult to share to the same degree that ultimate influence directing Gipps in all of his activities - the desire to serve together the common good and the state, which Gipps took to be embodied in the union between the Crown and its subjects.

During the last months of his administration Gipps suffered the anxiety of knowing that his behaviour in respect to the removal of Willis was being weighed before the Privy Council. Plunkett was shown all the papers relative to the removal on his return from overseas, and he conceded that the Executive Council had judged the case as any just tribunal would have done but 'he told Sir George the case would go against him, Mr Willis not having been heard personally'. Their Lordships of the Privy Council conceded

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'there were sufficient grounds for the amotion of Mr Willis; but [they] are of opinion that the Governor and Council ought to have given him some opportunity of being previously heard against the amotion, and that the Order of the 17th June, 1843, ought, therefore to be reversed'. 1 It was a case in which public opinion, the other judges, and the Legislative and Executive Councils were all favourable to Gipps, but because, on a legal technicality, his method of decision was incorrect, it was reversed. 2 It was also a case in which Gipps was unfortunately temporarily deprived of the competent legal advice of Plunkett who would certainly have insisted that Willis be heard before any decision was made. The Governor illustrated his reliance upon Plunkett when Broughton retired from his seat in the Executive Council in March 1846. Gipps did not hesitate to recommend Plunkett to take his place although he apprehended that 'the position in which he stands to the Government might be urged against the propriety of such an appointment'. 3 This apprehension Earl Grey did not share because he did 'not perceive that any officer of Your Government can with such fitness and propriety be appointed to the vacant seat.' 4 Plunkett thus took the seat in 1847, thereby adding to what could be reasonably termed already adequate responsibilities and commitments. 5

1. Order-in-Council, communicated by William L. Bathurst to Stephen, 1 August 1846, HRA, 1, XXV, 204-6. This decision was already anticipated in the Colony before Gipps's departure.

2. Even Lowe agreed with Gipps in this case, 'If the man [Willis] was not a decided lunatic, he certainly showed himself to be not very far from one, and Sir George Gipps — whether he acted legally or not — did a very great service to the community, by suspending this wretched caricature of justice', Atlas, 14 March 1846. Willis was paid the arrears of his salary and costs in his case but he was never given a further judicial appointment. See John V. Barry, Australian Dictionary of Biography, vol. 2, Melbourne 1967, p.604.

3. Gipps to Stanley, 28 March 1846, HRA, 1, XXIV, 829-31. In this case perhaps Lowe was pleased to see the change despite his opinion of Plunkett. To Broughton he said: 'Go thou and do likewise' when he advised the Bishop to follow Newman's example and become a Roman Catholic, Atlas, 28 February 1846.


5. Executive Council Minute 6, 30 March 1847, NSWA, 4/1552.
The other matter that preoccupied Gipps before his departure was his continued struggle with the squatters. It was well known that he was leaving the Colony, and that a successor had been appointed, and though it was hoped that the change would be for the better, it was considered that 'As regards the Land Question, it cannot be for the worse'. A dinner was held on 26 January 1846 in Sydney at which the guest of honour was Wentworth. The occasion was clearly engineered in order to serve notice that the Legislative Council would fight on the land question. Windeyer gave a speech in which he spent his time insulting the official members of the Council; whilst Lowe excelled his normal silver-tongued invective and rose to heights of inflammatory oratory: speaking of Gipps's administration he said that 'It was the most negligent, the most ignorant, the most selfish and the most tyrannical Government which ever existed', and he called upon those present to 'strike a blow...at the system which enslaves you'.

When the Council opened in May, Alexander Macleay resigned as speaker. His only one regret whilst he was speaker was that the Council had refused to say prayers before its sessions. Wentworth made a typical bid for the position with the unusual proviso that, if he were not allowed to speak on important matters he would not accept the speakership. This was regarded as 'utterly out of the question', so Dr Charles Nicholson, member for Port Phillip, was elected unanimously. With the new speaker in the Chair the 'great struggle' over the Crown Lands began in the Council on 3 June, when a Bill was introduced by the Government to continue for one year, the Act of Council, 5 Vict., No.1, known as

1. SMH, 1 January, 17 February 1846.
2. Ibid., 28 January 1846.
3. Ibid., 15 May 1846, report of Legislative Council proceedings of 14 May 1846.
4. Ibid., 21 May 1846; ibid., 21 May 1846, report of Legislative Council proceedings of 19 May 1846.
the Squatting Act.  

The Bill was debated at great length on 3 and 4 June and Plunkett gave a balanced, moderate and lengthy speech in favour of its extension for one year. But it was no time for moderation, and the Bill was thrown out by 19 votes to 10, with all the elected members voting against it; 'the whole of them Squatters except four I believe' Gipps later told Gladstone. The Council then adopted an Address to Gipps which was presented to him by Nicholson, Windeyer and Lord. It contained the words 'Because we are not disposed to continue summary powers, which have been used to support a claim to tax by Prerogative alone, the validity of which, we, as the Representatives of the People, can never recognize', which referred to the payment demanded of the squatters for the use of Crown Land. Gipps refused to recognize it as a tax or to answer the Address. An attempt was made to address Her Majesty to thank her for removing Stanley from the Colonial Office, but it was changed to one asking the Queen and Parliament 'to reform the system, upon which the Colonial Department of Government is conducted'. With this impasse reached, the Governor eventually prorogued the Council until 23 August, knowing that by then FitzRoy would have arrived, and hoping that the Council would be in a better frame of mind when dealing with a new Governor. 

The Herald clearly had Plunkett in mind when it said that

1. Ibid., 4 June 1846, report of Legislative Council proceedings of 3 June 1846.
2. Ibid.
5. Ibid., 112.
7. Ibid., 110; SMH, 15 June 1846.
'if any Government member had voted against the Bill his name would have been transmitted to posterity stamped with imperishable fame'. Back in 1839, to the surprise of Gipps, Plunkett had spoken against the Squatting Act and had proposed amendments to it that were in favour of the squatters. By 1846 he had seen the developing powers of the squatters reach such proportions that they had a majority in the Council and had extended their hold over vast tracts of land throughout the Colony. On this basis he was prepared to uphold the rights of the Crown in the matter, although Lowe was probably right when he said that in this matter Wentworth was no more decided in his political opinions one way, than Plunkett was the other. Both Wentworth and Plunkett saw the question as one in which conflicting interests struggled to uphold their chosen positions. The Crown was working for its rights and, as it saw the question, the rights of the future inhabitants of the Colony. The squatters thought that, as they were the pioneers who had won the land for their flocks, their rights in it ought to be established and preserved. Lowe was able to argue on what he judged were fixed political principles regarding summary powers, tax by Prerogative and the like, while Plunkett and Wentworth were forced into the arena of bargaining on the immediate question of what was to be done in the here and now.

Gipps himself was sure that he had done what was right, and he was equally sure that he occupied 'at the present moment a very strong position in the Colony, as strong at least, I may venture to say, as at any previous period of my Government'. Be this as it may, when the former sergeant of the marching regiment, Henry Macdermott, now mayor of the City of Sydney, and Henry Gregory, the Vicar-General of the Archdiocese of Sydney, set up a testimonial fund to Gipps, only 205 people subscribed to it, of whom, according to the Herald, only 80 were independent in the sense that

1. Ibid., 6 June 1846.
2. Ibid., 12 June 1846, report of Legislative Council proceedings of 11 June 1846.
they were in no way contingent upon government support. In all they subscribed £1,018.18.0 of which Polding gave £20, Plunkett £10.10.0 and Broughton, to his great credit, £10.1

In his last few weeks in the Colony Gipps turned his mind to two matters, one of which, railways, was to do more to help build a nation than possibly any other single factor in the 19th century, and the other, the separation of Port Phillip, was to be the decisive step towards the formation of the vigorous daughter colony of Victoria. In April he used his casting vote in the Executive Council to recommend that Port Phillip be erected into a separate Colony. In May he met and encouraged a deputation urging the introduction of railways into the Colony, and sent a draft drawn up by Plunkett of a proposed Act for their formation to the Colonial Office. Amongst his last acts in the Colony was the appointment of his friend and former private-secretary, Henry Watson Parker, to the Legislative Council. He rejoiced that the same body unanimously elected Parker as Chairman of Committees. He recommended that his supporter on the squatting regulations, William Augustine Duncan, be confirmed as Sub-Collector of Customs at Moreton Bay, and he pleaded that a certain obscure individual, Mr Homersham, be reinstated in a minor government situation 'as an act of justice'.

Gipps sailed from Sydney on 11 July 1846. He was scarcely outside the heads when the Herald returned to the attack. He was acknowledged as the 'First Governor of Free New South Wales' who had, however, spent his time substituting 'the bondage of the serf

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1. SMH, 11 July 1846.
2. Gipps to Stanley, 29 April 1846, HRA, 1, XXV, 26-33.
4. Gipps to Gladstone, 26 May 1846, ibid., 72; Gipps to Gladstone, 28 May 1846, ibid., 73; Gipps to Gladstone, 10 July 1846, ibid., 138-9. Homersham was in due course re-employed as an 'Acting Locker in the Customs', see Report of Commissioners of Customs, 17 February 1847, ibid., 393.
for the bondage of the felon'. His 'monstrous blunder' was to fix 'upon these lands a price which has destroyed the flourishing revenue derived from them'. It was a narrow and a petty judgment to make of a man who was one of the finest of the governors of New South Wales, a man who steered the Colony through its painful course across the turbulent waters of newly-found freedom, but a man also who held firmly that 'the condition of a Colonist is one to which duties are attached as well as privileges'. His own freedom from the reins of office was short-lived. He died on 28 February 1847 at the age of 57, still convinced that 'to be a Member of the British Empire is alone a glorious privilege'.

The departure of Gipps marked the end of an era for New South Wales, as, indeed, it did for the man whom he had recommended as 'eligible for a Local Order of Merit', John Hubert Plunkett. The days in which Plunkett stood alongside a powerful, determined, principled governor were gone. Henceforth, if he were to uphold the ideals of freedom tempered with justice, service and tolerance, that he had shared with Gipps, he was to do so in areas where the mounting pressures of young and vibrant, democratic institutions would test the quality of his dedication to those ideals.

1. SMH, 13, 17 July 1846.
2. Gipps to Stanley, 29 April 1846, HRA, 1, XXV, 31.
3. Ibid.; The Sydney Chronicle, 7 July 1847, grieved at the news of his death because 'his high and noble spirit had been wounded by the shafts of slander'.
4. Gipps to Stanley, 11 December 1844, HRA, 1, XXIV, 123-7. As explanation for Plunkett's nomination Gipps apparently considered it enough to remark of him 'known at the Colonial Office', ibid., 126.
CHAPTER EIGHT

THE END OF TRANSPORTATION

Charles Augustus FitzRoy arrived at Port Jackson on 2 August 1846 and took over the administration of the government on the following day. He was warned that the 'paramount question' he had to deal with was the 'Squatting Question', but in his own private despatch two weeks later he made it clear to the Colonial Office that he intended to judge the situation for himself rather than 'follow blindly in Sir Geo. Gipps' footsteps'. He had held several posts in colonial administration prior to his appointment to New South Wales, winning favour by his 'conciliatory demeanour'. His declared intention of assessing the conditions of the Colony, even in the squatting districts, before proffering advice to London on the 'paramount question' revealed personal flexibility and the ability to learn from experience.

It was to be on a separate, but related issue, that of the revival of transportation, that his immediate attention was focussed. The very possibility that the system upon which New South Wales was founded could ever be revived, excited emotions scarcely known in the Colony since the late thirties. The immediate cause of the widespread and bitter dispute, for such it became, was a private despatch from Gladstone to FitzRoy, that intimated the desire of the Home Government to look again at the whole question of transportation to New South Wales. A number of problems perplexed the Colonial Office, all of which pointed to a ready solution if some form of transportation could be revived in the Colony. By 1846 the great majority of convicts in New South Wales had finished, or were finishing, their time. As a result, a decision had to be taken whether the convict establish-

1. SMH, 4 August 1846.
2. FitzRoy to Gladstone, 19 August 1846, HRA, 1, XXV, 169-71.
ments were to be broken up, put to some entirely different use, or continued in some modified form. Then, too, the growing labour shortage, which the tardy improvement in immigration did little to lessen, forced the attention of some to the possibility of looking again at convictism, the source upon which the development of New South Wales had rested. Van Diemen's Land had a ready supply of convicts in the last stages of their sentences who could be readily absorbed into the labour market on the mainland, provided they were acceptable to the colonists. This colonial supply was coupled with the always bountiful source of convicts in the Mother Country, and England was not yet totally convinced that better ways than getting rid of its criminal elements to the Antipodes could and ought to be found.

As a consequence Gladstone asked FitzRoy to test the ground and to ascertain whether New South Wales was prepared to welcome again the grey ships with their pale cargoes. He made it clear that Her Majesty's Government had no intention of taking unilateral action in the matter; but at the same time it was equally clear that some members and officials of the same Government would be happy if 'the Members of the Legislative Council of the Colony should shew a disposition to concur in the opinion that a modified and carefully regulated introduction of Convict Labourers into New South Wales or into some part of it may, under the present circumstances, be adviseable'. In that sentence Gladstone and his advisers showed their hand, for it was precisely within the Legislative Council that a willing and vocal element sat, waiting for the opportunity to record its assent to the plans of London.

Acting on the suggestion that he could make the 'Private and Confidential' despatch public if he deemed it expedient, FitzRoy had it laid on the table of the House on 7 October 1846.  

1. Ibid., 35.
2. Ibid., 37; FitzRoy to Gladstone, 6 November 1846, Ibid., 249-50.
Wentworth proposed that a Select Committee look into the whole question of the revival of transportation, and ten members were nominated to it on 13 October.\(^1\) Plunkett had been injured in a fall from his horse, so he was not present in the House when these arrangements were made.\(^2\) It was immediately apparent that Wentworth was determined that the Committee would take for granted that there was a desire for revival, and that it should restrict itself to investigating 'how it shall be carried into execution'.\(^3\) The Committee went to work with a will and a fortnight later brought in its findings on the eve of the prorogation of the Council. The report summarized its attitude when it stated that the revival of transportation would result in building New South Wales into 'a mighty colony'.\(^4\) Debate on the report was, by necessity, postponed until the next session of the Council.

Meanwhile public opinion had been aroused with the Herald taking a firm stand against revival. The paper was both surprised and pained that its chosen few, the squating element in the Council, had 'deceived and betrayed' the community.\(^5\) It gave facts and figures to show how the proportion of bond to free had fallen from one bond to one free in 1821, to one bond to 16 free in 1846.\(^6\) This fall was judged as beneficial to the whole community. The community itself was also quick to react and a public meeting in Sydney on 22 October was addressed by several speakers, amongst them

\[1. \text{SMH, 10, 14 October 1846, reports of Legislative Council proceedings of 9, 13 October 1846.}\]
\[2. \text{Ibid., 17 October 1846, report of Legislative Council proceedings of 16 October 1846.}\]
\[3. \text{Ibid., 16 October 1846, report of Legislative Council proceedings of 15 October 1846. The Morning Chronicle wasted no time in attacking the 'Self interest' that in its eyes motivated the cry for revival, Morning Chronicle, 17 October 1846.}\]
\[4. \text{SMH, 2 November 1846, report of Legislative Council proceedings of 30 October 1846; ibid., 6 November 1846.}\]
\[5. \text{Ibid., 28 November 1846. By the mid 1840's the paper had begun to re-evaluate its stand on some public issues. In 1844 it began to berate Gipps for doing too little for the Aboriginals. This caused Duncan to comment, in surprise mixed with pleasure, '0 rerum humanarum vices!', Weekly Register, 12 October 1844.}\]
\[6. \text{SMH, 21 December 1846. The figures in 1833 were 1½ free to one bond, ibid.}\]
McEncroe who said that any decision to revive transportation would spell the death knell of the very body that seemed to suggest that it be revived, the Legislative Council, 'for where convicts are, no free institutions can exist'. A petition against revival was circulated in Sydney which 6,765 citizens signed in the space of four days, after which it was presented to the Council. Similar petitions were also received from Liverpool, Parramatta and Maitland and presented to the Council by Charles Cowper and Patrick Grant. The petitioners of Liverpool gave their reasons against revival in words that ring of the changes that had come over New South Wales since 1839, 'Your Petitioners consider this question includes not only the security of life and property, but likewise the reputation of the Colony, the integrity of Juries, the independence of the Honourable the Legislative Council, the purity of the Franchise, the Social, Moral and Religious condition of Society here'. Perhaps someone wondered whether time was not yet needed for the further development of these praiseworthy ideals when two leading lawyers, both members of the Legislative Council, fought each other in the Supreme Court a few weeks later. Stephen, from the Bench, awarded Windeyer twenty days and J. B. Darvall fourteen, to the delight of those who were convinced that the Bar needed reform.

FitzRoy did not commit himself when he forwarded to Gladstone an account of what had transpired in the Legislative Council, together with copies of the petitions from the anti-revivalists. But he at least indicated that he did not think the

1. Ibid., 23 October 1846. The Morning Chronicle spoke of 'Convict-Slavery Restorationists', and blamed the squatters for the attempt at revival, Morning Chronicle, 18 November 1846, 20 January 1847.
2. See Enclosures 1-5, HRA, 1, XXV, 250-4.
3. Ibid., 253.
petitions, or perhaps the Report of the Committee, told the full story. He wrote, 'I am entirely unprepared, as yet, to say on which side the opinions of the generality of the more respectable and influential portion of the Community will preponderate.'

He sent another despatch in February 1847 which contained a petition against revival signed by 6,600 Sydney workers. They clearly felt that in the circumstances renewed transportation would threaten their jobs, but it could scarcely be said that, in FitzRoy's terms, they represented the 'more respectable and influential portion of the community', nor, perhaps, did similar petitions from Dungog and Goulburn.

Meetings were held in various parts of the Colony during the latter part of 1846 and early 1847, all of which were opposed to revival. One of the most significant was held at Queanbeyan, in the centre of a pastoral district in which it could be supposed that a substantial body of support would be found in favour of revival. In fact only two out of the sixty persons present were in favour, to the delight of the Herald that continued its support of the anti-revival movement, and was quick to point out the significance of such a meeting. It was not until September 1847 that a full debate was held in the Council on the question. The debate took place in the knowledge that there would soon be elections for the Council, and many of the speakers had an eye to their outcome. Plunkett, from his position as an official member, was able to speak with a degree of freedom from the strictures of public opinion and, in any case, he must have been well aware by this time that opinion was against revival. He said that 'if they

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1. FitzRoy to Gladstone, 6 November 1846, HRA, 1, XXV, 249-50.
2. FitzRoy to Grey, 1 February 1847, ibid., 348-50; FitzRoy to Grey, 24 February 1847, ibid., 367-8; FitzRoy to Grey, 30 March 1847, ibid., 439-41. The people of Dungog said they were 'strongly opposed to their Country being degraded from a free to a Penal Colony', ibid., 368.
3. SMH, 19 February 1847. Lowe addressed himself to 'the ignorant clamourers against the revival of transportation among the labouring classes', and warned them that unless they accepted convicts they would get Chinese, Atlas, 27 March 1847.
could be so degraded as to ask again to have British crime poured in upon them they would be for ever unworthy of a place among the nations of the earth. He pointed out that immigration had been seriously affected by the possibility of revival because people did not want to come to a Colony that bade fair to return to a penal state, and he rejoiced that with the cessation of transportation, in great measure, all class feelings and distinctions had subsided, and he should much regret to see them revived again. Eleven members voted against the Report of the Select Committee of the previous session while seven, Grant, Bland, Lawson, Wentworth, Darvall, Henry Dangar and Robinson were for upholding it. An address was adopted to be forwarded to FitzRoy, and from him to London, containing the opinion that a return to the system of transportation and assignment would be opposed to the wishes of this Community, and would also be most injurious to the moral, social, and political advancement of the Colony.

The debate took place unmindful of the fact that in that same month Grey had replied to the despatch from FitzRoy containing the Report of the Select Committee of 1846 in favour of renewal. Grey was pleased that the Report had shown its favour to renewal in some form and he proposed that the exile system ought to be adopted by which convicts, having undergone suitable reformatory punishment in Britain, would be sent to New South Wales. They would come as ticket-of-leave holders or with conditional pardons, free therefore to take up work on their arrival and free also from the disadvantages of the assignment system. Grey further offered to send out the wives and families of men whose conduct was such as to entitle them to the indulgence, and to redress the balance on a social level by sending a number of free emigrants equal to the number of convicts. He recognized, however, that the Report of 1846 had not been debated

1. SMH, 16 September 1847, report of Legislative Council proceedings of 14 September 1847.
2. Ibid.,
3. Address to FitzRoy by Members of Legislative Council, HRA, 1, XXV, 764-5.
by the Council and he left aside precise arrangements until he knew the results of the debate.\footnote{Grey to FitzRoy, 3 September 1847, \textit{ibid.}, 735-8.} When Grey was apprized of the mood of the Council he answered that he would cause no change to be made in the existing arrangements, but would await a reply to the suggestion regarding exiles.\footnote{Grey to FitzRoy, 7 March 1848, \textit{ibid.}, \textit{XXVI}, 259-60.}

In the meantime, again, FitzRoy had laid before the House the despatch of 3 September 1847 outlining the exile plan and Wentworth moved that it be accepted.\footnote{\textit{SMH}, 8 April 1848, report of Legislative Council proceedings of 7 April 1848.} Despite the impression conveyed in at least one book on colonial New South Wales, the House did not come to the 'unanimous resolution' to receive the exiles on the conditions specified.\footnote{See G.C. Mundy, \textit{Our Antipodes}, 3 vols., 2nd ed. London 1852. \textit{vol. 3}, p.115.} The \textit{Herald} reported the debate and gave 120 lines to the speech by Wentworth, and ten lines to Plunkett. It is clear however that Plunkett spoke at much greater length than he was reported to have spoken, and he was totally opposed to the plan 'on the grounds that the social and moral interests of the Colony would be injured by the introduction of any class of criminals'. He advised the Council to be patient because the tide would soon turn in favour of free immigration. Wentworth in reply averred that 'if a large portion of this free immigration, of which [Plunkett] was so exclusive a supporter, were to come from that country to which he himself belonged...he [Wentworth] would far sooner take these criminals, as they were called'. Plunkett had also said that the Report of the Transportation Committee was 'the most unpopular Report that had ever issued from the Council', to which Wentworth replied that if it was unpopular it was only amongst the labouring classes and 'it was not to the decision of an ignorant and self-interested class like
this that he hoped the interests of the colony would be entrusted'. In the event, all bar Plunkett and Allen voted in favour of acceptance of Grey's despatch. The Council's subsequent address to FitzRoy requested that wives and families accompany the convicts, and that a due proportion of males and females be maintained. Even the Herald, staunch adversary of the revival proposals for so long, was prepared to give its cautious assent to the exile system, although it condemned Wentworth for talking nonsense in the debate because in its opinion not one in a hundred of the citizens of New South Wales wanted the transportation system, as such, revived.

When he received word from FitzRoy that the Council had swung around towards the acceptance of exiles, Grey decided in September 1848, after some initial hesitation, that he would send them out, even unaccompanied by free migrants. He was led to this decision because he could not obtain funds to pay for free migrants at the time, but he thought that the labour shortage in the Colony would dispose its inhabitants to view with favour the arrival of convicts, even though the conditions regarding equal numbers of free migrants were not fulfilled. In this estimate Grey was mistaken. Immigration had revived and the labour market was no longer acute, whilst public opinion in the Colony had been strengthened by frequent anti-transportation meetings. Grey, moreover, added to the already smouldering resentment when he decided not to await confirmation of his plan outlined in his September 1848 despatch, but went ahead by obtaining an Order in Council naming

1. SMH, 10 April 1848, report of Legislative Council proceedings of 7 April 1848.
2. Plunkett and Allen were praised by the Sydney Chronicle for their consistency, whilst Wentworth was deemed 'a remarkable man, but he is not remarkable in any honourable way', because 'either convicts or coolies he is determined to have', Sydney Chronicle, 17 March, 13 April 1847.
3. Address of Members of Legislative Council to FitzRoy, HRA, 1, XXVI, 368.
4. SMH, 12 April 1848.
5. George Grey to FitzRoy, 8 September 1848, HRA, 1, XXVI, 587-90. This despatch was signed by Sir George Grey, Secretary of State for the Home Department.
New South Wales as a place 'to which the Government may send persons sentenced to transportation', and informing FitzRoy that 236 convicts were departing with the ship Hashemy. ¹

The expected arrival of the Hashemy caused several 'Great Protest' meetings at which, despite an occasional deluge, the oratory of Lowe and the organizational ability of Henry Parkes served to co-ordinate and inflame the passions of many thousands of Sydney citizens.² FitzRoy had already told Grey of a deputation that held that no more convicts were wanted in the Colony even as exiles, and the Governor kept up a steady stream of petitions from various sources against any revival of transportation, together with two in its favour, both called 'loyal addresses'.³ Grey was ultimately moved to tell FitzRoy that 'no more convicts will be sent to any part of New South Wales' and that he would rescind the Order making the Colony once more a penal settlement.⁴ This was hailed as 'Glorious News' by the Herald,⁵ which had once again changed its mind, but Grey and some few diehards in the Colony still hoped that there would be a change of heart, thus allowing the exile scheme to be carried out.

The day had passed, however, when any possibility of reviving transportation was viable. In September 1850, 6,000 people attended a meeting called to protest against it, while in August and September 525 signed petitions in its favour and 36,589 signed

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¹. Grey to FitzRoy, 4 December 1848, ibid, 723-4.
². SMH, 2 June 1849. Ruth Knight, Illiberal Liberal, p.215 explains Lowe's change of heart on transportation.
³. FitzRoy to Grey, 1, 26 May; 1, 7, 15, 30 June; 3, 25 August 1849. Governors' Despatches, C.O. 201/413 and 416, National Library microfilm.
⁴. Grey to FitzRoy, 16 November 1849, in SMH, 13 April 1850.
⁵. Ibid., 11 April 1850.
against it. It was pointed out that the 525 were all landed proprietors, or country townspeople, while even to FitzRoy and Wentworth it must have been clear that the larger number contained some who were not simply ignorant and self-seeking labourers. The great debate in the Council on transportation was thus something of an anti-climax, but the Council that had wavered in its opinion in the past had still to affirm its position on a matter so vital to the interests of the Colony. The debate held in September 1850, occupied eighty-seven column of the Herald and Plunkett was the only officer of the Government who took a part in it. He drew on his immense experience to condemn any proposal to revive transportation in any form whatsoever. 'It was impossible for the Crown Prosecutor of New South Wales to shut his eyes to the evils of convictism', he said, and with a vast army of facts and figures, drawn from the returns of the Supreme Court and the Circuit Courts, he proved that, on the basis of crime alone, convictism ought never to be introduced into the Colony again. He reiterated his argument about the revival of 'class feeling' which, although he had not shared it, was painfully evident to those with any experience in the Colony before the forties, and was not yet fully eradicated. He concluded with the argument that 'Transportation and free institutions cannot exist together'. The few revivalists left the House when the vote was imminent, with the result that without division the House requested, 'as its final conclusion, that no more convicts ought under any conditions to be sent to any part of this colony'.

With the great debate the Colonial Legislature and public opinion at last coalesced and the transportation question was finally settled. Plunkett's contribution to that settlement was without parallel, and the resolution of the Council was perhaps his finest hour. In the days when transportation was accepted he had

1. Ibid., 18 September, 4 October 1850.
2. Ibid., 1, 2, 3, 4, 7 October 1850; reports of Legislative Council proceedings of 30 August, 27, 28, 30 September, 1 October 1850.
done his utmost to ensure that, as a system, it worked to the benefit of those who were its subjects and to the Colony itself. Once the decision was taken to cease its operation Plunkett agreed that it was the right decision and wholeheartedly accepted it. When the question arose as to its reintroduction he was a lone voice strenuously opposed to the suggestion, even thought it was made by those quarters to whom he was alleged to toady – the Colonial Office and the Colonial Government. If Wentworth can be remembered as a Father of the Nation despite his great failings, which were never more evident than in this whole matter of transportation, then surely Plunkett deserves to be remembered as one who stood firm when others seemed to falter.

Since the arrival of FitzRoy in August 1846 Plunkett became more evidently the adviser to the Crown, especially within the Executive Council to which he was appointed in early 1847. The Council still retained the powers to which it claimed a right from its inception. It considered such matters as land grants and holdings, not simply on the level of policy but also as to facts such as rentals, who held the lease, what was the extent of the lease and the length of tenure. Ecclesiastical matters were constantly before it in the realm of stipends to ministers of religion and grants for the building of churches. It dealt with questions such as immigration, that the Secretary of State for the Colonies asked the Governor to lay before it, and it prepared bills to send to the Legislative Council. Finally it had the right to exercise the prerogative of mercy or to send convicted criminals to the gallows. In this last case it began to use its prerogative with greater generosity so that executions dropped from 69 in the five years to 1843 while there were only 23 in the succeeding five years.1


2. SMH, 10 October 1849. Criminal convictions in New South Wales dropped 43% in the same period.
Although Plunkett still continued to work hard as Attorney-General he was less and less seen in the Supreme Court as Crown Prosecutor unless he judged a case of sufficient importance to warrant his attendance. He was regular in going on Circuit at least twice annually, probably because it gave him an opportunity to take a break from his activities in Sydney, and at the same time have a look at the state of the magistracy in other districts. His appearance in Court in a private capacity became almost something of an oddity. He appeared in a minor case of a claim for a debt related with board and lodgings, and he pleaded on behalf of the St Patrick's Total Abstinence Society against Edward McMahon, who had been expelled from its ranks for drunkenness but had retained the cornopean which he customarily blew in its band. McMahon was ordered by the Court to return the instrument and pay three guineas costs. The days had passed in which some segments of the public saw him as a pluralist, waxing fat on his salary and his private legal fees. It became more customary to call him 'that upright and impartial public officer', although he was recognized both in Court and in the Legislative Council as a formidable opponent.

It was in the Legislative Council especially that he began to exercise considerable influence stemming from his experience, official position, tolerance and judgment. By the mid and late

1. His work as Attorney-General required constant legal opinions of massive proportions. From 15 September 1847 to 22 April 1850, alone or with the help of Manning, Plunkett wrote over 700 letters to the Colonial Secretary on matters ranging from the occupation of Crown Lands to illicit stilling; Letters from the Attorney-General to Colonial Secretary, 15 September 1847 - 22 April 1850. NSWAL, 7/2678.

2. SMH, 15 April, 24 November 1848.

3. Ibid., A letter signed 'Justitia' used these words when praising Plunkett for his work in the Circuit Courts. The Sydney Chronicle, on the other hand, took him to task for charging with a mere misdemeanor a man whose 'hungry dogs of a most ferocious kind' ate a man alive, Sydney Chronicle, 10 March 1847.
1840s the realization had dawned that New South Wales was emerging as a stable society with free institutions guarded by a legal system; a society furthermore that could recover from economic setbacks due to drought and depression and utilize the seemingly limitless resources that nature had placed at its disposal. Events in other places, such as the 1848 Revolution in Europe, heightened this impression and the Herald, with some justification, claimed 'Australia Better Off Than Europe' and instanced the possession of free trade, free press, trial by jury, an elective legislature, equal laws, and perfect religious liberty, as proof of its assertion. But these advantages still had to be defended, even in Australia, and the Legislative Council was normally the forum in which their defence took place. When he saw fit, Plunkett did not hesitate to limit the use of freedom by some in order to preserve it for the minority. On the other hand he was equally dedicated to the proposition that no man's freedom ought to be limited because of his social circumstances due to his past or to his colour.

In Melbourne the 13th and 14th of July 1846 saw clashes between Protestants and Roman Catholics that bade fair to emulate the Battle of the Boyne itself, and it was feared that the incidents might be repeated on 5 November in Sydney, as well as in Melbourne. Plunkett immediately prepared a Bill to restrict party processions in the Colony, that met considerable opposition from Catholic quarters and from societies such as the Total Abstinence and Temperance Societies. The Bill went through the Council after Plunkett modified it to meet the wishes of interested bodies, without departing from its main principles. It achieved its 'desired effect'.

1. SMH, 26 July 1848.
2. Ibid., 15, 22 October 1846, reports of Legislative Council proceedings of 14, 21 October 1846. The Morning Chronicle was very pleased that the bill had been modified, 21 October 1846.
as FitzRoy told Grey, but 17 March 1847 saw a procession of teetotallers in Sydney that seriously ruffled Plunkett's customary calm. He made it clear that he intended to prosecute the leaders, amongst whom was his personal friend Father John McEncroe, and was only appeased when they publicly apologized for their activities.

In respect of his co-religionists, Plunkett held firmly to the ideal that any form of discrimination, whether for or against them, would only serve to bring disharmony into the community. In 1846 the Catholics of Maitland petitioned for the establishment of a separate Catholic hospital in the town on the grounds that Father Lynch, their local priest, was being discriminated against in visiting the patients. Plunkett deplored the alleged discrimination, but refused to further the petition because it would be inconsistent with 'those principles which have always guided me' and he thought such an establishment would work against 'harmony, good feeling, and charity' amongst Christians.

When the National School Board was set up in 1848, with Plunkett as the first chairman, he showed that he held strong opinions in favour of the National System, although conceding that it was 'highly desirable' that the Denominational System ought still to exist also. He hoped that religious harmony would be fostered by a framework in which adherents to differing religions would be educated together. This was an opinion that his own Church did not hold to then, and was to hold to even less as the years went on.

In upholding the rights of the individual, Plunkett was adamant in defending the nomination of William Bland as one of the original senators of Sydney University. Wentworth first

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1. FitzRoy to Grey, 9 January 1847, HRA, 1, XXV, 307-9. The 'serious riots' occurred between 'the lower orders of the Catholic and Protestant Inhabitants' according to FitzRoy, ibid., 308.

2. SMH, 5 April 1847.

3. Ibid., 8 October 1846.

4. Ibid., 12 May 1848, reports of Legislative Council proceedings of 10, 11 May 1848. The first National Board had Charles Nicholson and W.S. Macleay as members together with Plunkett as Chairman.
brought the proposal for a University into the Council in September 1849. A select Committee was appointed to investigate the matter, to which Plunkett was elected.\(^1\) He himself was away on Circuit Court in Maitland, but returned for some of the sessions of the Committee. With some haste, the Committee reported to the Council three weeks later; and on 28th September a Bill was read for the first time in the House for the establishment of a University. The Bill was moved by Wentworth and seconded by Plunkett.\(^2\) At the second reading, again a week later, Wentworth made it clear that 'It was to be an Institution merely for secular education' and then proposed a list of names for the founding Senate which included Plunkett, Stephen, Thomson, Wentworth himself, and William Bland.\(^3\) Strangers were asked to leave the Chamber while discussion took place on the proposed Senate, but from the debate in the following week it is clear that Lowe had refused to sit on the Senate with Bland. Plunkett then voted against Lowe being nominated as a senator on the grounds that he would not be dictated to by Lowe, and at the same time he would not 'cast a stigma upon a gentleman out of the House in order to secure [Lowe's] services'. Wentworth then moved that the question of a Senate be left to the Governor, but Lowe took six of his followers out of the Chamber, with the result that no vote could be taken as a quorum was lacking.\(^4\) The *Herald* came out strongly against Bland, avowing its 'deliberate conviction that no person ought to be placed in our seats of academic honour and distinction, whose past history could be identified with the penal origin of the colony'.\(^5\)

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4. *Ibid.*, 11 October 1849, report of Legislative Council proceedings of 10 October 1849. Bland was not mentioned by name in the debate but everyone knew he was the person in question. Bland was not at the time a member of the Legislative Council.
5. *Ibid.*, 12 October 1849. Lowe was attacked for his cowardice in not having accepted Bland's challenge. It was an unworthy
Bland wrote to Lowe to record his opinion that Lowe was 'a coward and a scoundrel', but Lowe was unable to sustain an action against him in Court. William Sharp Macleay, however, turned his attention to Plunkett, with whom he sat as a member of the Board of National Education. He wrote to FitzRoy to resign his position saying that he was obliged 'in conscience, to decline sitting at an Educational Board, not only with persons who have been prisoners of the Crown, but with a gentleman who has displayed so strong a leaning towards the emancipists, as to state that any of their class ought to be selected out of all this community to manage the education of youth.'

He claimed that as one who had served for eighteen years on the Senate of Cambridge University he had to record 'his abhorrence of any such principle'. He wrote that same day to Plunkett and to Nicholson, the third member of the Board, to say that, if an emancipist could be on the Senate, he could be also on the Board, and thus could take a place at Macleay's side on it. Plunkett replied and asked whether he was the gentleman in question, 'regarding a leaning towards emancipists' to which Macleay indicated that he was, and signed his reply signifying that he remained, 'notwithstanding, My dear Attorney-General, Yours faithfully'. Plunkett responded that evening to state that he had been eighteen years a law officer, and this was the first time he had been accused of 'an improper leaning towards any class whatever of Her Majesty's subject', and concluded 'Henceforth I reject, not only your friendship, but your acquaintance'. The last communication charge given Lowe's poor eyesight; Bell's Life in Sydney even scorned him as an Albino. 20, 27 October 1849.

1. SMH, 20 October 1849. Plunkett took no part in the Court action. Wentworth spoke in Bland's defence, ibid.

2. W.S. Macleay to FitzRoy, 23 October, 1849, SMH, 26 October 1849; W.S. Macleay to Plunkett, 23 October 1849, ibid.; W.S. Macleay to Nicholson, 23 October 1849, ibid.
came from Macleay who regretted that Plunkett could become so angry with him, when he ought to have become angry with himself for his 'great mistake'.\(^1\) Perhaps the Sydney electorate had the last word, however, when in December, Lowe having resigned his seat in the Council, it elected Bland in his place.\(^2\)

In March 1849 word was received in Sydney that all the members of the exploratory expedition led into the Northern Territory by Edward Beasley Kennedy had been murdered by the Aboriginals. The only remaining witness to the event of Kennedy's own death was an Aboriginal named Jacky Jacky, who had shown a high degree of courage and loyalty and recounted the story on his return to Sydney.\(^3\) It was immediately stated that Plunkett would look into the matter in his capacity as Attorney-General. Plunkett made a report to the Executive Council two weeks later, in which he stated that he examined the depositions placed before him, from which it was clear that the murderers were known to Kennedy's 'faithful companion Jacky Jacky and they have subsequently been identified by him'. He went on, 'If they had all been taken into custody at that time and were at this moment in one of our prisons they could not be prosecuted, as Jacky Jacky is not, by our law, competent to give evidence and no white person was present at the murderous attack'. Plunkett's conclusion was, to him, scarcely novel: 'This melancholy case furnishes an additional proof of the necessity that exists for altering the law of Evidence so as to allow the Aboriginal Natives to be competent witnesses in the Courts of Justice of the Colony'.\(^4\)

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1. Plunkett to W.S. Macleay, 25 October 1849, ibid., 27 October 1849; W.S. Macleay to Plunkett, 26 October 1849, ibid.; Plunkett to W.S. Macleay, 26 October 1849, ibid.; W.S. Macleay to Plunkett, 28 October 1849, ibid., 29 October 1849.
2. Ibid., 22 December 1849. Bland was later confirmed as a senator, but Lowe never held the position. He left the Colony in January 1850 and had a distinguished career in England. See R. Knight, Illiberal Liberal, ch. 7 and Epilogue.
3. SMH, 6 March 1849.
During the 1849 session of the Legislative Council Plunkett was mainly concerned with Bills on the administration of the Criminal Law and defects in the administration of Criminal Justice. He brought in a series of Bills that were mostly an attempt to bring further into line local colonial law with the developments in British law.\(^1\) His legislation had a smooth passage until 27 June 1849 when the Aboriginal Natives Evidence Bill was read a second time. In its introduction Plunkett acted as a private member rather than an official of the Government. The Government had not itself sponsored the measure, perhaps in an attempt to take it out of the arena of party politics as they were understood at the time. The essence of the Bill again was that the evidence of Aboriginals be taken on a declaration rather than on oath, and then only as a collateral to white evidence. When it went to a vote it was lost by ten votes to nine.\(^2\)

In his speech Plunkett allowed his concepts of justice and humanity to override his political judgment when he argued that the Bill was necessary for the sake of the Aboriginals rather than for the sake of the white race. He said that they were being shot, poisoned and persecuted, and the only remedy was that of admitting the testimony of Aboriginal witnesses. The native police were admirable in their devotion to duty, but even they could not give evidence, and, indeed, they could be assaulted with impunity. Lowe thought that Plunkett was both *wise and liberal*, but it was better to let nature take its course and allow the whites and the blacks to 'fight it out between themselves'. He also saw the influence of Exeter Hall in such a measure. Foster thought that the Aboriginals were 'utterly debased a race' without any knowledge of truth or falsehood, whilst the native police were 'very good bloodhounds'; but their qualities did not extend any further than that. Wentworth also saw the hand of Exeter Hall in the Bill, and

\(^1\) SMH, 8 June 1849, report of Legislative Council proceedings of 7 June 1849.

\(^2\) Ibid., 28 June 1849, report of Legislative Council proceedings of 27 June 1849.
gave one concept of progress with the statement that 'The civilized people had come in, and the savage must go back'. He also referred back to the 'judicial murder' of white men over Myall Creek, which forced him to set his face against this present measure, taken likewise 'in pretended sympathy to these savages'. Edward Hamilton said that Plunkett stood alone as the 'prime mover' in this Bill which proved 'the predilections in favour of the aboriginal natives, which his career betrayed'; thus to pass this Bill would only serve to give Plunkett greater power. He had already used his authority so dreadfully in 1838, and now wanted more 'which [Hamilton] would emphatically assert would place in jeopardy the lives of the white settlers'. He referred to the 'morbid philanthropy' displayed by Plunkett whom he held solely responsible for 1838, which was 'the blackest stain on the criminal calendar of New South Wales'. Cowper followed with a milder speech in which he was opposed to the Bill on religious grounds because it set aside the sanctity of an oath, and also because he did not trust the evidence of an Aboriginal. Robert Fitzgerald thought, with Lowe, that it was best to let the strongest prevail and thus pleaded for the races to settle it amongst themselves without the restraining influence of law.

Berry who had great confidence in the Aboriginals, and Thomson and Allen who were ready to defend Plunkett, showed that they were prepared to vote for the measure, although none of them could rise to the flights of oratory of their opponents. Plunkett came to his own defence over Myall Creek, by stating that he would be ashamed if he had acted in any other way because 'The English law placed every man on a level and he had only endeavoured in this Bill to

1. *Ibid.*, 29 June 1849, report of Legislative Council proceedings of 27 June 1849. Barry Bridges, 'The Aborigines and the Law' gives the impression that this Bill was an official government measure, p. 69. In his speech in favour of the Bill, Deas Thomson admitted that it was not a government measure and Hamilton asserted that Plunkett was its 'prime mover', *SMH*, 29 June 1849, report of Legislative Council proceedings of 27 June 1849.
prove that principle"; as he had done in the Myall Creek affair. He gave it as his opinion in reply to Cowper that 'the ends of justice would [not] sustain any serious injury if every species of oath was wholly abolished' because experience had taught him that the fear of 'temporal punishment' swayed witnesses to tell the truth, rather than their fear of eternal punishment if they lied. His last reflection, a combination of his own theological faith in man's dignity, and a prophetic utterance as to the future, was a summary of his own motivation, despite the temper of the times: 'When he...reflected that each of these benighted beings had a soul to be saved - that each had stamped on him the image of his Creator, he could not but believe that the treatment that had been visited on these blacks, was sufficient to call down the vengeance of Heaven'. The vote was taken with Plunkett, the Colonial Secretary, the Collector of Customs, the Auditor General, Berry, Dickson, Macintyre, Allen and Parker for the Bill and Hamilton, Oakes, Lowe, Wentworth, James Macarthur, Bowman, Fitzgerald, Nichols, Icely and Cowper against it. The Herald, whilst it rejoiced at the rejection of the measure because the right course was to uplift the blacks rather than degrade the law by bringing it down to them, nonetheless deplored the attitude of the grazier element in the Council that virtually asked the Government to 'connive at the extermination of a race'.

At the next meeting of the Council, on 29 June 1849, Foster moved for a Select Committee to investigate the state of the Aboriginals, and to look closely at the Protectorate, which he thought was both a perfect and a costly failure. He nominated Dickson, W. Macarthur, Murray and Hamilton as members. Thomson

1. Ibid.
2. Ibid.
3. Ibid., 30 June 1849, 'The blacks being degraded, the law was to be degraded too. As they could not rise it was to stoop'.
suggested that a ballot be taken, with which Plunkett agreed, saying that after all he had heard from Hamilton on the matter he did not think him a fit person to sit on such a Committee. 1

He then referred to a book, Twelve Years Wanderings in the British Colonies from 1835 to 1847, by J.C. Byrne, an author unknown to Plunkett. He instanced the account of Myall Creek and the subsequent trials as a 'bundle of lies', but one upon which judgments unfavourable to himself and others concerned were made. 2 Hamilton replied with the bald assertion that he personally lacked no feeling for the Aboriginals, whilst Donaldson, who was not present at the previous debate rejoiced that the 'dangerous measure' was rejected. He thought that had it been passed it would have rendered the bush uninhabitable. In his view Myall Creek was no more than a stunt to 'satisfy the views of a clique at Exeter Hall' and he hoped that the Protectorate would be immediately abolished. 3 Wentworth then attacked Burton, whom he condemned as a hanging judge and a tool of Exeter Hall who had won his promotion to Madras on account of Myall Creek. But on this occasion at least Plunkett did not lack defenders. Cowper thought Plunkett had done his duty over Myall Creek, and Suttor said that he had never known of a case in which the Aboriginals had been the aggressors, yet presently 'the blacks were poisoned by thousands'. He said that he would have voted for the Bill had he been present at the previous debate. Darvall also regretted that he was not present as he too would have voted for the Bill. He thought that the verdict given in the Myall Creek case was, in the

1. SMH, 2 July 1849, report of Legislative Council proceedings of 29 June 1849.

2. Ibid., The book to which Plunkett referred, and from which he quoted verbatim at some length was J.C. Byrne, Twelve Years in the British Colonies from 1835 to 1847, 2 vols, London 1848. The account of Myall Creek, vol.1, pp.161-3, is both flamboyant and absurd; indeed the same can be said of a good deal of the contents.

3. SMH, 2 July 1849, report of Legislative Council proceedings of 29 June 1849.
estimation of 'the country at large', a just one, and that Plunkett both deserved and obtained their thanks for his actions in that instance. In the event Dickson, W. Macarthur, Hamilton, Suttor and Cowper were appointed to the Committee.¹

Yet if Plunkett's attitude to the Aboriginals was unequivocal, his attitude to Indians and Polynesians showed a curious ambivalence. In a debate on immigration in the Council in May 1847 he tried to make a distinction between the Indians and the Islanders. The latter he was not prepared to countenance at all as immigrants, both on the grounds that they were 'cannibals' and that their introduction would, in effect, give rise to a 'slave trade'.² It could be argued that his rejection of them on the grounds of their alleged cannibalistic tendencies was to strengthen his argument against their introduction at all because of the danger of a slave trade developing. But his rejection of the Indians as desirable migrants reveals the other facet of Plunkett that was never far below the surface. He was both a man of the law and a public servant, and unless a situation could be securely fitted into a framework adaptable to the legal and administrative process Plunkett was inclined to reject it. As a result he was against the introduction of Indians because he asserted that they were always discontented with their conditions. They had a different understanding of the agreements made with them when they were back in India, and they were thus inclined to reject such agreements when they arrived in the Colony. This meant that legal arguments developed, and even then, 'when the cases were called upon, they could not be entered into because the witnesses could not be sworn except upon the waters of the River Ganges

1. Ibid. Lowe still thought that 'these benighted tribes be taught how immeasurably inferior they were in every respect to civilised men', and even Thomson had his misgivings about the Protectorate which he thought 'might be abolished' soon, ibid. The Protectorate was abolished in the following year. For a recent study on the Aboriginals see C.D. Rowley, The Destruction of Aboriginal Society, Canberra 1970.

2. SMH, 19 May 1847, report of Legislative Council proceedings of 18 May 1847.
with which the magistrate at Moreton Bay was unprovided'. This speech was replied to in a letter from A.P. Friell, whom Plunkett had mentioned by name. He said that Plunkett was mistaken in thinking that only the Indian 'coolies' were discontent, and asserted that no Indian was ever content. Plunkett's uneasiness about the Ganges Water was also baseless, as such a requirement was no longer necessary, even in India, to validate an oath. He put his finger on the basis of Plunkett's hesitancy when he asked 'will the introduction of these people give extra trouble to the authorities, or not? This is the Rubicon to be passed over'. The Herald registered its delight that only 'free immigrants from the United Kingdom' were in favour, and that no pagans from India or 'anthropophagi' from the South Seas were acceptable. Later, when Lowe initiated a debate about the possibility of a slave trade developing Plunkett assured him that no such thing would be allowed, indeed could ever occur here for 'so long as the Habeas Corpus Act is in existence, so long as there is a magistrate to whom persons can complain of an assault or an injury, there cannot be slavery'. He quickly acted upon a rumour then circulating in Sydney that the South Sea Islanders brought into the Colony by Benjamin Boyd had been 'taken away from their native Islands against their will'. He was satisfied that in the instances in which intimidation and force were claimed, evidence existed to prove the rumours, but it was of a kind upon which he could not act legally.

1. Ibid. It was at this stage that Lowe began to turn against the squatters because he saw the attempt to introduce coloured labour as a dire blow to the Colony, ibid.
2. See letter signed A.P. Friell, ibid., 21 May 1847.
3. Ibid., 2 October 1847.
4. Ibid., 2 October 1847, report of Legislative Council proceedings of 1 October 1847.
5. FitzRoy to Grey, 24 December 1847, HRA, 1, XXVI, 119. FitzRoy's despatch does not seem to reproduce correctly the opinion given by Plunkett on the matter, Plunkett to Colonial Secretary, 25 September 1847. Letters from Attorney-General to Colonial Secretary, p.32-3, NSWA, 7/2678. Lowe thought that 'Boyd's Savages' were 'outrageous violators of the decencies of
Although Plunkett was less seen at the Bar he still took his duty seriously as its leader, and was always prepared to defend its rights. He showed no animosity towards those who had succeeded in their bid to preferment on the Bench, although there was an evident preference on his part to go on Circuit with Therry, and together they went to Moreton Bay to open the Circuit Court there in 1850, a Court the necessity of which Plunkett had long pleaded. When Therry was away in 1848 Plunkett suggested that the Solicitor-General, Manning, take his place on the Bench, a step that paved the way for Manning's later career. Plunkett had by this time clearly decided that he was never to ascend the Bench, and he showed no response when Stephen was attacked by Wentworth in the Council because 'It was a matter of notoriety, that the neighbouring colony, Van Diemen's, as well as this colony, was deluged with Stephens and they all well knew that the patronage extended to this family originated 50 years ago, and they all knew well the source from which it originated'. Wentworth's conclusion to this imhuendo was the statement that Plunkett, rather than Stephen, would and should have been appointed Chief Justice 'but for the overwhelming interest to which he had alluded'. Stephen was by this time well established on the Bench, and had been granted the knighthood for which he had formally applied because it had been 'hitherto conferred and proper to be conferred on the Chief civilized life'. It seems that some of them appeared in the Sydney streets minus a lower garment, Atlas, 18 September 1847; and Bell's Life in Sydney complained that 'These fiendish looking cannibals have become a complete nuisance in the city'.

1. SMH, 21 May 1850, the Herald remarked that it was an 'entirely unprecedented' fact that when the names of the 48 jurors were called all were found to be present.
3. SMH, 17 July 1850, report of Legislative Council proceedings of 16 July 1850. Lowe considered Stephen, Plunkett and the Herald were a trio of 'old women', Atlas, 16 September 1848.
Justice of this Colony'. Only on one occasion did it happen that Stephen acted in a manner which caused Plunkett to rebuke him publicly. Circumstances had arisen that caused two barristers to change sides during the progress of a case through the Court. At the instigation of Plunkett the Bar had already met to take action on the matter when Stephen saw fit to refer disparagingly to the affair from the Bench. Plunkett went into Court and remonstrated with Stephen for his interference in the 'usages and practices of the Bar'. He said that 'acting on the part of the Bar, he felt bound to protest against what had fallen from His Honor'. Apart from this incident the two men remained on an amicable footing.

In 1846 a Bill was introduced into the Legislative Council by Edward Brewster, intended to bring about a reversion to the former practice of not separating the legal profession into barristers and attorneys. The Herald had changed its mind since 1834, and gave the measure cordial support, but Plunkett went to the Council with a petition against the Bill signed by all but two members of the Bar. He pointed out that the original rules had been prepared in 1828 and shown to all members of both branches of the profession before being carried into effect in 1835, and that the separation had been in the best interests of all concerned. After the debate Plunkett was accused of having 'a peculiar faculty

1. Stephen to Stanley, 6 February 1846, see Alfred Stephen's Letter Book. pp.222-5. ML.
2. SMH, 28 April 1847. It was agreed that in future the Bar would attend to its own internal affairs.
3. SMH, 3, 22 September 1846.
4. SMH, 24 September 1846, report of Legislative Council proceedings of 23 September 1846. Lowe reported on Plunkett speaking at the meeting 'with supercilious and spiteful pride' and 'with a face of fastidious horror'. Lowe thought the division was premature in Australia which 'for centuries [will not] be ripe for it'. Atlas, 26 September 1846.
of saying, of and to his opponents, most offensive things (sic), in the most unconscious manner, but no examples were given to prove the assertion.¹ The normal procedure of setting up a Select Committee, charged with looking into the whole matter, and especially that of fees, was followed.² When the debate was resumed in 1847 it was postponed because Plunkett was at Bathurst on Circuit with Dickinson.³ The argument dragged on into 1848, with Plunkett totally opposed to the proposal, and by then he was able to point out that it had already caused the Bar to be reduced, because English barristers would not come to the Colony while the possibility of amalgamation existed.⁴ He was able to carry the day and amalgamation did not take place. On the other hand he did change his mind in regard to the admission of colonial youth to the Bar without requiring that they pass through the English legal system beforehand. He insisted however that they undergo an examination, to which purpose a Board consisting of the three judges, William Foster, Edward Broadhurst and Plunkett was set up with the duty of ascertaining whether prospective candidates could show their proficiency in Law, Classics, Mathematics and History, before admission.⁵

In September 1848 the first Royal Commission of Inquiry instituted by the Government of New South Wales was set up.⁶ Its purpose was 'that a diligent and full enquiry should forthwith be made into the Constitution, Practice, and proceedings of Our said

¹. SMH, 29 September 1846.
². SMH, 25 September 1846, report of Legislative Council proceedings of 24 September 1846.
³. Ibid., 25 September 1847, report of Legislative Council proceedings of 24 September 1847. Bell's Life in Sydney, 28 August 1847 called Brewster's Bill a 'bantling'.
⁴. SMH, 1 May 1848, report of Legislative Council proceedings of 28 April 1848.
⁵. Ibid., 26 April 1848, report of Legislative Council proceedings of 25 April 1848; ibid., 30 September 1848. Hallam's Constitutional History was a required text.
⁶. FitzRoy to Grey, 14 October 1848, HRA, 1, XXVI, 638-42.
Supreme Court, and also of the lesser courts of the Colony, in order to effect any alterations and improvements. The Commission consisted of nine members and a secretary. The three judges and Plunkett were on it, and it was given six months to bring back its findings. In July 1849 Thomson moved that the House go into Committee on the report of the law Commission. When Riddell, the Colonial Treasurer, seconded the motion, Plunkett immediately spoke against it. He thought that the sense of the House ought to be heard first. He did not agree with large sections of the Report, and, because it was a matter of vital importance, regretted that he was the only member of the Commission with a seat in the House. Reform was needed, but the Commission had refused to deal with the problem and had only proposed one real change, which was to augment the power of the Supreme Court by adding a fourth judge; it also proposed to abolish some of the minor courts. This, in Plunkett's opinion, was no way to reform. As a result he was able to agree only with the one single resolution of the Report which proposed that the Sheriff and the Commissioner of the Court of Requests for the County of Cumberland be united in the one office. He told the House, in conclusion, that Judge Dickinson, Edward Broadhurst and William Foster, the Solicitor-General, who were also on the Commission, agreed with his opinion on the Report.

George Nichols brought great applause when he said that the Report had neglected the very thing it was brought together for - the reform of the Supreme Court. All it proposed to do was to enlarge it and this 'bespoke that the Commission was composed of placement'. A fourth judge would be a useless addition to the Court because 'the three they possessed had now almost nothing to do'. This statement, doubtless an exaggeration, contained some truth because with the cessation of transportation the criminal side had decreased, whilst the improvement in social and economic

1. Ibid., 641
2. SMH, 13 July 1849, report of Legislative Council proceedings of 11 July 1849.
4. SMH. 13 July 1849.
conditions over the previous few years had also tended to lessen the demands on the civil side. Thus both Nichols and Donaldson, who said that the work of the Court had been cut by half, were not very far from the truth. Most of the argument however was based on the economics of reform, and the desire to wait until the future of Port Phillip had been decided before reform was undertaken. Wentworth returned to his customary attack on Stephen by saying that he had simply made up his own mind on what was desirable, and had induced the rest of the Commission to agree with him. When the question was put to go into Committee there were only seven in favour with nineteen against. Plunkett, certain at this time that the Report would be shelved, voted with the ayes, which may have been another way of saying that the Report ought to be rejected in Committee of the House as well as in a prior debate.¹ The Herald on the following day deplored the fact that the Report was so summarily disposed of but, added, 'We cordially admit, however, that the debate was conducted with great ability. The Attorney-General in particular, acquitted himself nobly, both as a public-spirited statesman and as a constitutional lawyer'.² Plunkett gave it as his opinion a month later 'that the administration of justice in this colony cost less than was paid for the administration of justice in any country of the world'.³ It was probably a sound opinion, and Plunkett seemed determined to avoid adding to the costs by what he felt would be an ineffective reform of the legal machinery.

New South Wales in the late forties looked forward to the separation of the Colony with the cutting off of Port Phillip, and the simultaneous granting of a New Constitution. Port Phillip was determined to stand on its own feet, be financially free of the Mother Colony, and retain its pride in a population free of the

¹. Ibid.
². Ibid., 14 July 1849
³. Ibid., 24 August 1849, report of Legislative Council proceedings of 23 August 1849.
convict taint. This latter attempt caused Plunkett some amusement, and he said that the population there were 'not quite such pure merinoes as they would have it appear' and he instanced one month in 1847 in which 34 convicts had been charged with crime.\(^1\) Towards the end of that year there was much speculation on the form of the new Constitution with public meetings and then great public meetings to argue about its form.\(^2\) The Legislative Council was dissolved in June 1848, and 'Luckily the full complement of candidates' was available for election to the new Council.\(^3\) In Port Phillip a 'set of hairbrained fellows' proved what they thought of a Council to which they returned members at a distance of six hundred miles. They returned Earl Grey as their representative for Melbourne and declined to return anyone for the other five seats in Port Phillip. 'Such wanton proceedings' scarcely needed comment from FitzRoy except insofar as they clearly proved the impatience of the inhabitants of Port Phillip for the granting of their independence from Sydney.\(^4\) Nonetheless FitzRoy had to accept the election of Grey, when Plunkett and Foster informed him that it was a legal election and thus the Council met in the following May of 1849 in the absence of 'The Right Hon. Earl Grey, member for the City of Melbourne'.\(^5\) Later James Martin, who had his own difficulties about retaining his seat legally in the Council on lack

1. Ibid., 14 June 1847, report of Legislative Council proceedings of 11 June 1847.
2. Lowe, convinced that New South Wales had proved itself fully equal to the task of governing herself more fully, spoke out for a new Constitution, Atlas, 16 October 1847.
3. SMH, 12 July 1848. A week earlier five of the remoter districts lacked candidates. The Herald praised the reports of the Council's Select Committees calling them 'a colonial encyclopaedia, authenticated by the stamp of authority', ibid., 28 June 1848.
4. Ibid., 2 August 1848, FitzRoy to Grey, 18 August 1848, HRA, 1, XXVI, 569.
5. FitzRoy to Grey, 22 September 1848, ibid., 609-10; Plunkett and Foster to Colonial Secretary, 22 August 1848, ibid., 611-2; Foster's and Plunkett's opinion to Colonial Secretary in Executive Council Minutes 25, 26, 2, 8 August 1848, pp.408-16. NSWA, 4/1513; SMH, 16 May 1849, report of Legislative Council proceedings of 15 May 1849.
of land qualifications, upbraided Plunkett for not having made his legal opinion on Grey public. Plunkett showed what he thought of the whole affair when he replied that to have done so 'would be of no use whatever to the House, any more than the production of an opinion upon the show of Punch and Judy, or any other buffoonery similar in character to the proceedings at Melbourne'. 1 In Melbourne however such 'buffoonery' was seen as a legitimate attempt to force action in London, and when separation was finally announced in November 1850 the people there allegedly 'lost their senses' with rejoicing. 2 In New South Wales the Act of 1850, 13 and 14 Vict., c.59, apart from its provisions separating Port Phillip, hence named Victoria, made such slight changes in the existing conditions that it was received almost with apathy. 3 It did not grant responsible government to New South Wales, and it was left to the Legislative Council in 1851 to record its disapproval of its shortcomings.

By the end of 1850 Governor FitzRoy had settled in to his office, with prudence and moderation guiding his activities in his official capacity. He suffered the grievous loss of his wife in an accident at Parramatta in December 1847. 4 Despite the fact that gossip was sufficiently prevalent in the previous eighteen months to cause some to wonder at his private life, Plunkett remained close to him and was termed his 'personal friend' at the time of the death of Lady FitzRoy. 5 To most of the community

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1. Ibid., 6 July 1850, report of Legislative Council proceedings of 5 July 1850.
2. Ibid., 23 November 1850.
3. An exception was Lowe who had all along regarded the proposed New Constitution as 'Earl Grey's political abortion'. By the time it was promulgated Lowe had left the Colony, Atlas, 19 February 1848.
4. SMH, 8 December 1847.
5. Atlas, 14 November 1846, said, 'Society is no longer pure - the profligate jostle the most virtuous' at the Governor's residence; SMH, 9 June 1847, complained of people who lived in concubinage being invited to the Governor's home; Bell's Life in Sydney, 26 December 1846, said let FitzRoy entertain as he pleased although it felt that something should be done because 'the Military Barrack of Sydney is a brothel', Ibid., 18 April 1846.
however, FitzRoy proved something of a relief after the austerity and dedication to office practised by Gipps. In that long series of communications printed in Historical Records of Australia, FitzRoy appears to be the only governor to use the word 'smile' in an official despatch to the Colonial Office. He had the humanity to suggest that even Earl Grey would 'probably smile' when he read a despatch detailing the arguments about the Table of Precedence prevailing in the Colony. Perhaps FitzRoy himself had some reason to smile, as within a couple of years of his arrival harmony prevailed between himself and the Legislative Council, the agitation about the land question was dampened and even the Herald, once more sniffing the prevailing winds, was writing of 'that gigantic anomaly, the Squatting System of New South Wales'.

By 1850 Plunkett, too, was well pleased with the progress towards social, economic and legal stability made by the Colony in the eighteen years since he arrived. He was still concerned about some aspects of its social life, especially when statistics revealed that one half of the criminal charges laid were for drunkenness. But those years had seen the passing of transportation and the convict element reduced to such a scale that its presence was scarcely noticeable. Plunkett set his face against any revival of convictism's characteristics, and when it was suggested that the whip ought to be used on male juvenile offenders he successfully had the proposal rejected on the grounds that whipping was 'too...

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1. FitzRoy to Grey, 2 April 1847, HRA, 1, XXVI, 453-4. FitzRoy thought that alterations in precedence would not cause 'mortification to any sensible mind', ibid., 454.
2. SMH, 15 April 1848. The squatters paid less than 3/16 of a penny per acre in license fees for their runs; and the average run was 29,000 acres. These figures included the Port Phillip District.
3. Ibid., 21 September 1849. 8,922 out of 19,296 were for drunkenness. There were also 83 charges laid for 'furious driving', ibid.
analogous to the punishments under the convict system'.

Indicative as it was of the development of New South Wales, a case in which he prosecuted on an ex-officio information of his own must have given him great satisfaction. It was in Breach of the Electoral Act and the first case of its kind in the Colony, thus eliciting much interest. A Sydney grocer, John Stirling, was charged with having voted twice, the second time impersonating another person of the same name. Plunkett said that Stirling was a man of character and position and by his action had given bad example to others. He hoped that 'If the present prosecution had no other good effect, it would at all events show the country that such offences would not be suffered with impunity, even when committed by persons of respectability'. He affirmed that his purpose was to ensure the purity of elections and won the applause of Lowe who defended, unsuccessfully, in the case.

1. Ibid., 27 June 1850, reports of Legislative Council proceedings of 28 June 1850.
2. Ibid., 11 June 1849.
TOWARDS RESPONSIBLE GOVERNMENT

By 1851 Plunkett had become a symbol of permanence, stability and order in colonial society. For almost twenty years he had held positions of official responsibility that had kept him in constant public view. His private life, overshadowed by the ill-health of his wife and the acceptance of a childless marriage, was known in its details only to his intimate friends like the Therrys. It was not unusual for the Irish-born judge and Attorney-General to have their families accompany them when they went together on Circuit, but apart from his sustained interest in music, an occasional trip to such places as Bathurst and Goulburn seemed Plunkett's only relaxation. Aloof as he was, Plunkett was certainly respected and even admired, but few were drawn to him on the level of human companionship. His constant, almost obsessive determination to uphold the law was all-embracing and he never seemed to heed the possible consequences. When Henry Parkes began the Empire Plunkett waited for a while and then wrote to him pointing out that he had not filed an affidavit as its publisher and proprietor with either the Colonial Secretary or the Supreme Court. He told Parkes that he was liable to a fine of £100, but that, as he was willing to believe that the dereliction was due to an oversight, he would not institute proceedings under Section 2 of 5 Vict., No. 19 'provided you rectify the error forthwith'.

1. Even the small boys of Sydney knew of him it seems. They held a Guy Fawkes procession 'to the no small annoyance of Her Majesty's lieges' and with Bell's Life as Amicus Curiae apologised to Plunkett "earing as how we ar loike to cotch it". The amicable solution arrived at was judged as 'creditable to the heads and hearts of the small boys and the Attorney-General'. Bell's Life in Sydney, 6 November 1847.

2. Plunkett to Parkes, 13 March 1851, Parkes' Correspondence, vol. 29, pp.281-2, ML.
In this facet of his character Plunkett revealed the perhaps exaggerated element in his mental outlook that was to stand in sharp contrast with the characters of the men who were already emerging as the formative influences of a new society. He was always scrupulous in basing his activities on what he deemed the rightness of an action seen in its totality. Thus, to him, the end itself had to be seen in the context of the means taken to achieve it, and those means had to conform to his concept of law, public order and morality. Morality he saw within the framework of a Christian tradition with, in his case, its Roman Catholic overtones. But law and public order were to him part of that inheritance of the British tradition that he prized so highly, praised so constantly and sought to inculcate with all his power. Plunkett was one of those whom Roger Therry had in mind when he wrote to James Macarthur in September 1851, 'It is to those who first oppose and conquer pernicious principles that the main and meed of victory are due. It is much easier and safer to be a liberal just now than it was when the battle for freedom had first to be fought'. It was to be precisely on the grounds of the British tradition flowering in law and public order that Plunkett was to reveal himself as a liberal of the old order, an order that was soon to pass.

Two main features of colonial society between 1851 and 1855 that preoccupied the minds of those responsible for the development of New South Wales were the discovery of gold and the framing of a new Constitution. The impetus towards a new Constitution began as soon as the Act of 1850, 13 and 14 Vict., c.59, was presented to the Legislative Council. The Council opened on 28 March 1851 with William Westgarth 'in the room of Earl Grey', but Grey was present himself in a sense through the Act for which he was in large part responsible. La Trobe came up from Port Phillip to be

1. Therry to James Macarthur, 15 September 1851, Macarthur papers, vol. 34, pp. 1-4, ML.
2. SMH, 29 March 1851, report of Legislative Council proceedings of 28 March 1851.
present at a Council which would formally cut the remaining ties with the southern part of the Colony, and would result in his assuming the position of Lieutenant Governor.\(^1\) After a few preliminary sessions, at one of which Plunkett spoke in favour of an expedition to go and look for Leichhardt, the first countermove was taken by Wentworth when he moved on 8 April for a Committee to frame a remonstrance against the Act of 1850. Plunkett was absent from the Council on this day, being engaged in Court work.\(^2\)

In many senses the Act of 1850 was a grievous disappointment to those who wanted fundamental changes in the Constitution of New South Wales. Apart from the separation of Port Phillip it maintained the status quo of the colonial legislature vis-a-vis the Governor and the Executive Council as well as the Imperial Government. In no real sense could the Act be interpreted as an embodiment of the principles of responsible government through granting powers to ministers responsible to the electorate through Parliament. There was some reduction in the requisite qualifications for the franchise, but it did not extend to persons 'who were neither leaseholders nor householders', both of whom Plunkett thought ought to be given the vote provided they were 'educated persons'.\(^3\) If Wentworth were seriously convinced that the stage had been set by 1850 for some form of genuine, responsible government in New South Wales then he was justified in his move towards a remonstrance against the 1850 Act.

When Plunkett spoke in the debate ensuing from Wentworth's motion he referred to 'democratic influences' which had to be checked by the establishment of a second house through which

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1. Ibid.
2. Ibid., 7, 9 April 1851, reports of Legislative Council proceedings of 4, 8 April 1851.
3. Ibid., 18 April 1851, report of Legislative Council proceedings of 16 April 1851.
the 'conservative influence' would operate and thus temper the thrust of democracy.\textsuperscript{1} A few days later the \textit{Herald} saw fit to define the terms. Democracy arose through representation based on population alone, whereas conservatism stemmed from 'population combined with wealth and intelligence'.\textsuperscript{2} At the same time Plunkett was moved by other factors than the mere numerical. He clearly distrusted America as a model, quoted at length from Professor Story and instanced 'the abominable manner' in which the Indians were treated as 'a great blot' on American democracy. Furthermore he thought that there had to be some balance in the distribution of seats based on other factors than mere numbers as, otherwise, Sydney itself would simply dominate the Colony. Lang wanted six members for Sydney rather than the proposed three whilst Wentworth was appalled at the idea on the grounds that there was too much 'socialism' there already. Apparently 1848 had left some impression on colonial minds for both Lang and Nichols were quick to deny the existence of either 'socialism or communism' in Sydney.\textsuperscript{3} Throughout April the Electoral Bill for Victoria was debated at length, to which Plunkett made a characteristic contribution on which the House did not even divide. He was convinced that too frequently good men 'were restrained from coming forward as candidates by a dread of the expense and corruption which the existing system entailed'. He thought that far too much was spent by the agents of some candidates, who liberally supplied drink in public houses as a form of bribe for the electors. His remedy was to ask each candidate to sign a declaration that he had not engaged in bribery; at which it was pointed out that his zeal was greater than his discretion in that

\begin{enumerate}
  \item \textit{Ibid.}
  \item \textit{Ibid}, 21 April 1851. The paper estimated that there were only four or five genuine democrats in its sense in the House. A few years before Lowe had defined the radicals in New South Wales as those who 'feel they are worthy of Self-Government, and are determined to have it', \textit{Atlas}, 18 January 1845. On this definition Wentworth was certainly a radical but he was never a democrat in the sense defined by the \textit{Herald}.
  \item \textit{SMH}, 18 April 1851, report of Legislative Council proceedings of 16 April 1851. Joseph Story, 1799-1845, was a lawyer who
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candidates who engaged in bribery would gladly make a declaration that they had not done so.¹

On 1 May 1851 the House adopted the remonstrance drawn up by Wentworth's Committee in which 'deep disappointment and dissatisfaction' was expressed at the Act of 1850.² In general it was an expression of confidence in the ability of the people of the Colony of New South Wales to manage satisfactorily their own affairs, whilst remaining a loyal and integral part of the Empire. Its corollary was a rejection of those parts of the Act that placed limitations, financial and legislative, on the powers of the Legislative Council. With this as its last act the Council was prorogued, and Plunkett and the other officials of the Government went down to farewell La Trobe and the Victorians who were returning to elect or be elected for their own Council. To them the Herald said 'Good Bye Port Phillip' with the explanation that it really meant 'God be with you'. Thus without fanfare or tumult an era in colonial history ended.³ Perhaps some of those present in the final days of the Council debates were dimly aware of what was happening beyond the Blue Mountains. In that first week of May 1851 Edward Hammond Hargraves was naming Ophir and lecturing on gold to an interested audience in Bathurst. According to one historian these events combined with official inactivity to create 'a far graver crisis than Australia faced in 1914 or 1939


1. Ibid., 24 April 1851, report of Legislative Council proceedings of 23 April 1851.
2. Ibid., 2, 3 May 1851, reports of Legislative Council proceedings of 1, 2 May 1851.
3. Ibid., 3 May 1851, report of Legislative Council proceedings of 2 May 1851; Ibid., 5 May 1851.
because it was so sudden, so novel, so revolutionary in its social implications with its fears of famine and bloodshed'.

Gold was first reported in Sydney on 15 May 1851 and on the next day Thomson wrote requesting the opinion of the Crown Law officers, Plunkett and Manning, on what legal procedures the Government could take in the matter. Plunkett was away on Circuit at the time so Manning obtained leave to consult with Broadhurst for an opinion. It was not until 20 May that they were able to give their opinion: that the Government was competent to establish Regulations to control the people on the goldfields, and of 'imposing upon them a reasonable charge in aid of the Territorial Revenue' as well as to defray the expenses needed to manage 'the large concourse of persons who may be expected to proceed to the localities in question'. They were clearly unsure of their ground, but they urged the Governor and Legislative Council to act promptly and enact laws 'for securing the peace, welfare and good Government of the Gold Districts and its inhabitants'.

When the Executive Council met on 23 May 1851 to draw up the regulations concerning the licence fees, they had no experience and only a tentative legal opinion to act on. But they had a letter from Major General Stewart written from Bathurst who urged

2. Colonial Secretary to Attorney-General and Solicitor-General, 16 May 1851, No. 51/3331, Colonial Secretary's Letterbook, Judicial Departments, vol. 21, NSWA, 4/3757.
3. Manning to Thomson, 20 May 1851, No. 51/4997, Colonial Secretary in letters, NSWA, 4/2934. Broadhurst received £10.15.0 for his assistance, see W.W. Billyard to Thomson, 22 May 1851, Colonial Secretary in letters, Gold Discoveries, NSWA, 4/1146.1.
4. Manning to Thomson, 20 May 1851, No. 51/4997, Colonial Secretary letters, NSWA, 4/2934. In a supplement to the Government Gazette of 20 May 1851 the Regulations were proclaimed and it was stated that the licence fees would be promulgated soon.
the quick importation of 'an Infantry Regiment' to keep order on the fields. The later effects of the licence fee may have been pernicious because 'it remained like so many emergency taxes long after the crisis had passed'. At the same time it must be seen in its context and the fact that the Governor and Executive Council were not stampeded into other forms of repressive legislation says a good deal for their stability and prudence.

Plunkett was not a participant in the framing of the Regulations for the goldfields, but his later attitude makes it clear that he held to a view that an historian a century afterwards expressed with the words 'the population of New South Wales never suffered the impact of a real gold "rush".' In 1852 Plunkett summed up his view of the impact on the community of the new source of wealth. 'The harvest had been got in, the sheep had been shorn, and all sorts of industrial pursuits had gone on much the same'. He also thought that thanks to the police and to 'the orderly character of the diggers as a body, the law was never more powerful than at present'. It was a view far removed from that of Sir John Pakington who told FitzRoy that the gold discoveries engendered a 'state of affairs which has no parallel in history', and C. F. Hemmington who stated 'It must be evident to every reflecting and thinking mind that the gold fields have been the

1. Stewart to Colonial Secretary, 21 May 1851, Colonial Secretary in letters, Gold Discoveries, NSWA, 4/1146.1. Thomson noted on the letter to tell the General that his suggestions would receive close consideration', ibid. Stewart was not alone in his anxiety. Hugh Hamilton wrote from Bathurst to James Sloan on 17 May 1851, 'The country is ruined...Mr Wentworth is off to get a detachment of Soldiers to keep peace and I think they will bolt, all the horrors of California will be here immediately', Hamilton to Sloan, 17 May 1851, Sloan family letters. Received 1844-88, ML.
4. SMH, 8 September 1852, report of Legislative Council proceeding of 7 September 1852.
sole salvation of the colony'.¹ By January 1854 the Herald conceded that gold¹ has now settled down as one of the permanent and ordinary interests of the colony...pursued without disorder, without excitement'.²

It was precisely this kind of normalcy that Plunkett worked to see achieved on the gold fields. He had no interest in the economics of gold on a personal level, he only visited one or two goldfields himself, and he thought that the police, the commissioners and licence fee were the linch pins of stability and good order on the fields.³ He asserted, even after Eureka, that in New South Wales the diggers wanted a licence fee and would readily pay at least the ten shillings monthly because they wanted law and order on the fields.⁴ It was with this purpose in view that he helped amend and consolidate the Gold Regulations in 1852, agreed to the reduction of the fee from thirty to ten shillings in 1853, and watched over and saw to the enforcement of the Regulations throughout.⁵ The discovery of gold, which to others was a source of wealth and romance, hardship and heartbreak, new social and political ideals and movements, proved to Plunkett no more than an opportunity to exercise his responsibilities as a civil servant and law officer. In this he was a reflection of Gipps and FitzRoy, a partner of Thomson and Riddell and those others who watched a community develop and grow after the discovery of gold, but who

2. Ibid., 1 January 1854.
3. Ibid., 6 October 1854, report of Legislative Council proceedings of 5 October 1854. Plunkett, in this as in other instances refused to accept America as a model and he had a fear of taking any lead from the experience on the Californian goldfields, ibid.
4. Ibid., 15 June 1855, report of Legislative Council proceedings of 14 June 1855.
5. Government Gazette, 2 April 1852; SMH, 30 September 1853.
saw their role in this romance as the stabilising factor that would ensure continuity, good order and purpose to the community.

On 12 June 1851 FitzRoy was ceremonially appointed Governor-General of Australasia amidst unease that Her Majesty's territory of Australia might still be blighted by the stain of transportation. A great public meeting was called to request the dismissal of Grey over the question of transportation and the elections for the Legislative Council were held in that atmosphere. For the first time a Catholic candidate was put forward for a Sydney seat in the person of Alexander Longmore who received the active support of Father John McEncroe. The Herald expressed surprise at the candidature, given the presence of Plunkett in the Council who was deemed 'a most powerful ally, and a vigilant guardian of Catholic rights and Catholic interests'. With the Ecclesiastical Titles Bill in England as a background McEncroe was warned 'against taking any steps by which similar commotions be produced here'. Plunkett perhaps added to suspicions when he reluctantly went to Court to prosecute the respected Scottish Presbyterian minister James Fullerton for the illegal solemnization of a marriage in which a girl of fourteen was married without her father's consent. Fullerton was found guilty but was not imprisoned, and, in its way, the incident proved valuable in that it gave Plunkett further impetus to undertake the important work of rewriting the Marriage Laws.

1. Ibid., 12 June 7 July 1851.
2. Ibid., 31 July 1851.
3. Ibid., 28 July, 21 May 1851. It was unfair to accuse Plunkett of having canvassed Catholic rights in the Council and the fact that no proof was proffered illustrates the unfairness. Parkes in the Empire also attacked Longmore. See Empire, 7 August 1851. Longmore was the Catholic representative on the Denominational School Board.
4. SMH., 10 July 1851. Fullerton was misled about the girl's age and was also told, wrongfully, that her father was dead. See Plunkett and Manning to Colonial Secretary, 22 August 1853 re a Bill to annul the Marriage. Colonial Secretary Bundle, NSWA, 4/714.4.
It was Wentworth rather than Longmore who had cause to worry over the election. He was warned that unless he joined the Australasian League and subscribed handsomely to its fund his stand on transportation would be regarded as so questionable as to render him less suitable for election than even Longmore. He did not join the League and narrowly defeated Longmore for the third seat, thus proving that the Colony was more disposed to acquiesce in the temporary disadvantage of dependence on the Mother Country rather than accept in any shape or form the disgrace of remaining a receptacle for English felons. Therry, from the Bench, watched the elections with interest. He wrote to James Macarthur after he 'heard from Plunkett with some surprise and regret that several R. Catholics and some of their clergymen continue to oppose you'. He was glad 'to find however they are few, and that their opposition will be ineffectual'. Macarthur was returned, to the delight of Therry, who thought also that 'a few defeats that have taken place are likely to weaken the pernicious influences of Socialism and its unprincipled votaries'. Representatives of the old interests of property, law and order were expressing their unity, despite religious differences, against new elements in society that under absurd labels such as Socialism seemed to pose a threat to the established fabric of the past.

It was a quiet Council that opened on 14 October 1851. Gold promised prosperity, transportation was quickly settled in a

1. SMH, 15 August 1851.
2. Lang led the poll with Longmore fourth and Cowper last. Edward Lamb won the second seat, ibid., 17 September 1851. T.L. Suttor, Hierarchy and Democracy in Australia 1788-1870, Melbourne 1965, p. 120, quaintly judged 'the Spirit of the Age, the rising tide of secular liberalism' defeated Longmore.
3. Therry to James Macarthur, 15 September 1851, Macarthur papers, vol. 34, pp. 1-4, ML.
4. Therry to James Macarthur, 26 September 1851, ibid., pp. 1-4.
debate in which all agreed that it could never be introduced, the relations between the Governor and the Council were amicable: even Wentworth was temporarily subdued,¹ but he showed some of his customary impetuosity when he recommended consigning hardened criminals 'to a fate which he thought they fully deserved, and which it was much more beneficial to the community they should undergo', namely the scaffold. Plunkett replied with shock at the proposal which he thought would be a step back into barbarism.² In any case it was a proposition difficult to fulfil given the balance of judgment required to distinguish between types of criminal behaviour in a society in which two of the leading citizens, Mitchell and Donaldson, had fought a duel three weeks before.³ For a few weeks the debates were desultory and fruitless. Henry Douglass moved to regulate immigration from China as European immigration would otherwise suffer. Plunkett agreed with the tenor of the Bill but refused to foster it as he thought it both ultra vires and inexpedient. His solution was to amend the Master and Servants Act excluding Chinese from making contracts. He told several blood-curdling tales about their behaviour in the Northern Districts, and asserted that 'A greater curse than this species of immigration could not be inflicted on the colony'.⁴ The Bill came to nothing, and the Chinese continued to arrive.

Plunkett also had difficulties within the Council in persuading some of the members to accept the validity of the National system

1. SMH, 1 November 1851, report of Legislative Council proceedings of 30 October 1851.
2. Ibid., 23 October 1851, report of Legislative Council proceedings of 22 October 1851.
3. Ibid., 1 October 1851. Neither duellist suffered injury.
4. Ibid., 24 November 1851, report of Legislative Council proceedings of 21 November 1851. Plunkett said that he would prefer 2000 convicts than 500 Chinese probably on his usual grounds that British law knew how to deal with convicts.
of Education. This was accentuated by the fact that some of the clergy, especially the Anglicans and Catholics, were slow to accept the invitation to go into the National Schools to instruct the children of their denomination in religious knowledge. Plunkett expressed his regret that, unlike Ireland, the clergy would not give genuine support to the National schools. At the same time he defended the schools against Cowper who claimed that the system under which they operated was 'practically an infidel system' whilst the denominational was the 'best and only sound system'. To Plunkett 'thus to characterise the national system was to offer a gross insult to all its supporters', but he knew nonetheless that unless the clergy of the most powerful denominations were numbered amongst those supporters the future of the National system would be in jeopardy.1

In the Council on 4 December 1851 Wentworth made an impressive speech against the interference of the Home Government in the affairs of the Colony. His Address for Redress was adopted by the Council with only eight members voting against, all but one of whom, including Plunkett, were paid officials of the Crown.2 FitzRoy sent this petition to Grey informing him that he thought that it was an expression of the wishes of the broad section of the community, and, insofar as the petition meant that the Colony wanted an executive dependent upon the legislature rather than upon the Governor this was assuredly true.3 What precise form the

1. Ibid., 29 November 1851, report of Legislative Council proceedings of 27 November 1851. See Regulations and Directions to be attended to in Making Application to the Commissioners of National Education for Aid Towards the Building of School Houses or for the Support of Schools, Sydney 1849. A day or part of a day was to be set aside for religious instruction given by pastors approved by the parents, but no one was to be forced to attend. pp. 5-6. Plunkett, Nicholson and Macleay signed these Regulations.

2. SMH, 9 December 1851, report of Legislative Council proceedings of 4 December 1851.

machinery of Government was to take was by this time still unclear, although it is doubtful whether a sufficiently well-informed segment of either the Council or the community at large felt wedded to the Canadian form, as the petition implied. What was important was the fact that there was by 1851 a body of representative members within the Council, led by Wentworth, and backed up by public opinion, who were determined that the old state of affairs could no longer continue. It is equally clear that this conviction was shared by some of those whose positions within the Council depended upon their official appointments, and Plunkett was amongst them. That he still felt himself restrained by his position from speaking with the vigour Wentworth was able to adopt is understandable, given that, whilst it was relatively easy to remonstrate, it was another matter to offer an explicit alternative which would prove acceptable to the Colonial Office and the Imperial Parliament.

When the Council opened again in June 1852 Wentworth was ready with a move for a Select Committee to draft a new Constitution. No single official member was amongst those he proposed to sit on the Committee, but the result of a ballot named Thomson and Plunkett amongst the ten members. Plunkett's inclusion pleased the Herald at least, because in him 'the enlightened portion of the public have strong confidence'.

This Committee had hardly begun its work when a despatch arrived from Grey, who had already been supplanted in the Colonial Office by Sir John Pakington. Grey's despatch was a reply to the remonstrance adopted by the Council in May 1851 and in effect it was a rejection of this remonstrance. Again Wentworth obtained a Select Committee to reply and this time the answer even went as far as to make a clear parallel between New South Wales and America where arms had been resorted to to redress its grievances. By this time even the moderates like

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1. SMH, 17 June 1852, report of Legislative Council proceedings of 16 June; ibid., 18 June.
3. VPLC 3, 10 August 1852.
Plunkett were inclined to a mild form of protest at least. On 3 August 1852 a debate took place on raising Thomson's salary from £1,500 to £2,000. Plunkett praised Thomson on the grounds that even 'into that secret tribunal [the Executive Council] Mr Thomson had succeeded in infusing a truly liberal spirit'. He went further in that 'For his own part, he wished the Schedules to the winds and he believed that his honourable friend, the Colonial Secretary, coincided with him in that wish'. With this speech Plunkett made a thinly-veiled attack on two of the instruments used by the Imperial Government to hold the Colony in check, the Executive Council whereby decisions were made subject only to the judgment of its officially appointed members, and the Schedules whereby colonial revenue was tied up in carefully formulated proportions.

The fact that his words were greeted with 'Prolonged cheering' perhaps indicates the satisfaction felt by the Council in that one of its most esteemed official members was prepared to go that far. A fortnight later Wentworth tried to force his point by stopping supplies. In the debate Lamb called Plunkett the 'great Intriguer-General', to which Plunkett replied that he still thought that the Schedules 'ought to be abolished as unsuited to the exigencies of the country', but that stopping supplies would achieve nothing especially as the Colony was progressing satisfactorily 'notwithstanding the flocking of thousands of people to the goldfields'. He thought Wentworth was insincere in his measure to stop supplies and that all who voted for it would be glad when it was lost. The motion was defeated by 28 votes to 17. When Wentworth pressed ahead and threatened to cut off supplies for

1. SMH, 5 August 1852, report of Legislative Council proceedings of 3 August 1852.
2. Ibid., 20 August 1852, report of Legislative Council proceedings of 19 August 1852.
1854 unless a New Constitution were granted, Plunkett taunted him by asking him to produce what he 'still kept in his pocket'. He advised moderation given that 'John Bull, although a slow animal, was always ready to yield to justice and to reason what he refused to grant to fear' and that the same animal would not be 'bullied on this present occasion'.  

The sense of resentment in the Council was sufficiently strong to induce FitzRoy to advise Pakington to accept the draft of a New Constitution. This draft was completed in September and was then presented to the Council for consideration. It consisted of three bills, the third of which was in fact the suggested constitution. In it provision was made for a bicameral legislature with a nominated Upper House. The other significant provision required the consent of the majority of the Upper House and that of a two-thirds majority of the Lower House to vary electorates. Both clauses were a clear attempt to limit the amount of power wielded by the democratic influences within the Colony. It thus aroused considerable public dissent with the result that whilst the Council discussed the report of its Select Committee it did not proceed to adopt it. The other grounds for its reluctance was uncertainty as to what attitude would be adopted in England now that there had been a change in the Colonial Office with the replacement of Grey.

In England Pakington, with the informed assistance of Merivale, had prepared a reply to the remonstrance of the Council. This despatch was received in May 1853 and was given immediate

1. Ibid., 26 August 1852, report of Legislative Council proceedings of 25 August 1852.
2. FitzRoy to Pakington, 31 August 1852, C.O. 201/453, National Library microfilm.
3. VPLC, 17 September 1852.
4. SMH, 7 December 1852.
5. Ibid., 11 September 1852.
publicity, as well as being tabled in the Council. It expressed general agreement with the wishes of the colonists in regulating their own affairs. The immediate response was a move by Wentworth for the setting up of another Select Committee to make a final draft of the New Constitution. The members elected to it were Wentworth, Thomson, James Macarthur, Plunkett, Cowper, Martin, McLeay, Thurlow, Murray and Douglass. Even further impetus to the work of the Committee was given by another despatch, this time from Newcastle who had replaced Pakington at the Colonial Office, in which an assurance was given that the Council rather than the Imperial Parliament was regarded as the better place to formulate 'provisions for securing good government in New South Wales, and promoting harmony in the connection subsisting between Great Britain and this important province of the Empire'.

One of the major sources of conflict regarding the New Constitution was whether the members of the new Upper House were to be granted hereditary titles. This particular matter was much debated at the time both within the Council and in the public press. Since then it has become one of the touchstones by which historians tend to evaluate the liberalism or otherwise of those who put it forward. In fact it was not a novel idea, it was never promoted

1. Pakington to FitzRoy, 15 December 1852, C.O. 202/60. National Library microfilm; SMH, 12 May 1853. Pakington thought that the gold discoveries would 'stimulate wealth and material prosperity, with a rapidity alike unparalleled', ibid.
2. Ibid., 21 May 1853, report of Legislative Council proceedings of 20 May 1853. Wentworth pledged himself to 'make the new Electoral Law of a conservative character', ibid.
3. J.M. Main, 'Making Constitutions', loc. cit., remarks that the Committee was 'of very conservative character', but excepts Cowper and Thurlow from that category. Cowper was 'a Sydney liberal' whilst Plunkett was 'educated at Trinity College, Dublin', p.375.
4. Newcastle to FitzRoy, 18 January 1853, C.O. 201/453. National Library microfilm. The word of New Zealand's Constitution had come through in January. SMH, 19 January 1853. This possibly helped foster action in Sydney, although Cowper complained to Parkes in 1855 that like New Zealand New South Wales would have had a Constitution long before 'had we been united'. Cowper to Parkes, 9 May 1855, Parkes Correspondence, vol.6, p.314, ML.
with excessive vigour by its authors in New South Wales, and it served, in their eyes, the useful play of diverting attention from an objective they were determined to attain, namely a nominated Upper House, to a proposal they were quite happy to let go. It seems something of an anomaly, then as later, that the real achievements of the authors of the New Constitution should be clouded by the desire of some of them to see titles granted to the members of the Upper House on an hereditary basis; especially when a few years later Therry was able to remark that he had been told that one could scarcely walk down Macquarie Street without treading on the toes of a knight, though, admittedly such knights were incapable of the reproduction of their own kind.¹

The clauses in the new Bill that referred to hereditary titles were modelled to some extent on similar ones in the 1791 Canada constitution, which in turn stemmed from the Nova Scotia baronetage precedent of 1624. In the Australian colonies as early as 1821 John Macarthur had spoken of the need for an 'Aristocracy' although he made no attempt to define its privileges. It remained for Archibald Cunningham in 1847 to make the first positive suggestion of an Australian peerage in a letter to Earl Grey. This idea met with local opposition in Melbourne and it was not adopted. In 1848 there was some discussion on the matter in New South Wales with Wentworth apparently in favour of it and in 1849 Wakefield in his A View of the Art of Colonization also put it forward. This was followed by a resolution in 1849 brought before the Legislative Council in South Australia by John Morphett. He wanted an upper House 'to consist of hereditary members' but the proposal met strong local opposition and fell flat. In England itself the proposal was given very meagre support.²

¹ Therry to James Macarthur, 17 September 1860. Macarthur papers vol. 34, p.72. ML
² See C.J. Borthwick, 'The Bunyip Aristocracy', History Honours thesis, A.N.U. 1969, p.1. This thesis is a valuable account of the hereditary titles argument, although nothing is made of the probable ulterior motives of Wentworth and Plunkett.
In January 1832 Judge Dickinson published *A Letter to the Honourable the Speaker of the Legislative Council, on the Formation of a Second Chamber in the Legislature of New South Wales.* He proposed 'hereditary honours' for the members of the Upper House, a proposal for which the *Herald* thought the community 'was scarcely prepared' whilst the *Empire* rejected it outright. When the Select Committee sat during 1852 Wentworth made no reference to the question of hereditary titles though he, together with Plunkett, Thomson and others held out for a nominated Upper House whilst Cowper was in favour of an elected one. As has already been noted, no finality was reached towards a New Constitution in 1852 and it was left to the events of the next year to clarify the situation as regards titles.

It is not clear from the *Votes and Proceedings* just when and how the clauses relating to hereditary titles were put through the Committee, but in the debates on the Constitution it became evident that Wentworth, Thomson, Plunkett, Macleay, James Macarthur and Murray were in favour of them, whilst Martin, Douglass, Cowper and Thurlow were against. Their opposition was not against titles themselves, but against their possession conferring any legislative powers. When the proposals were made known at the end of July 1853 they provoked immediate opposition from the press, and public meetings were held on 6 and 15 August. At the meeting held in

1. *A Letter to the Honourable the Speaker of the Legislative Council, on the Formation of a Second Chamber in the Legislature of New South Wales,* Sydney 1852. The pamphlet was anonymous: but the judge's authorship was acknowledged.
2. *SMH,* 10 January 1852; *Empire,* 14 January 1852.
5. *SMH,* 30 July, 6 August 1853; *Empire,* 16 August 1853.
the Victoria Theatre on 15 August in the presence of six Legislative Councillors and 2500 people, Parkes spoke at length. He was followed by Daniel Deniehy in a speech since made famous in the annals of Australian wit, sarcasm and invective. Deniehy regaled the crowd with his imprecations against 'these harlequin aristocrats, these Botany Bay magnificos, these Australian mandarins' who wanted to form 'a bunyip aristocracy'. It was brilliant, entertaining, derisive and decisive, but it missed the mark for although it served to bury for ever the question of titles, it did nothing to prevent the far more important step of making the Upper House a nominated one.

When Plunkett came to speak in the Council during the second reading debate on 24 August 1853, he said that he would do so even though his opinions would be as little palatable to some, as the ones he had formerly held against transportation were to those in power. In his eyes the essential thing was to have two houses with the upper one consisting of nominated members. He thought that 'the rights and liberties of the people would never be safe without the existence of a strong executive, and of two other independent powers' but as 'they had no desire for a republic [and] they wished to stick to their monarchy...he could not conceive how a monarchy could exist with an elective Upper House'. He made it clear that he did not care a whit about the hereditary clauses as long as the non-elective ideal was retained. At that moment Wentworth echoed 'hear, hear'. Not to be contained Parkes and Deniehy were again the main speakers at another meeting on 5 September. Deniehy elicited cries of 'down with Plunkett', spoke of Wentworth as 'a person of incurable commonplace mind' whose

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1. SMH, 16 August 1853; Empire, 16 August 1853.
2. SMH, 25 August 1853, report of Legislative Council proceedings of 24 August 1853. In the House on 2 September 1853, Wentworth made it clear that 'the only principle he pledged honourable members to, was the institution of two Houses of Legislature', ibid., 3 September 1853, report of Legislative Council proceedings of 2 September 1853.
poem 'Australasia' was 'about an execrable a piece of trash as it had ever been his misfortune to read', and wound up the discourse by calling for three groans for Wentworth, Plunkett, Nicholls and Martin, which were readily given. The House adjourned on 11 October until 6 December to give time both to the members and the public to think further about the Bill.

Early in December 1853, Alfred Stephen sent a long letter to Plunkett in which he outlined his views on the composition of the Upper House. He began

'I address myself in this form to you, partly from feelings of personal regard and respect, but chiefly because I am persuaded that no one, either in or out of the Legislative Council, is better able - or will be more disposed - to do justice to my views, and the reasons by which they may be supported, or to receive them with indulgence and kindness, in case I shall be thought to have failed'.

He proposed that the Upper House be partly nominated and partly elected, with some members there by right of their office. He envisaged twenty five members including the Chief Justice as Speaker. The others were to be equally divided, twelve being nominated by the Governor, and twelve elected by the Lower House. The nominated members would remain for life whilst the elected would have a term of nine years with four retiring at the end of three years and four at the end of six, which would mean the election of four new members every third year. Stephen thought that the Upper House would thus contain an aristocratic and conservative element which would prove a check to democratic tendencies. There is no indication as to how Plunkett received these views at

1. SMH, 6 September 1853. 3000 people attended this meeting.
2. Ibid., 22 October 1853, report of Legislative Council proceedings of 11 October 1853.
3. Stephen to Plunkett, 1 December 1853 in ibid, 3 December 1853. The letter ran to about 7000 words. To what extent Stephen, like Dowling before him, wanted a Speaker's chair is uncertain.
the time, although the fact that he was prepared to allow them to be addressed to him and printed in the public press is an indication that he was not unfavourably disposed towards them.

On 7 December 1853 Wentworth moved the House into Committee on the Bill outlining the New Constitution. The hereditary titles clauses had been expunged, as also those to exclude judges and ministers of religion from holding seats. Plunkett had spoken in favour of expunging the exclusive clauses; he thought that in principle no one ought to be excluded, but that if any exclusion were adopted it should be left either to the electorate itself to operate it, or to the good sense of people in such positions not to offer themselves as candidates. An entirely nominated Upper House was accepted, in favour of which Plunkett spoke. He also moved that there be five members for Sydney in the new Legislative Assembly rather than four, but was defeated in this issue. The only other major change in the Bill was the abandonment of the clause designed to keep Moreton Bay permanently part of the Colony of New South Wales. This was done in response to the opposition offered to it by the northern districts although it went against the grain of those elements in the Council who did not want to lose the revenue of the northern districts. Plunkett was not amongst those who wanted to retain Moreton Bay, and in a minority of six he had spoken and voted for printing a petition demanding separation, and protesting against its permanent inclusion in New South Wales. At that time, in December 1852, he did not think that separation could take place immediately, but suggested that a Provincial Council, on the pattern of those in New Zealand, ought to be erected there.

1. Ibid., 8 December 1853, report of Legislative Council proceedings of 7 December 1853.
2. Ibid., 10 December 1853, report of Legislative Council proceedings of 9 December 1853.
3. Ibid., 13 December 1852, report of Legislative Council proceedings of 10 December 1852.
On 23 December 1853 the Herald proclaimed 'The Bill is Safe' as the session was closed and it had passed through its final stages. The Bill was sent to England on 29 December by FitzRoy and Thomson left on 23 January 1854 to see to its passage through Parliament, farewelled by an enthusiastic crowd of well-wishers and a poet justly asked Australia of the future:

When in the zenith of thy power
Forget not Thomson's name. 2

On the 21 March 1854 Wentworth, true father of the Bill, also left the Colony with the same intent as Thomson. 3 Their departure left the Legislative Council without its two most prominent leaders. Riddell became Colonial Secretary after ten years of 'dumbness' in the Council and his elevation to the position did nothing to render him more loquacious. 4 The House met again in May, but was prorogued until June despite the prevalent fear of an imminent Russian attack which was quelled partially when FitzRoy laconically told the House 'we possess ample means for repelling any predatory attack'. 5 By September some of the members were perturbed about the state of the House to the extent that Cowper moved a motion of no confidence in the Government because of its alleged 'ignorance, apathy and unconcern'. To him it was 'inefficient, prodigal and corrupt', but he excluded Plunkett and Manning from blame. 6

1. Ibid., 23 December 1853. For a full account of the speeches in debate see E.K. Silvester (ed.), New South Wales Constitution Bill. The Speeches in the Legislative Council of N.S.W. on the Second Reading of the Bill, Sydney 1853.

2. SMH, 24, 27 January 1854. Thomson still awaits his much deserved biography.

3. Ibid., 22 March 1854. Wentworth as Chairman of the Committee and the idealist who championed the cause of the Colony must be given full recognition, although Plunkett as the drafter of the Bill stands beside him. To sum up the Bill that formed the basis of N.S.Wales' political development for the next century as a mere reflection of 'the wealth and status of the pastoralists' and as 'a monument to [their] political dominance' is surely unmerited, see J.M. Main, 'Making Constitutions', loc.cit.,p.379

4. SMH, 16 December 1853.

5. Ibid., 7 June 1854, report of Legislative Council proceedings of 6 June 1854. A few years earlier FitzRoy feared the violence of 'such a mob as Sydney would produce did circumstances encourage its organization' and wanted to keep up the Military Force to repel such a mob. See Executive Council Minute 40, 20 August
Plunkett was away on Circuit at Goulburn at the time, but when he returned Thurlow thought it time to lift his exemption from blame. He accused Plunkett of making himself 'dictator-general over the magistrates of the city' who commonly asked 'what does the Attorney-General say in this case or in that' when faced with giving judgments. Nichols also attacked Plunkett and said that he ought not to go on Circuit, but ought to stay in the House and speak up as a responsible member of the Government.¹

In his reply Plunkett ignored Thurlow, but generally identified himself with his government colleagues. He claimed that he was not lukewarm in defending Riddell and denied that he wanted the job for himself: 'It would be neither discreditable to his honourable friend or to himself to say that it had been pressed upon him repeatedly and urgently to take the office, but he had said that it was perfectly foreign to his duties and he at once declined it'. He pleaded with the Council to give Riddell time as he was new to the job. He also stated that he himself was doing a better job as Crown Prosecutor than he would be by taking part in discussions on worms, or on estimates. He said he knew nothing about such matters. The motion of no confidence was lost 27-10 with none of the government members voting.²

Lang was back in the House temporarily before he went to serve six months sentence for libel, whilst Parkes had returned after beating Charles Kemp for a Sydney seat despite his promise

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¹ 1849, NSW A 4/1524. For the Russian scare see also Freeman's Journal, 22 April, 6 May 1854.
² SMH, 14 September 1854, report of Legislative Council proceedings of 13 September 1854.
1. Ibid., 23 September 1854, report of Legislative Council proceedings of 22 September 1854.
2. Ibid. The House had recently debated the problem of scab in sheep. Plunkett always kept well clear of topics about which he knew little.
to the electors, after Thurlow beat him in 1853, that he would never appear before them again as a candidate. Together with Martin and Cowper, Lang and Parkes added some life to a House that had settled to mere routine after the effort required for the new Constitution and which lacked the erratic brilliance of Wentworth and the staid but solid leadership of Thomson. After the no-confidence motion Plunkett assumed leadership of the House despite the presence of Riddell, but as his leadership was moral rather than official, odium, both within the House and out of it continued to fall upon Riddell. "Sir Charles Hotham has his Chinese Puzzle - Sir William Denison has his Riddle" said the Herald after remarking that "the Government does not know exactly what it is about". Even the House itself, in a physical sense, seemed determined to signify symbolically its displeasure at the desultory proceedings within its walls. On the very evening upon which the Herald wrote about 'Riddle' large masses of plaster fell from the ceiling, narrowly missing the government members and a week's adjournment was requested while it was repaired. By December 1855 the Council, Plunkett thought, was 'in its last agonies' and even he was glad to see the demise of a body the purpose of which had been to mark time until the arrival of the new Constitution.

If the House itself did little during 1854 and 1855 to

1. Ibid., 5 June, 9 July 1855; 11 March 1853.
2. Ibid., 21 June 1855. Denison succeeded FitzRoy in January 1855. W.A. Duncan said that FitzRoy escaped political strife 'by the perhaps not unwise policy of doing as little as possible', W.A. Duncan, Notes, p.147. J.M. Ward suggests 'he may have lacked vigilance and energy', see Australian Dictionary of Biography, vol.1, p.388. The Herald praised him because, unlike Bourke and Gipps who put the interests of the Crown first, with FitzRoy it was 'Fiat justitia, ruat coelum', and he 'endured a flood of calumny few men could have borne', SMH, 6, 17 January 1855.
3. Ibid., 23 June 1855.
4. Ibid., 18 December 1855, report of Legislative Council proceedings of 17 December 1855. Cowper told Parkes 'The Council Proceedings certainly do no credit to a Legislative Assembly', Cowper to Parkes, 15 October 1855, Parkes Correspondence, vol.50, pp. 312-5, ML.
warrant the esteem of the Colony it nonetheless debated and passed two bills that were of considerable importance, both then and afterwards, for the well being of the colonists. The bills were directed at the promulgation of one Act regulating Marriage and another to ensure the registration of Births, Deaths and Marriages. Plunkett was their main author and he guided both of them through the Council. As early as 1851 he had his first draft of the Marriage Bill ready and presented it to the Legislative Council. At the same time he made it clear that he was in no hurry to proceed with it, but preferred to entrust it to public opinion as the best Committee to enquire into its merits or demerits. A Select Committee of the House did discuss it however, and its final report, signed by Plunkett as chairman, was presented to the House in August 1853. Clause 6 stated:

That marriage being a civil as well as a religious institution, and, at all events, involving important civil rights and duties, the State is bound so to regulate it, as best to secure the public good, avoiding at the same time all unnecessary interference with it in its religious character.

This clause gave the necessary justification for the Bill whilst Clause 9 made it clear that civil marriages would be allowed. Even after the presentation of the report of the Select Committee, Plunkett still refused to press the measure so as 'to give the public ample time for considering is provisions' and to allow the House to get on with the business of the New Constitution.

1. SMH, 5 December 1851, report of Legislative Council proceedings of 3 December 1851. Its object was twofold. Firstly 'to remove all doubts as to each branch of the Christian Church equally partaking of the provisions thereof', secondly to allow civil marriages for those who wanted them.
2. SMH, 25 August 1853. The use of the expression 'at all events' seems to have been common to two Irish-Australians in their speeches and writings, Plunkett and Archbishop Mannix.
3. Ibid.
4. Ibid., 7 October, 14 December 1853.
year later he brought in the Registration Bill, to which even Lang was prepared to give his 'cordial approval'.

By August 1855, almost four years since the first draft of the Marriage Bill was presented, Plunkett was ready to proceed with the first reading. He conceded that the previous draft bill had been too unwieldy, and laid great stress on the fact that by this Act all previous laws would be repealed which would result in the consolidation into one law of the whole range of legal enactments on marriage. He thanked the Chief Justice for his valuable help and concluded by hoping that 'the absurd jealousy of the people of Victoria, with regard to this Colony, would not prevent them from adopting it'. At the second reading he underlined the difficulties in shaping the bill by saying that 'if St Peter and St Paul came down from heaven and framed a marriage bill, they could not satisfy all the members of the community'. When Nichols accused him of taking action on something in 1855 that he ought to have acted on twenty years previously, Plunkett replied that, at that earlier time, those who held power would not allow him to act. He instanced Burton as one who had given 'a solemn judgment in court, that no marriages were legal but those that were solemnized by the Church of England' as a result of which judgment 'nearly all the colony would be bastards'. The Bill passed its second reading by 27 votes to 10. Martin still

1. Ibid., 27 October 1854, report of Legislative Council proceedings of 26 October 1854.

2. Ibid., 2 August 1855, report of Legislative Council proceedings of 1 August 1855. In the Plunkett papers there is an undated letter from Denison to Plunkett (probably mid 1855) enclosing one to Denison from Stephen, also undated. Stephen affirms his own active assistance in drawing up the Bill and hopes that Plunkett will get on with it in the House, 'People never do anything here, till the day is at hand for doing it'.

3. SMH, 16 August 1855, report of Legislative Council proceedings of 15 August 1855. Burton was another for whom Robert Lowe had held no brief. When Burton left for Madras, Lowe wrote 'we enjoy the inestimable blessing of his absence', Atlas, 17 May 1845.
tried to block the Bill by moving that the whole thing be postponed six months, but he received no seconder.

The Bill for the Registration of Births, Deaths and Marriages went through the Council with the same opposition from Martin, who said that the new Parliament would abolish it. Plunkett must have been well pleased with his final contribution to the laws of New South Wales under the old form of government. That pleasure was surely heightened when he read the editorials in the Herald on himself and the Marriage Act. The editor, John West, thought the Act 'a great and glorious achievement, and it will enrol its chief authors and its chief supporters among the benefactors of the colony. It has not a particle of insolence, bigotry or narrowness'. He praised Plunkett 'on whose character the memory of religious disabilities has left no other impression than reveals itself in friendly sympathy for all classes of his fellow-men. The first ruler who offered an asylum to all races and religions - who gave them freedom to worship God according to their own consciences - was Lord Baltimore, of Maryland, a Roman Catholic nobleman - and the course of Mr Plunkett on this and many other occasions would almost lead us to question certain hereditary prejudices on the subject of religious persecution'.

This kind of praise perhaps moved Plunkett to extend his patronage even to organ grinders. In a debate a few days later Donaldson

1. SMH, 19 October 1855, report of Legislative Council proceedings of 18 October 1855. Martin was of the opinion that matters of such moment ought to be left in the hands of an elected assembly. It is worth noting that the details required on the new registration forms for births, deaths and marriages were to make the N.S.W. records among the most full and useful in the world and a model for other countries. In a way this was one of Plunkett's major administrative achievements.

2. Ibid., 6 October 1855.

3. Ibid., 22 September 1855. Plunkett was perhaps so pleased that he permitted himself to use language that resulted in his being called to order for the first time in his career in the House. He told Parkes in a debate on the Estimates that when Parkes got a crotchet in his head 'he was cracked upon the subject'; ibid., 11 October 1855, report of Legislative Council proceedings of 10 October 1855.
wanted to ban them but Plunkett was 'opposed to the prevention of music of whatever kind in the streets' and thought that 'wandering minstrels' were 'an acquisition to the city'. Donaldson was defeated.

From 1851 until responsible government in 1856 Plunkett was rarely seen in Court in his private capacity. One notable case, however, in which he was retained was when he acted on behalf of the plaintiffs, Edward and John Devine, in their claim to 210 acres of land at Newtown. The case attracted widespread interest over eight days, and Plunkett summed up in an address lasting six hours. During it he 'expressed a doubt of his own ability, from want of practice at Nisi Prius to contend satisfactorily for the interests of his client'. Stephen as Chief Justice replied to this by stating that 'no better or more able speech had ever been delivered by any member of the bar in any Court of Justice' and that it was rendered ever more meritorious given the 'array of talent as was levelled against him'. The other side, led by the Solicitor-General, Manning, included seven barristers and nine attorneys, whilst Plunkett had two barristers and one attorney to assist him. In the event the judgment went with the strength. In another memorable case of the period, in which he acted as prosecutor for the Crown, Plunkett won a victory for Henry Parkes that some would regard as redounding to the credit of neither Plunkett nor Parkes, although it had to be seen that Plunkett, conditioned by his training, learning, and, above all, his experience as an administrator in a complex Colony,

1. Ibid., 21 October 1855, report of Legislative Council proceedings of 19 October 1855. Plunkett quoted 'Music hath charms to soothe the savage breast'. Donaldson thought 'Pop goes the weasel' bad enough but 'Vilikins and his Dinah' infinitely worse.

2. His own legal department had now grown to a staff of twelve, including a housekeeper. It is probable that even had he been so inclined he would have had little time for private practice, see Waugh and Cox's Almanac for the Year 1855, Sydney 1855, p. 94. Plunkett was the only remaining figure from 1833 when there were six on the staff, see E.W. O'Shaughnessey, Australian Almanack, Sydney 1833, p. 171

3. SMH, 6 April 1852.
naturally viewed the case as a socio-legal one. Plunkett prosecuted seventeen compositors of the Empire who were charged with conspiring 'to raise wages'. Plunkett claimed that it was the first case of its kind in the Colony, and praised Parkes for being prompt in taking action because 'Nothing could be more injurious than that the practice of striking for wages should grow into strength in this colony'. He emphasised that both employers and employees would be prosecuted if they resorted to coercion because 'it could not be tolerated that men or masters should enforce their respective views by measures such as this'. His social argument was that the whole community was watching the case, and it would result in discontent and insubordination if a verdict against the compositors was not granted. They were found guilty before Therry, and were sentenced to periods ranging from 24 hours to six weeks.¹

Yet if Plunkett could be stern in asking for justice against the workers he was equally stern when cases arose in which he thought justice ought to be done against those in high places. He had J.N. Beit removed from the magistracy in 1852 because he had an 'ungoverned temper'; he went into Court and publicly reproved a magistrate who had given a licence to a publican who was a notorious drunkard and who afterwards committed murder. He affirmed his right and duty to discipline magistrates and to teach them the law and he did not seem to mind that a frequent threat in the Colony was 'I will put the Attorney-General at you now'.² He claimed, probably with justice, that his concept of true liberty was one that would allow everyone 'to enjoy life and property unmolested', but it also compelled everyone 'to give up a portion of natural liberty for the general benefit of society'.³ At the same time he was prepared to

1. SMH, 11, 15 February 1854. Foster on behalf of the compositors probably rightly said that Plunkett's address, by raising the wider issues, put the defendants in greater peril than the merits of the case itself warranted. Parkes had virtually ruined himself financially with the Empire by 1854.
2. Ibid., 14 February 1852, 8 March 1854, 14 July 1855.
3. Ibid., 21 July 1853, report of Legislative Council proceedings of 20 July 1853.
see that concept of liberty widened with the changes in society. He spoke in favour of changing the law that prevented former convicts from visiting England because 'it was desirable that every vestige of the old convict system should be swept away'; he defended the liberty of the press constantly, threatening to walk out of the House if Martin and Parkes pressed to call for the removal of 'strangers' in a debate; he rejoiced that only once in twenty one years had the Crown Law officers instituted proceedings against the press for libel; and he held that the standard of the press was 'a credit to the country'. In his own attention to the duties of his office he made it clear that no authority would make him act unless he thought the ends of justice were involved. Stephen had intimated in Court that he would request the Governor to have Plunkett take action in a case of alleged perjury. Plunkett went before the three judges and said 'the Governor-General had authority to remove him from his office, but neither by any person, or from any quarter would he be bullied or driven'.

Blending with this almost fanatical devotion to duty Plunkett showed a streak of idealism, partly stemming from his own nature and partly from his understanding of the development of society. He spoke out in favour of private executions because 'public executions were extremely demoralizing', and he said that he would be prepared to give 'his best consideration' to a bill to abolish the death penalty rather than to one restricted to its abolition for rape. Perhaps his idealism was never more evident

1. Ibid., 14 October 1854, report of Legislative Council proceedings of 13 October 1854; 8 November 1854, report of Legislative Council proceedings of 7 November 1854; 2 July 1853, report of Legislative Council proceedings of 1 July 1853.
2. Ibid., 14 May 1855. A day later Stephen and Plunkett went together to Brisbane for the Circuit Court there, ibid., 18 May 1855.
3. Private executions came into force in 1855. Plunkett also claimed that when matters dealing with persons condemned to death took place in the Executive Council he took no part in the discussion, ibid., 21 July 1853, 12 January, 15 August, 20 October 1855.
than when he tried to move in the Legislative Council 'that no member of the Executive Council or of the Legislative Council should be capable of being a director of a Bank or of any other private trading Company. (Oh, oh! and laughter)'. He said that he had personally refused shares in the Railway Company in order to maintain his own independence and had thus been free to speak on the Railway question in the Executive Council. Martin attacked him on this issue, and accused him of making a public show of his independence thus causing newspapers to call him the 'most independent of the Government officers' and the 'most public spirited individual in the British Empire'. His motion received scant attention from his fellow councillors. When by 1855 the Railway Company had failed, thus necessitating the Government's coming to the rescue, Plunkett made much of the bungling that had led to this pass with perhaps a degree of pique that his views had not been accepted. The Herald came to his defence claiming that his remarks on the Company were not unkind or ungenerous - they could not bear this character when uttered by the learned gentleman, whose genial temper and upright reputation are amongst the precious possessions of the whole House'. It then made the strange claim that Plunkett 'often relieves the funereal melancholy of the House with the sparkling wit indigenous to his country' probably prompted by the fact that Plunkett had allowed himself a brief moment of levity when he suggested that under responsible government Lang would become Attorney-General whilst he would become a bishop.

His ability to change was revealed in his attitude to two matters to which he had devoted a great deal of his time and

1. Ibid., 18 June 1853, report of Legislative Council proceedings of 17 June 1853.
2. Ibid., 12 July 1855, report of Legislative Council proceedings of 11 July 1855. As early as 1848 the Sydney Chronicle had warned that it would be in everyone's best interest if the railways had been a government concern, Sydney Chronicle, 28 March 1848.
3. SMH, 12 July 1855.
ability. In 1852 there was a debate on raising the stipends of the clergy during which he defended the Church Act with vigour.¹

There was no action of his life that he could look back upon with so much pride and satisfaction as the part he took in passing the Church Act. He should always be proud to declare, his was the hand which under the enlightened direction of Sir Richard Bourke, had drawn the Church Act. It broke that spirit of church ascendancy in this colony which had ever led to the bitterest animosities in other communities. It put an end to the jealousies, heart burnings and resentments which will always prevail where any man's faith is proscribed, or in any way placed under ban. It promoted the spread of religion.

By 1855 he was prepared to recognize that the Church Act 'had done its work'. It was no longer suitable to the Colony as there were so many denominations. As a result he supported the Bill for the Temporary Relief of Ministers, but showed that he was moving towards voluntaryism by claiming the duty of Christians to support their pastors.²

In regard to the National Schools Plunkett began with the conviction that the two systems ought to be able to work together in harmony. He subscribed to the principle that 'Our Saviour did not intend his religion to be forced on men by violent means'.³

He wanted the clergy of the various denominations to cooperate with the system, but by 1853 it was evident that their support was given reluctantly, if at all. What puzzled him was the alignment of Rome and Canterbury on this issue, and in the House he attacked the alliance between the Freeman's Journal and the clergy of the Church of England as 'unnatural, unholy and hypocritical' whilst saying that their 'charge of godlessness was untrue, was libellous and

¹. Ibid., 30 September 1852, report of Legislative Council proceedings of 28 September 1852.
². Ibid., 12 October 1855, report of Legislative Council proceedings of 13 October 1855. See also Empire, 31 October 1855.
³. Regulations and Directions, p.13.
slanderous'. As for himself he would say,

that although he would never be induced, for any earthly consideration, to give up one single principle of his religion, either as to form or as to substance, yet he differed completely from those who opposed this system of education. He had assumed the duties of Chairman of the National School Board as a labour of love, and he looked upon them as the most important duties he had to discharge.

On one other matter Plunkett remained adamant in an opinion as little acceptable to many, then as now. He refused to acknowledge that the country would benefit by the introduction of Chinese, or other coloured immigrants. He was the only officer of the Government to vote for a motion of Parkes aimed at the exclusion of coloured immigrants in 1854. Plunkett said that he was glad the Boyd scheme fell through regarding the introduction of 'poor South Sea Islanders'. As regards the Chinese his views were, if possible, hardening. He taunted the House with its refusal to allow Aboriginals to give evidence by instancing a case in which a Chinese in court at Bathurst had sworn an oath by chopping the head off a cock. He said that he had proposed already a system of exclusion by disallowing agreements signed between masters and servants anterior to the arrival of the latter in the Colony. If they were signed after arrival he conceded that they then had to be treated as the native born. Parkes's motion, as Plunkett's previous ones, was thrown out, with Murray summing up the feelings of the squatting

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elements. Murray said that he had never employed a coloured man because he liked his own too well, but he would have no hesitation in so doing if want of white labour drove him to it.  

During 1854 and 1855 there was constant speculation in the Colony as to the ultimate fate in Parliament of the Constitution Bill. When the news of Eureka arrived at Sydney it was not thought that New South Wales and its Constitution would be in any wise effected; as for Victoria, 'The insurrection at the Victorian Diggings could scarcely be unexpected' given the 'motley population' there and the fact that an insurgent Legislature such as the Victorian must produce insurgency." Cowper was more realistic when he wrote to Parkes in that same month, 'Taking everything into account, and particularly after what has lately happened at Ballarat, (which will have its effect upon us) our position, just now, is very critical'. He told Parkes that he would not stand for Sydney again given the treatment he received in 1851 when he was beaten and 'dragged in the dirt most ignominiously - as many useful and good men have been before me'.  

In England, after the bills were scrutinised by the Law officers of the Crown, one of whom stated privately that they were 'little less than a legislative Declaration of Independence on the part of the Australian Colonies', Lord John Russell brought the New South Wales Government Bill into the House in May 1855.  


1. SMH, 8 July 1854, report of Legislative Council proceedings of 7 July 1854. The motion was defeated by 19 votes to 7.
2. Ibid., 7 December 1854.
3. Cowper to Parkes, 23 December 1854, Parkes Correspondence, vol. 6, p. 379. ML
preserved except that the power of constitutional amendment was granted to the legislature. This deprived Wentworth, and those who thought like him, of their intended control over democratic influences. The New Constitution, together with Russell's despatch, was laid on the table of the House on 30 October 1855 and the comment was made that 'The Australian Bills have excited but small attention in England'. If this was true of England it was true to some extent of New South Wales where the really 'Glorious News' a few weeks later was the fall of Sebastopol. On the following day a Select Committee, of which Plunkett was a member, drew up an Address to the Queen. It congratulated her on the 'glory and success of your Majesty's arms, on a firm conviction entertained, that with that success the cause of peace, order, liberty, and civilization are intimately and inseparably interwoven'. It came from a House in dissolution, a House about to open out into an era of responsible government in which the Colony would have a degree of independence scarcely foreshadowed half a century before. But in the year 1855 the Colony of New South Wales was as firmly a part of the British Empire as it had ever been.

1. SMH, 1, 3 November 1855. See ibid., 17 November 1855 for full text of Act 13 and 14 Vict., C.59.
2. Ibid., 11 December 1855.
3. Ibid., 12 December 1855.
The New Constitution was received in a Colony in which, by 1855, the effects of the gold rushes had already begun to show another face. Some thought that New South Wales had 'ceased to derive any but a very trifling benefit from gold itself' whilst the influx of migrants had become a burden, prices were high, the market for consumer goods was glutted and there were again some insolvencies.\(^1\) There was renewed interest in land as the source of permanent stability and men like Cowper and Parkes had begun to take a keen interest in the apportioning of land by lease to the squatters. Cowper sent a clipping to Parkes in late 1854 showing that, amongst others, John Dobie had taken up four runs totalling 117,549 acres on the Clarence River. He told Parkes, 'You should get someone to watch the "Leases" issuing to these big squatters',\(^2\) and thereby already foreshadowed the divergent elements that were to coalesce under responsible government. The New Constitution arrived at a time when increased and varied migration had introduced fresh elements into New South Wales' society. Nonetheless the old order had not passed away, its power structure was to some extent enshrined in the Constitution, and the first years of responsible government were to see the struggles of that old order to retain its position as the dominating influence within the Colony.

As one of those who had wielded power in New South Wales for a generation or more, Plunkett was regarded by some as a desirable component in a form of government that would stem from

1. SMH, 2 June 1855.
2. Cowper to Parkes, 5 December 1854, Parkes Correspondence, vol.6, pp.325-9, ML
the implementation of the Constitution. John West, the editor of the _Herald_, which was now the most powerful organ in the Colony, deemed Plunkett an eminently suitable candidate for a seat in the new legislature.¹ West was a Congregationalist minister who saw in Plunkett qualities transcending barriers of creed and coalescing in the ideals of human and social rights that both men cherished. 'We scarcely think that any constituency would refuse a seat in the New Parliament for which Mr Plunkett offered himself as candidate; and any administration would be glad to avail itself of his consistent and popular reputation', he wrote in September 1855.² West's aspirations were matched by Plunkett's own intentions as he had already made up his mind to stand for election.³ Although canvassed for the speakership, he had refused to run for it; his main problem was selecting a constituency for which to offer himself. 'Plunkett has invitations from two or three constituencies but I believe he intends to accept one from the City', Therry told James Macarthur.⁴ At the same time there were already elements within the old Council determined to ensure that 'the chief officers of the present Executive' were excluded from future executive positions, and their main target was Plunkett.⁵

By December 1855 Sir William Denison, was already experiencing some difficulty in the implementation of the New Constitution.⁶

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1. Only _The Times_ and the _Morning Advertiser_ had a greater daily circulation in England than the _Herald_ had in New South Wales at the time, _SMH_, 1 January 1856.
2. _Ibid._, 13 September 1855.
3. One seat for which Plunkett refused nomination was Northumberland because he would not run against his friend Nichols. See _Freeman's Journal_, 17 November 1855.
4. Therry to James Macarthur, 1 November 1855, Macarthur papers, vol. 34, p. 25, ML
5. _SMH_, 20 November 1855.
6. The letters to the Colonial Secretary under the Bundle title '1855 Constitution Bill', _NSWA_ 4/714.3, and the Colonial Secretary's letters to the Judicial Establishments, vol. 26, _NSWA_ 4/3761, reveal the extent of the difficulty and the assistance required from Plunkett and Manning to sort it out. The
The old Council had been prorogued on 19 December amidst cheers and claps for Nicholson who fondly hoped that 'a spirit of patriotism, wisdom, loyalty and moderation may characterise the parliamentary history of New South Wales to the very remotest generation'. ¹ Denison had the problem of initiating that 'parliamentary history', aggravated by the fact that he could not appoint ministers until after the elections: his Executive Council had ceased to exist with the promulgation of the New Constitution and he could scarcely appoint new members in anticipation of the elections. He called on Deas Thomson, back in the Colony after his leave and still Colonial Secretary, to form a ministry. When Thomson refused, Denison turned to Donaldson who offered to try.²

In the meantime the campaign itself had begun, and even though Plunkett was still of necessity Attorney-General, he had allowed himself to be put forward for Sydney. The most remarkable feature of his candidature was the cross section of the Sydney law officers had to prepare all the forms for nominations, elections, appointments, the dissolution of the old Legislative Council and the calling together of the new one, together with the entirely new Legislative Assembly. These two sources are particularly valuable to the student of constitutional history.

1. SMH, 20 December 1855, report of Legislative Council proceedings of 19 December 1855.

2. Denison's difficulties on the level of personalities are revealed by his letter to Plunkett, 19 December 1855; he was in communication with Nicholson, Macarthur, Parker and Cowper over the proposed ministry, 'I made out from an expression used to Parker by Cowper that he was annoyed at not being sent for, but to apply to any active political character now would to a certain extent identify the Government with the policy of that individual - however goodbye for the present. We can talk matters over tomorrow at one o'clock', Plunkett papers. See also Denison to Grey, 19 February 1856, Denison to Grey, 14 May 1856, and Thomson to Denison, 20 April 1856, C.O. 201/493, National Library microfilm.
community that supported him. It was led at the top by the formidable West, who did not scruple to make all possible use of his position as editor of the *Herald* to promote Plunkett. He began with an editorial on 3 January 1856 in which he laid great stress on Plunkett's contribution to the fight against the revival of transportation. Whilst the other government members were weak and silent Plunkett, who finally remained *alone* in a House which had been deserted by his colleagues*, spoke up and *contributed largely to the triumph of the cause*. West averred that by his activity in this direction Plunkett *ran the risk of losing his official employ* because *discontent of a very marked character was excited against him in the highest quarters for this act of patriotism and official heroism*. West's other argument for Plunkett was the ecumenical nature of his religious convictions and the justice with which he applied them: *We know of no man in the community who has shown a deeper interest in religious liberty*, he wrote. His last statement probably served, unintentionally, as the kiss of death to Plunkett in that it appealed only to those Protestants and Catholics whose outlooks were as fair and broad-minded as were those of both West and Plunkett themselves. West overlooked the other religious zealots who thought otherwise, when he said that Plunkett would *receive the cordial support of the most protestant of the Protestant community, as well as of his own*. ¹

A few days later a public appeal was addressed to Plunkett asking him to stand. The signatories to the appeal bear some examination: whilst there is about an even breakdown of Irish and Anglo-Saxon names amongst them, another element is also evident, reflecting Plunkett's stand for equality for the Jewish community. Names such as Cohen, Levey, Salomon, Moses, Myers and Jacobs recur on the appeal. ² To the appeal Plunkett replied that he had wanted

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¹ *SMH*, 3 January 1856.
² *Ibid.*., 7 January 1856.
to resign as Attorney-General as soon as the Act was proclaimed, but had not been allowed to do so because of the difficulty of replacing him. He said that he would stand for election, but as electioneering was incompatible with his official duties he would not personally canvass 'a single vote'. The following day Lang attacked Plunkett at an election meeting, mainly on the grounds that, like the other officials of the government who were all branded 'W.T.D.', Plunkett was also one of Denison's 'cattle'. This evoked cries of 'John Hubert Plunkett for ever', and the meeting closed on a discordant note.  

Plunkett's campaign opened at a large public meeting held in the Royal Hotel on 11 January. Robert Ross was chairman and Ryan Brenan proposed Plunkett formally as a candidate. John West seconded Brenan, repeating his editorial points and concluding by proclaiming that Plunkett was an honest man and 'an honest man was the noblest work of God'. Plunkett replied to his nomination with a moderate speech in which he refused to refer to the other candidates who were 'all respectable and honest men'. He said that 'He had no principles to explain away; none to recant' and that his agreement with Bourke and Gipps had been motivated by conviction, rather than by subservience. Without using names he gave several instances of exploitation of convicts by their masters, and explained that he 'had always, with his whole heart and soul, endeavoured to protect the weak against the strong'. Perhaps because Peter Faucett was the only other Irishman to speak at the meeting Plunkett decided to refer to the Irish Question. He thought how happy Ireland would be if she had the custody of her own affairs in the manner of New South Wales, and then indulged in

1. Ibid.
2. Ibid., 8 January 1856. Lang later called Plunkett a 'Tipperary Boy' which must have caused Plunkett, with his aristocratic background and Trinity College education, some amusement, see Freeman's Journal, 9 February 1856.
a rare lapse into Irish blarney, when he dreamt aloud of 'that Ireland more dear in her clouds and her sorrows than all the rest of the world in its sunniest hours'. On a more practical level he asserted his conviction that the two-thirds clause in the Act had to be repealed as soon as possible. But probably the most revealing statement at the meeting came from Ryan Brenan, who in proposing Plunkett said 'cautious, steady men' were needed now, Sydney as an electorate had not hitherto revealed much interest in such men. Plunkett was being projected as a conservative in a radical electorate.1

A Committee was then elected to run his campaign. It contained very few Irish names, but some of its members were Charles Kemp, John West, and A. and J. Fairfax. Robert Ross and James Hart were the honorary secretaries. A few questions were then asked and, inevitably, Plunkett was called upon to explain his attitude to a nominated Upper House. He recalled the incident of years before when almost all the magistrates voted for Macalister, 'this most incompetent person' rather than Manning, the present-Solicitor-General, in the election for the office of Chairman of Quarter Sessions. He admitted that this experience had weighed most heavily on his mind when he had voted for a nominated Upper House, but declared that he personally favoured an elected one, and that if the nominated one did not work satisfactorily then it could and ought to be changed. In an effort to prove his own democratic tendencies he claimed that it was by his own efforts that the old Council doors had been opened to the public and that he had had to obtain Gipps's own vote to get the proposal through the Executive Council at the time. Again, recalling the past, he stated that the Mudie case had awoken him to the cruelty of some masters to their convict charges and that, after that time, he had always striven for

1. SMH, 12 January 1856. The Freeman's Journal, 19 January 1856, spoke with warmth of Plunkett's 'tender and affectionate allusions to his native land'.
justice for the convicts.¹

While one group of Sydney citizens was engaged in ensuring Plunkett's election for the city, another group was equally determined to see that he was beaten. Sydney had four seats in the new Assembly, and according to the prevalent system it was possible for four candidates to group themselves in what Plunkett himself termed a 'bunch'.² By this stratagem they could almost ensure the election of all four, provided at least three of them were sufficiently popular to win a majority of the vote, and thus pull the fourth in with them. Parkes, Campbell and Wilshire were already determined to combine together, so that all they needed was another candidate who could command a solid vote, and thus ensure the election of all four. Cowper was certainly not an obvious choice given his past association with the establishment elements in New South Wales society, but it was Cowper who ultimately decided to make up the four by joining the bunch. He wrote to Parkes on 12 January, when he was still uncertain of which seat to run for, but by 14 January he was publicly aligned with Parkes, Campbell and Wilshire in a bid to win all the Sydney seats.³ That Plunkett's candidacy was a factor in his decision can be seen by the unease with which he viewed it when he wrote in the same letter to Parkes on 12 January, 'If Plunkett should be beaten, his friends are acting very unwisely, but, I believe, if he does succeed, it will be only because he is a R.C. - however the fact may be disputed'.⁴

By the middle of January the lines began to clear with the public announcement of Parkes, Cowper, Wilshire and Campbell as

1. SMH, 12 January 1856.
2. Southern Cross, 17 March 1860, where Deniehy made this claim.
4. Cowper to Parkes, 12 January 1856, Parkes correspondence, vol. 6, p. 489. ML
candidates. A writer signed C.C.L. wrote to the Herald to state that Plunkett 'has intelligence, which Mr Campbell has not...refinement, which Mr Parkes has not...political consistency, which...Mr Cowper has not; and he has the advantage of a liberal education which...Mr Wilshire has not'. None of these qualities were likely to win an election however, and Plunkett's committee were soon recommending an election slogan of 'Plump for Plunkett', by which they meant that electors who favoured Plunkett as a candidate should cast their vote for him alone, disregarding the other candidates. Plunkett thought plumping was an undesirable practice, yet he said that he 'would scorn to enter into any coalition whatever' after Kemp expressed regret that Plunkett did not have three others standing with him. At the time Plunkett was still conducting cases in Court as Attorney-General and was standing by his intention not to attack the other candidates. He still affirmed that they were all good men and that he did not want to be elected by any contrast to them. A faint note of bitterness crept in, however, when he proclaimed that if the electors liked him they must take him as he presented himself; 'not dressed in any false colours' and when he said that 'he could not think that it looked quite like fair play' to fight four against one in the election. With some perception he observed that the bunch combined together 'to avoid that scrutiny into the principles of each, which they well knew those principles would not stand'.

1. SMH, 15 January 1856.
2. Ibid., 17 January 1856.
3. Ibid., 22 January 1856.
4. Ibid., 2 February 1856.
5. Ibid., 22 January, 2 February 1856. Dismissing sectarian arguments, Plunkett quoted lines he said his father taught him, 'For modes of faith let graceless zealots fight
He can't be wrong whose life is in the right', ibid., 22 January 1856.
In his own speeches Plunkett relied heavily on his own past record rather than proposing any cohesive policy that he would follow once elected. This was not unusual at the time and, if anything, his opponents were somewhat less coherent in that they concentrated most of their campaign oratory on the shortcomings of Plunkett himself. In the end Parkes, at a meeting of the bunch, was asked to talk about himself and his friends rather than Plunkett. Parkes replied 'With regard to Mr Plunkett, he said he owed that gentleman a larger debt of personal kindness than, perhaps, he did to anyone else'. He did not elucidate the nature of the debt, but then went on to accuse Plunkett of having sold his country by taking a position in a colonial convict Colony.\(^1\) This accusation against Plunkett was not new in that he had already been called a 'renegade Irishman' and William Maxwell said 'it grieved him to see an Irishman [Edward McEncroe] on the committee of a man who supported the vile calumniator [Denison] of those illustrious exiles'.\(^2\) Plunkett did not help his own case when he accused Smith O'Brien and his party of having 'ruined Ireland', dividing it into factions and thus breaking Daniel O'Connell's heart. He obliquely included Gavan Duffy in his accusation, although he could not have been unmindful of the fact that Duffy

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1. Ibid., 6 February 1856. Whatever the debt may have been it did not deter Parkes from attacking Plunkett for his alleged nepotism, Empire, 1, 11 March 1856.

2. SMH, 26 January 1856. A year previously Plunkett had raised the ire of James Martin for failing to prosecute the Freeman's Journal when it described Denison as 'Gaoler-General of Van Diemen's Land'. It was almost precisely because Plunkett kept free of involvement with personalities and tried to remain on a lonely level of principles that he engendered resentment, see Freeman's Journal, 11 November, 2 December 1854.
was about to arrive in the Colony. ¹

When John West realized how formidable the bunch was, he continued to uphold Plunkett as the most worthy candidate for the city, but, as well as eulogising the Attorney-General's past, he began to tinge his editorials with remarks faintly reminiscent of an epitaph,

'It is to the high honour of Mr Plunkett, and it is one which none hereafter will be able to claim, that in the time when power was on the one side, and helpless misery on the other, he stepped into the breach, and threw forward the shield of his office and of his blameless personal character to protect his wretched fellow men' ²

There was still the appeal to all to throw over the prejudices of other times and other places and show 'by our choice of this gentleman, that Englishmen and Protestants, wish in this new world, that all old feuds should be forgotten'. ³ To West it was evident that the tactics of 'the bunch' were showing signs of success, and he deplored the double-barrelled attempt to stir up sectarian strife by painting Plunkett as an Irish Catholic for Protestants, and a non-Irish patriot for Irish Catholics. ⁴

Undaunted, the Voice, a new publication under the aegis of Lang, alleged that 'If the electors return him, they will in reality

¹. SMH, 2 February 1856. For Therry's opinion of O'Brien and his companions see Therry to Donaldson, 16 July 1856. Donaldson Ministry letters. ML. 'O'Brien was more of a fool than a felon [whose] conduct partook of the character of insanity. Yet he was a gentleman. [On the other hand] some of O'Brien's associates were very bad men. Mitchell was a truculent madman, and Donaghue a most disreputable fellow'.

². SMH, 15 January 1856.

³. Ibid., 25 January 1856.

⁴. Ibid., 22 February 1856. Polding arrived back from Europe in early February and Plunkett was in charge of his welcome home. Prominence at such an event probably served to convey the impression of Plunkett's Catholicity on the one hand and his universality on the other, see Freeman's Journal, 2 February 1856.
return not Mr Plunkett himself but his confessor!', and said that in the House he would represent Rome rather than Sydney. West, with 'admiration not unmingled with shame' quoted Polding who asked all to act on the basis that 'we are Australians' and James Cameron, Moderator of the Synod of Eastern Australia, repudiated the Voice. The Voice or other rumours must have affected Rev. L.E. Threlkeld who wrote to ask Plunkett whether he was in fact a Jesuit. In his reply Plunkett refrained from citing the existence of Mrs Plunkett as evidence to the contrary, but stated that he had never met a Jesuit in his life. It was with some anxiety that West wrote that Plunkett, even if he lost, would 'make friends in his defeat, who will one day assure him of triumph'.

By early February Plunkett himself had decided that it was time to set aside the niceties related to the fact that he was still the Attorney-General, and to behave in a manner more befitting a candidate for election. He wanted to know whether Cowper was a genuine liberal and if so 'how far he would support civil and religious liberty [and] religious equality'. He thought that if Parkes was fit to represent Sydney, then the most appropriate part of the city to have him as its member was Pinchgut Island, because Parkes had opposed a rise in salaries for the officers of the Crown who were at 'starvation point'. He tried to counter the anti-Irish argument by outlining his activity on behalf of Daniel O'Connell in the years before he left Ireland, but he refused to refute the

1. SMH, 26 February, 1 March 1856. Polding was never accused of fostering Plunkett's campaign but in his Lenten Pastoral he wrote 'that man is a pest and a domestic traitor among us, who, by naming the name of nation, or race, or class, or past injury, stirs up by word or pen one bitter feeling'. The Pastoral was directed to his own people but West saw its wider application, SMH, 26 February 1856; Freeman's Journal, 16 February 1856.

2. SMH, 8, 13 March 1856.
charges Martin brought against him on the grounds that they were beneath him.¹

Martin was brought into the campaign by Parkes who had been left to conduct it almost single-handed in the first few weeks. Cowper did not appear until 13 February and contented himself with an attack on Plunkett asking 'what good measure he had ever devised or carried out', while Wilshire and Campbell generally left the speech-making to Parkes when they sat with him on a platform.² James Martin proved more worthy of the responsibility accorded him as he considered it afforded him an opportunity of 'unmasking this imposter'.³ Martin's main accusation against Plunkett was that in his wielding the sword of justice the Attorney-General had allowed personal animosities to enter into his official activities, even to the extent of putting the life of a fellow man in jeopardy. The case he instanced concerned an inn-keeper at Berrima named Lakeman. This man had allegedly insulted Plunkett, had later been charged with rape, and, after the Attorney-General had used unusual energy to prosecute him, had been found guilty. These charges were refuted by others, but not at the time by Plunkett or West who scorned to notice such 'gross and wicked charges'. It was one thing for West later to refuse to have any dealings with Martin until he publicly retracted word for word as vicious calumny the charge he had made, but it would have been better politics to have forced him to retract them then and there.⁴

1. Ibid., 7, 18 February 1856; Freeman's Journal, 23 February 1856; Empire, 21 March 1856.
2. SMH, 13 February 1856.
3. Ibid., 16 February 1856.
4. Ibid., 22 February 1856 and 24 September 1856. Plunkett and Mrs Plunkett called at Lakeman's inn where Mrs Plunkett became ill after her meal. Plunkett took umbrage at the treatment she was given but it was not directed at Lakeman who was not present on the day in question. The rape case took place some time later. Martin made the charge in the heat of an election and proffered no proof of his statement. See letter to SMH, by J. Sullivan, 22 February 1856 and editorial of that day.
West continued to uphold Plunkett's past career as the best guarantee that he deserved to hold a Sydney seat. He wrote a three column editorial in February, outlining in ten points what Plunkett had done for the Colony as a 'servant of the Crown'. Plunkett had opened the Legislative Council to the public; terminated a 'system surcharged with darkness, oppression and cruelty' when masters tyrannised their convict servants; drew up the Act that sheltered the right of ticket-of-leave holders to goods and money; stood for public education even when leading members of his own Church were opposed to it; gave equality to all in religion and included the Jews in his own draft of the Church Act. He paused to comment here 'How much Mr Plunkett was then in advance of the times would be invidious to tell'. Plunkett's other contributions were the Marriage Law which won the gratitude of all but especially the Presbyterians; his help to the railways; his attempts to mitigate the aftermath of convictism; his opposition to the introduction of a system of slavery such as that proposed by Boyd and his companions and finally his fight against the revival of transportation. As a result of this career Plunkett had 'a stronger claim than any other man now before the constituencies of this colony'. West's eulogium was all soundly based on the facts of the past, but there was some doubt, at least, of its relevance to the present and the future. In any event, praise for past conduct was no substitute for organisation, and in that field the bunch excelled, due to their experience in the previous five years when Plunkett himself had been able to disdain the necessity of activity at the hustings.

On the very eve of the official nomination of candidates, and thus only two days before the elections themselves, a banquet was held in Sydney for Gavan Duffy. There were 500 present at five guineas a head, but Plunkett was not amongst them. He wrote to explain that his official duties as Attorney-General required his

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1. Ibid.
absence from Sydney on that day. 1 Duffy had arrived in Victoria in early February and moves were soon afoot to have him visit Sydney. Edward McEncroe pleaded for April, when the elections would be over, but Parkes was able to persuade the Committee to invite Duffy for 11 March, with the clear hope that his visit would help his own candidature and serve the interests of the anti-Plunkett faction in Sydney. 2 In the event Duffy gave a moderate speech at the banquet. He said about the Constitution that 'With all its faults I believe you have one of the safest, wisest, and most liberal constitutions in the world'. He disagreed with the two-thirds clause and the nominated Upper House and referred to 'Queen Merivale' now ruling the colonies instead of 'King Stephen'. 3 Parkes was at a loss as to how he ought to reply to this urbanity, so he contented himself with stressing that the Constitution, which he had previously regarded as totally inadequate, needed some changes. John West spoke on behalf of the press in a similar, moderate vein and William Bede Dalley, speaking in place of Daniel Deniehy whose absence was unexplained, was equally tentative. 4

The next day was wet, but a good crowd gathered for the nomination of 'the bunch' first, and then Plunkett whose nominator

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1. Plunkett was in Bathurst for the Assizes there. He stated that it was his 'intention and wish to attend' the banquet had it been possible. McEncroe would not attend because of the political overtones and the fact that it was Passion Week! See ibid., 6, 12 March 1856. Plunkett was able to be in Sydney on the day after the banquet, however. ibid., 13 March 1856.

2. Ibid., 27 February 1856. It was good politics on Parkes' part as it helped to dispel any fears that he may be either anti-Irish or anti-Catholic.

3. Ibid., 12 March 1856; Empire, 12 March 1856.

4. SMH, 12 March 1856; Freeman's Journal, 8 March 1856. Therry wrote to Macarthur about Duffy's visit. He feared the fast flow of 'the tide of democracy' and thought 'Duffy will no doubt become an instrument for this purpose in Victoria and there are many here ready and willing to be inoculated with his spirit', Therry to Macarthur, 1 March 1856, Macarthur papers, vol. 34, p.39. ML
was John Fairfax. Fairfax said that Duffy held the same views on the New Constitution as Plunkett, which probably stirred up Parkes who then called Plunkett a tool of the anti-liberal movement. Plunkett made one last attempt to prove from his past that he had never been anti-liberal. He began with the Church Act which he again claimed to have drawn up. He said that in 1838 and 1839 he had fought, even with Gipps opposed to him, for the ministers of the Presbyterian Church who would not submit to the Synod. He claimed that he had battled alone for 'the glorious privilege of trial by jury', and that in 1837 he had introduced into the Colony the first Act based on the elective principle when he had an Act passed for the management of markets in towns. He had later used this Act to fight against restrictions to the franchise in the first colonial legislature when the Secretary of State sought to clog it with conditions regarding class and property. In his opinion the broader the elective base the 'more substantial and permanent must be the superstructure'; and he had only voted for a nominated Upper House because no realistic alternative had been proposed. He spoke at length on the ineffective nature of denominational schools, especially in the interior, and thus defended his sponsorship of the National System. Finally he claimed that he held no land under the Crown, that he would not give the squatters more and that he himself was free from pressures as he had no business or mercantile interests nor, if elected, would he ever have any. It was a very long, able speech which he concluded by saying that 'His heart, his affections, his gratitude, were rooted in this land'. It was doomed to be ineffective precisely because those who listened and those who were to vote the following day were, in large part, not interested in the battles of the past, but interested in how a new democracy was to be shaped in New South Wales and they looked to the new men such as Parkes to shape it.

When the final numbers went up Plunkett ran fifth with

1. SMH, 13 March 1856.
2800 votes. Cowper led with 3073, followed by Parkes with 3057, Campbell with 3041 and Wilshire with 2901. Dr Duigan ran last in the poll with 89 votes. The 'bunch' won a narrow victory and proved the effectiveness of their organization, and the greater appeal of their policies. Danny Deniehy wrote later to Parkes,

'A new phase on the face of local Politics has been wrought by the last Sydney election by the evocation of the mythical "Bunch" - that "Boo-man-Bugbear and Rawhead-and-Bloody Bones" of the respectability of Catholic Noodledom, sore and savage at the defeat of that archetype of immaculate inanity and respectable humbug - "Mister Plunkitt". This cry of "the bunch" is raised by every blackguard, in and out of Parliament - those who know that it is a phrase no more reducible to palpable meaning than the popular vocable "bosh[?]" as well as those who read it'.

Probably both Wilshire, who benefited by the tactics, and Plunkett, who lost the election, knew a little more about it than Deniehy, but at the time Plunkett was prepared to submit 'quietly, calmly and constitutionally to the decision of the majority' whilst West thought it was a result 'which even the most sanguine must have contemplated as not improbable' given that Plunkett lacked 'a more perfect organization' than his opponents. West made one last plaintive plea to posterity, 'No name will shine brighter in the pages of Australian history, when written by impartial hands, than the name of Mr Plunkett'. Perhaps he realized that Plunkett would contribute very little henceforward to the shaping of that history, but his unwearying appeals to the hoped for 'impartial hands' cast their own shadow over his campaign.

1. SMH, 13 March 1856.
2. Deniehy to Parkes, 28 November 1856, Autograph letters, vol.71, pp. 58-61, ML. Before the election Deniehy wrote hoping his letter would reach Parkes on 'a day the issue of which, most earnestly do I pray God, will be the return of Messrs Campbell, Cowper, Wilshire and yourself and the discomfiture of the Plunkettry', Deniehy to Parkes, 9 March 1856, ibid., pp.51-2.
3. SMH, 14 March 1856.
4. Ibid.
5. Parkes, probably in reference to West and the Freeman's Journal of 1856 wrote 'had it not been for the silly extravagancies of those injudicious eulogists, who unwittingly have caricatured his real worth, [Plunkett's] name would be held in more general
Within a few hours Plunkett was wondering about the nature of the majority decision. He alleged that some had voted several times and that others had been 'personated', as a result of which a scrutiny was needed.¹ At the declaration of the poll a week later 'the bunch' left without speaking. Plunkett said that he had proof of his allegations regarding the poll and it could be supported by affidavits. He claimed that over three hundred votes of his opponents were 'false and fraudulent', and tarnished his reputation for detachment by calling Parkes 'as great a despot as ever lived', although he also showed he could accommodate slightly to the language of political expediency. He accused McEncroe of favouring Cowper thus costing him many votes, and named Cowper as a liar in trying to take away from him his credit in drawing up the Church Act. The meeting ended on a note of levity when Dr Duigan said that if Plunkett did not upset the poll he would himself, whereupon he was upended from the barrel he was using as a rostrum.²

At Bathurst there was general astonishment that Plunkett had not been returned for the city. Holroyd thought that now that Wentworth had left the Colony, Plunkett was the man to lead it.³ So Plunkett was nominated against Bligh in Bathurst, and won the respect by the community he has served', Empire, 15 April 1856. To read today the constant stream of editorials by West in praise of Plunkett induces repugnance in one, rather than admiration.

1. SMH, 15 March 1856.
2. Ibid., 21 March 1856. Therry thought 'Plunkett's speech at the hustings was injudicious: but he had been badly used and much will be pardoned to the expression of feelings by a man conscious of having been so treated', Therry to Macarthur, 31 March 1856. Macarthur papers, vol.34, pp.43-50. ML. McEncroe denied he had helped defeat Plunkett, see Freeman's Journal, 22 March 1856.
3. Wentworth would have had as little hope as Plunkett of leading the Colony at that time. Popular opinion was still unfavourable to them both over the New Constitution. Undaunted, the Freeman's Journal, 27 September 1856, wanted Plunkett as premier. At the time the paper was edited by the former monk, J.Sheridan Moore, and had been publicly repudiated as a Catholic organ by Polding, see Empire, 22 April 1856 and Freeman's Journal, 26 April 1856.
seat, but he was beaten by Edward Flood in the North Eastern Boroughs for which he was also nominated. Flood called him 'an insidious candidate' and declared that the only ones who had voted for him were Roman Catholics. ¹ Plunkett won the seat of Argyle against Chisholm who was supported by Charles Cowper Jnr., which must have given his father pause for thought because he had written to Parkes, 'J.D. Chisholm will go in for Argyle. A lamentable result'.² West had written 'Mr Plunkett, should he not sit for Sydney, will have as many constituencies open to him as there were towns claiming to be the birth-place of Homer', and Plunkett must have taken the point because he asked his friends in Northumberland and Hunter not to vote for him in an electorate that he would probably have lost given the sectarian animosities being stirred up, especially by the Empire.³ West apparently thought that the choice of two seats was enough to satisfy Plunkett, and said that he would enter the House 'with all the prestige of a career which will become a standing example and a proverb of history'. He also thought that there were those 'who hate him because they know him to be fearless and incorruptible' which was perhaps West's way of saying that, whatever else he was, Plunkett was not a politician; at least not one suited to the style and exigencies of New South Wales in 1856. But it must be said that his narrow defeat in Sydney and his two victories indicate that his long record of service to the community was not completely unappreciated.⁴

¹ SMH, 1, 2 April 1856.
² Cowper to Parkes, 12 January 1856, Parkes correspondence, vol.6, p.489. ML
³ SMH, 3, 12 April 1856; Empire 5, 10 April 1856. 'Down with Plunkett, Polding and Popery - Wooden shoes and the Inquisition', ibid., 5 April 1856.
⁴ SMH, 12 April 1856. West thought that the 'No Popery' cry won hundreds of votes against Plunkett. Peter Loveday, 'The Development of Parliamentary Government in New South Wales, 1856-1870', Ph.D. thesis, Sydney 1962, pp.463-5 provides a useful analysis of the voting trend in Sydney at the election of 1856. It is clear that, whatever else, sectarianism had little effect on the electorate. Plunkett's vote was based on social and political rather than religious or racial factors.
Donaldson had had more success than Thomson in forming a ministry. Like Thomson, he had offered the post of Attorney-General to Plunkett, who had refused. Plunkett would not go in with Thomson because he thought that Thomson ought to head a ministry as an elective member of the Assembly rather than as a nominated member of the Upper House and that a responsible ministry should be chosen from the representatives of the people. He refused Donaldson on the grounds that he thought the old officers of the Government ought not to continue in office.\(^1\)

Manning was able to accept Donaldson's invitation to be Attorney-General, although Plunkett continued in the office until early June, and Donaldson, Manning, Darvall and Nichols were sworn in as members of the Executive Council.\(^2\) Denison then proceeded with his Executive Council's advice to nominate the members of the Legislative Council. The four heads of the major churches were initially invited, together with Stephen and Dickinson from the Supreme Court, but Therry was omitted. It was remarked that they were all 'with very few exceptions [from] one denomination'.\(^3\) In the event Polding and Barker refused to accept nomination, with the result that the heads of the other two denominations refused also. Therry was placed on the official list together with the other judges and members of the old administration such as Riddell,

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1. Thomson to Denison, 20 April 1856; Denison to Grey, 14 May 1856, C.O.201/493, National Library microfilm; SMH, 21 April, 5 May 1856.
2. Ibid., 30 April 1856. See also W. Elyard to Manning, 6 June 1856. The old form of 'I am directed by His Excellency the Governor-General to inform you' was changed to 'I am directed to inform you', and then to 'I am directed by the Colonial Secretary to inform you', indicating in this minor form that responsible government had come to N.S.W., Colonial Secretary letters to Attorney-General, vol. 26, NSW 4/3761.
3. SMH, 3 May 1856.
Thomson and Merewether. Stephen was appointed as Speaker of the Council, and when Denison wrote to the Colonial Office to explain that the composition of the Council catered for all classes, creeds and interests, Secretary Labouchere noted on the letter for Merivale's attention that he thought it unwise to appoint judges 'in a colony where party is sure to run high'. Denison had offered the position of Speaker to Thomson, who refused it, but the Chief Justice, Stephen, accepted it on the understanding that no salary would be attached to it. Another important appointment that Denison undertook, with the advice of his Executive Council but 'under the recommendation' of the Anglican bishop, Barker, was that of Cowper to be Chairman of the Board for Denominational Schools. The Herald pointed out that it was an appointment that ought to have been made by the Governor and the Executive Council acting together, and 'upon their own responsibility'.

The new Council and the new Assembly met for the first time on 22 May 1856. One significant fact about the social composition of New South Wales was that for the first time in its short history of sixty eight years there were now more females than males in Sydney. In its own way it spoke volumes for the progress that the Colony had made in its development as a free society, and the women present at the opening session, led by Lady Denison, added

1. Ibid., 3, 14 May 1856, Manning had asked Plunkett's advice on the nomination of a suitable Roman Catholic to the Legislative Council. Therry had also been asked and 'observed on the remarkable fact that very few gentlemen of education had ever been attracted from his country to this Colony'. Plunkett's reply is not known but perhaps he remarked that Ireland did not produce many Roman Catholic 'gentlemen of education' in the nineteenth century. Manning to Plunkett, 5 May 1856, Manning papers, uncat. MSS., ML.


3. Denison to Grey, 24 August 1856, ibid.

4. SMH, 10 May 1856. Plunkett also had his appointment - as Queen's Counsel. 'As this note is unofficial I may be allowed perhaps to express my best wishes for your happiness on your release from office', Denison to Plunkett, 7 June 1856, Plunkett papers.

5. SMH, 13 May 1856. In 1836 there were 12,111 males to 7,618 females, in 1856 26,220 males to 26,898 females.
to the colour of the scene. Whether the shadowy figure of Mrs Plunkett was present to witness her husband in the unusual situation of being signed and sworn to represent two electorates, Argyle and Bathurst, is not known. Plunkett himself had decided not to press further the matter of the validity of the Sydney elections, and now claimed the right to two votes in the election for the Speaker on the grounds that he could not resign from either seat until a Speaker was elected. He was persuaded by Donaldson not to press his claim, but he spoke in favour of Parker because he thought his opponent, Daniel Cooper, lacked the experience needed in the position. Cooper won by 24 votes to 23 with Parkes, Cowper, Wilshire and Martin voting for him. Cooper, allegedly, gave good parties, which caused West to remark that the reasons for his election were 'partly culinary, partly personal, and partly political'.

The new ministry under Donaldson commenced its term of office amidst rumblings from Parkes that it would not work and a public explanation in the House from Plunkett, now the sitting member for Argyle, as to why he refused to join it. He had replied to Donaldson's letter of 21 April inviting him to become Attorney-General by pointing out that he and Donaldson were not politically united and further, 'I am so strongly impressed with the conviction that the amalgamation which you propose would not command the confidence of the country, that I feel compelled to decline'.

1. Ibid., 20, 23 May 1856. Plunkett heeded advice not to press his claim despite the fact that Dickinson was recorded as having voted for the bunch although he was absent in Goulburn on polling day.

2. Ibid., 30 May 1856, report of Legislative Assembly proceedings of 29 May 1856. Plunkett made his objection to Thomson clearer also. He said 'he had all along expressed his conviction that the first nominated Upper House should be appointed by an Executive Council formed of representatives of the people', ibid. This was Plunkett's understanding of the democratic influence operating on the Legislative Council.
In the ensuing debate Donaldson and Cowper became so heated that they called each other out, which perhaps impressed itself so strongly on Plunkett that he announced his intention of sitting in the centre rather than on the right or the left, because from there he could act as an arbitrator. In this manner the new House got down to the business of government fulfilling somewhat Lady Denison's prophecy 'I suspect that we shall have some odd scenes before people and things in general settle down into a quiet state of working under the new regime'.

Attorney-General since 1836, Plunkett continued to act as prosecutor in Court until early June as the members of the new ministry, according to the terms of the Constitution Act, had to resign, and stand for re-election. This did not apply to Manning who awaited the re-election of Darvall before coming to the House as Attorney-General and then presented himself in that office before the Supreme Court on 8 June. The House had adjourned on 7 June for eight weeks and Plunkett was absent from the session on that day, perhaps because, after all those years, he felt it difficult to see another sitting in his place as Attorney-General. A few days later, as Queen's Counsel he took his place in a case in the Supreme Court. He had precedence before the Bar, excepting Manning, and Darvall, the new Solicitor General. Manning was the opposing Barrister, Plunkett lost the case, and in this event no one remarked on Manning being a pluralist.

The Supreme Court of New South Wales paid tribute to Plunkett on 24 June 1856. Each judge spoke of his career, Stephen

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1. Ibid., A littler later, Parkes sincerely said that Plunkett was the only genuine cross bencher in the House, who judged every case on its merits, Empire, 6 September 1856.


3. SMH, 8, 9, 13 June 1856.
at great length. The Chief Justice had long since risen above any conflict between the two men on the level of personal ambitions, and his peroration was almost Ciceronian in its range, 'When the contests of party shall have passed away, and the voices of friendship and calumny have been alike silenced by death, and the grave has closed over the generations which now know us, there will be no name recorded by the pen of history, in Australian annals, with juster or more enduring praise than that which belongs to Mr Attorney-General Plunkett'.

Plunkett's reply was almost whimsical. He had refused a public dinner proffered by the Bar on the grounds that it would seem too like a 'valedictory manifestation' and he apparently thought that the eulogiums pronounced on his career by the Bench were much in the same vein. He pointed out that he did not intend to leave the Colony, die, or, its equivalent, give up his practice as a barrister. As a result he hoped that he would continue to earn the approbation of the Bench. The next day West penned his final tribute to Plunkett. He thought that New South Wales justice and the New South Wales Bar were both what they were because of the man who had so ably filled an office 'to which there is no parallel in the records of English jurisprudence'. The speech of Stephen 'will be preserved by the colony as one of its choicest memorials, and be read, for ages to come'. His final point summed up the claim Plunkett held to posterity because, whether due to his character, the peculiar nature of his office or the length of time for which he held it, 'future times will not furnish a sphere of trial, and therefore of virtue, such as Mr Plunkett occupied so long'. After all this it must have come as some relief to Plunkett to know that henceforth he would stand or fall entirely on his own merits.

1. Ibid., 26 June 1856. Therry said 'We took leave of Plunkett quite affectionately in Court yesterday'. Therry to James Macarthur, 25 June 1856, Macarthur papers, vol.34, p.51.
2. SMH, 26 June 1856.
3. Ibid.
The Legislative Assembly that sat again on 5 August 1856 differed little in procedures, ambitions and muted passions from the Legislative Council that had preceded it. It feinted tentatively with its new responsibilities and, initially, men who had had little or no experience with their departments of government had to grapple with the intricacies of their office. By the same token the seed of responsible and prudent action had been well sown, so that the transition to the new form of government was smooth and uneventful. Whilst there was a solid block of members in opposition to the government there was no such thing as a party structure, so that members could still act in an individual manner when judging policies or personalities. At the same time it was inevitable that a ministry formed on hopes or expectations would have to stand the test of numerical support for its policies in a House sensing for the first time in New South Wales the power to make or break a government. The new ministry chose to allow the House to find itself on grounds other than the actual business of government and, in so doing, it perhaps lost the initiative that would have been its if it had brought in the estimates immediately. Denison, from the sidelines, had predicted to Grey that there would be trouble over the estimates, as he thought that Donaldson would have to add to the expenses of government and this would cause the time-worn cry of 'extravagance' to be raised.\(^1\) The occasion for the removal of the first ministry under responsible government was, however, that of the appointment of judges to the Legislative Council.

To the surprise of the House an opposition motion condemning the inclusion of the judges in the membership of the Upper House was passed on the casting vote of the Speaker.\(^2\) It was a formidable group that sat across from Donaldson, including \underline{men like} Parkes,

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2. \textit{SMH}, 13 August 1856, report of Legislative Assembly proceedings of 12 August 1856.
Cowper, John Robertson, Martin and William Forster, all of whom were later to head ministries themselves. But it was on Plunkett that Donaldson turned his ire when he moved two days later that the motion concerning the judges be rescinded. Donaldson accused Plunkett of duplicity in that he had said that he would not exclude any man, including clergymen, from taking a seat in either house, and yet he had voted for the motion against the judges. Plunkett replied at length to the leader of the House. As a speaker it was perhaps his finest hour and he was constantly cheered by those to whom he personally felt little attachment. He elaborated the respective positions of the judiciary and the legislature, and insisted that they had to be kept separate. He said that his vote against exclusion in a former time was an abstract one in that he would exclude no man on principle. His recent vote, he said, was in the particular case and had been forced upon him because he thought that the judges ought to have used their own discretion and refused the proffered seats. When the vote was taken the government won by 23 to 22 as Manning, who was absent at the first count, gave the slight majority to the government at this count. Donaldson chose to interpret the vote as indicating that he did not have sufficient support in the House to govern comfortably, and on 22 August, only two weeks after responsible government had begun, the first ministry resigned. Denison, clearly chagrined at the course of events, told Labouchere that Donaldson had taken the right action as, otherwise, he and his ministers would have become subservient 'to the opinions of others altogether derogatory to them'. He said that he had called Cowper, the 'leading member of

1. Ibid., 15 August 1856, report of Legislative Assembly proceedings of 14 August 1856. Perhaps sensing his newfound freedom Plunkett a few days later made another remarkable speech in favour of Edward Smith Hall. Plunkett said Hall 'did more for the interests, the political interests of the colony, and to advance it to its present eminence than the whole bunch of modern patriots', ibid., 21 August 1856, report of Legislative Assembly proceedings of 20 August 1856. Parkes and Cowper probably winced at the use of the word 'bunch' in the context.
the opposition to form a ministry. ¹

Cowper, to Plunkett's surprise, immediately asked him whether he would join him as Attorney-General. Plunkett refused on the grounds that 'nothing but a great public necessity' would induce him to enter any ministry, and that in the case of Cowper he had especial difficulties that scarcely needed to be spelt out. ²

West was clearly amazed that Plunkett had even entertained the notion this far, and warned 'in the present instance...an acceptance of office by Mr Plunkett would have disappointed his political friends. His reputation is the property of the country'. ³ Equally clearly it was precisely for that latter reason that Cowper had offered the post to Plunkett. In the event he turned to Martin as his Attorney-General, and gave the Treasury to Robert Campbell, whilst T.A. Murray took Land and Public Works. ⁴ West went into full cry immediately against Martin. It was an appointment that gave him 'a feeling akin to horror' and no one could suppose that Martin was a patriot, or that 'he believes in anything but himself'. Martin at the time was thirty-six and had not then been admitted to the Bar, so that he was 'an Attorney-General that cannot practice', joined with Campbell, 'a Treasurer who cannot count'. ⁵

Denison was also apprehensive at the appointment of Martin. He told Labouchere about it, but explained that he had asked the Chief Justice, who saw no legal grounds for opposing it, and that in any case Martin would soon be admitted to the Bar. ⁶

¹. Denison to Labouchere, 13 September 1856, C.O. 201/495, National Library microfilm. Denison remarked on the fact that there were no parties in the House, but that it was an assembly of individuals and thus liable to change.

². SMH, 25 August 1856.

³. Ibid., See also Freeman's Journal, 6 September 1856, which also makes it plain that acceptance of the offer would have been a shock to its readers.

⁴. SMH, 26 August 1856.

⁵. Ibid., 28, 30 August, 6 September 1856.

to Martin not having been called to the Bar was underlined in the Colonial Office, but the reply made no mention of the matter, which indicated that in London the granting of responsible government was taken seriously. Whilst the Bench may have seen no legal obstacle to the appointment, the Bar, led by Plunkett, thought that it was improvident, against the usages of the Constitution and a violation of the rights and privileges of the Bar. This attitude was conveyed to Denison by a deputation with Plunkett as the spokesman. Denison, strengthened by Stephen's opinion on the matter, stood by Cowper and left the decision to the House as to whether Cowper would be able to form an effective ministry.¹

When Cowper faced the House he was obliged to enter into a long explanation of his choice of Martin. He indicated that he had done his utmost to persuade Plunkett to accept the position, and that Plunkett had promised that if the Bar conspired against him to stop him forming a ministry he would join Cowper to put it down. He said that Martin had gone as far as to offer not to take a position in the ministry knowing that Plunkett would not sit with him. He made his offer in order to ensure that Cowper obtained Plunkett's services and won West's begrudging praise for that.² Hay told Cowper and the House that at the moment Cowper realized that he could not obtain the co-operation of Plunkett he ought to have returned his Commission, as Plunkett's absence would ensure that he would not have the 'confidence of the House'.³ Donaldson agreed with this opinion, and revealed that he had told the Governor to send for Plunkett if Cowper failed, whilst Robertson hoped that he would soon see Plunkett fighting 'in the van of the struggle for liberal principles'. He quoted Duffy, who had said in Melbourne that it was his wish to see Plunkett and Parkes in the one ministry soon, because when Plunkett arrived in the Colony, 'he was a slashing

¹. SMH, 9 September 1856.
². Ibid., 17 September 1856, report of Legislative Assembly proceedings of 16 September 1856.
³. Ibid., 18 September 1856, report of Legislative Assembly proceedings of 17 September 1856.
young Irishman, as fine a young chap as ever set foot on these shores, and full of the wildest opinions of what were the rights of the people, opinions that had alarmed the Macarthurs and Macleays of those days. Donaldson was perhaps unmindful of the fact that those same opinions may have caused some alarm to Denison in 1856!

Plunkett made it clear in forcible terms that he thought Cowper's action in attempting to form a ministry at all was both inopportune and objectionable. He denounced the motives that induced Cowper 'to grasp at office'. They were 'selfish and inconsistent with the spirit of constitutional government' and it was a ministry 'unconstitutional in its inception and rotten at its core'. The latter piece of invective was aimed directly at Martin rather than Cowper, because Plunkett had not forgotten, or forgiven, the accusations levelled against him by Martin from the hustings, and the thought that such a man could succeed him as Attorney-General was odious. It was inevitable, once Plunkett refused to serve with Cowper and then attacked his ministry in the House, that the ministry could not survive. Cowper sparred for time after a motion of no confidence and a refusal of an adjournment were put through the House. He then went to Denison and asked for a dissolution of the Assembly but the Governor refused to grant the request, on the grounds that no political necessity warranted it, with the result that Cowper resigned.

Denison turned to Parker to attempt again to stabilize the ministry. When Parker came into the House with his new ministry, with himself as Colonial Secretary, Manning as Attorney-General,
Donaldson as Treasurer, John Hay with Public Works and Lands and Darvall as Solicitor-General, he had only rung the changes on the previous Donaldson grouping of ex-official and landed interests. He explained that his first step, after Denison called him, was to try to get Plunkett as Attorney-General. Plunkett had refused as he had 'worked his work' and would only take office in an 'inevitable necessity'. In order to facilitate Parker's offer Manning had expressed his willingness to be Solicitor-General, and Darvall had offered to step down altogether, but again it was to no avail. The new ministry took office and Plunkett continued to sit in the centre, from which position he reminded the House during a verbal clash that 'we are a society of gentlemen, and that we ought to act as gentlemen'.

The Parker ministry was wise enough to get down to the business of government by introducing the estimates, without undue delay. As usual Plunkett took little interest in such proceedings, except when he thought that matters of principle were involved. He pleaded eloquently for a rise in the salaries of the judges on the grounds that they were the 'worst paid officers in the colony', and he introduced a Private Bill to grant a £1000 for the building of a School of Arts at Goulburn because he 'looked at institutions of this kind as the great branches of the education of the colony'. As firm as ever on the question of equality to the Jews 'to whom as a nation, they were indebted for their common Christianity' he voted in a minority of four against a motion to support the churches on a per-capita basis because the word 'Christian' was used in the motion, thus excluding the Jews. He tried to distinguish between the

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1. SMH, 29 October 1856, report of Legislative Assembly proceedings of 28 October 1856.
2. Ibid., 8 November 1856, report of Legislative Assembly proceedings of 7 November 1856. By the same token Plunkett was beginning to loosen up, at least verbally. He called Martin a 'foul and malicious slanderer' after Martin wrote an article on Parker in the Empire, ibid., 1 November 1856, report of Legislative Assembly proceedings of 31 October 1856.
3. Ibid., 21, 26 November 1856, reports of Legislative Assembly proceedings of 20, 25 November 1856.
4. Ibid., 12 December 1856, report of Legislative Assembly proceedings of 11 December 1856.
State fostering a system of 'Compulsory voluntaryism' with which he agreed, and State support for religion which he rejected because it bound the churches to the State. He instanced America where the clergy in the South were unable to attack the 'iniquitous system' of 'negro slavery' because the churches looked to the State for support. His last public act of 1856 was to campaign for John Fairfax in the Sydney seat from which Parkes had recently resigned. Plunkett said that, despite their differences, he was sorry to see Parkes resign as he was a 'great acquisition to that House'. At the same time he was sorry to see Dalley stand against Fairfax because he thought that, whilst Dalley had great promise for the future, on this occasion he was simply being used by Martin for political ends. Dalley won the seat by a comfortable margin.

Despite the three rapid changes in ministries the transition to responsible government in New South Wales was effected with dignity, efficiency and order. As was evident at the time any one of the ministries would have benefited had Plunkett been prepared to give it stability by his taking office. There is no evidence to suggest that Denison ever approached Plunkett himself to form a ministry. Perhaps it was too early in the history of colonial development to expect that a governor would ask a Catholic to assume such a position. It is more likely, however, that Plunkett himself made it clear that he was not prepared to undertake the responsibilities of leadership. He must have known that he lacked both interest and acumen in financial matters, without

1. Ibid.
2. Ibid., 29, 30, 31 December 1856. The fact that Plunkett was already able to evaluate the contribution of Parkes and the future career of Dalley indicates that the old liberal of pre 1856 understood both the needs of the future and the men who would shape it.
3. Deniehy, from Goulburn, was still complaining to Parkes that, despite the changes in the ministry, 'The country is again in the hands of Deas Thomson, and the faction who look upon it as their preserve', Deniehy to Parkes, 28 November 1856, Autograph letters, ML.
which to lead a ministry would have implied a degree of irresponsibility that was not part of his nature. He remained fundamentally a man of the law and, although he was not prepared to remain in office, he was equally not prepared to leave his chosen field. By 1856 Plunkett thought of New South Wales as his home, and he was prepared to spend his remaining years contributing to its development.
CHAPTER ELEVEN

ATTEMPTS AT ADJUSTMENT

Early in January 1857 Alfred Stephen decided to relinquish his position as President of the Legislative Council. Impaired health, he said, was his reason, but he may also have been uneasy about the vote in the Assembly regarding the position of judges in the Council. The work of the Council itself was scarcely onerous, despite the enthusiasm of those members who wanted it to be more than a mere rubber stamp for the proceedings in the Assembly. At the same time it was relatively unaffected by the changes in the ministerial benches, its meetings were conducted with decorum and there was within it a strong element of the older, experienced and less flexible men who had helped to guide the Colony before the days of responsible government. Men such as Thomson, G.K. Holden and Stephen were those to whom conservative observers like G.W. Rusden had looked in 1853 to 'interpose a check between rabid democratic notions and abuse of power': although there had not been any real evidence of radical extremism in the Assembly itself, democracy was still seen by some as a threat and the Council was regarded by them as a brake on imprudent and improvident legislation.

With some of these factors in mind Denison wrote to Plunkett on 17 January 1857 requesting him to accept the position of President of the Legislative Council. Impressed by the importance of the offer, Plunkett delayed his decision for a week. He said that he felt bound to accept the office 'under a sense of Public duty', but that he regretted leaving the Assembly to which he was attached, his electors to whom he was responsible, and his profession which he loved and cherished, together with 'the income derived therefrom which is of no little importance to me'.

1. G.W. Rusden to James Macarthur, 4 December 1853, Macarthur papers, vol. 27. ML
He requested that he be given a week to resign his seat in order to allow 'the Constituency of Argyle the longest notice that the circumstances will allow'. Public duty certainly weighed heavily with Plunkett in his decision, then as always. At the same time his infrequent appearances in Court since the previous June bear out Therry's remark that Plunkett had been so much out of civil business, 'and so many young and ardent spirits have appeared on the tapis that I doubt whether he will be able to break into business again worth his while'. Perhaps Plunkett hoped, in the event fruitlessly, that he would receive financial assistance in the position as President, given that his salary would be the same as the pension he relinquished.

Plunkett's removal to the Council was regarded by some as a great loss, and the Herald wryly commented that he had been 'solicited as an ally and colleague of every succeeding government'. Others saw in his nomination ominous signs of rising Popish power. The Australian Banner rejoiced in early January when Fairfax, allegedly Plunkett's candidate, was beaten for a Sydney seat by Dalley, whom the Banner preferred, despite the fact that he too was a Roman Catholic. It was alleged that during FitzRoy's administration Plunkett ran the Colony, and it was feared that in his new position he may begin the same process.

1. Plunkett to Denison, 22 January 1857, Plunkett papers. Apparently relations between Plunkett and Stephen were amicable as they had discussed the matter and Stephen had offered to remain in office for a week to allow Plunkett to make his own arrangements, ibid.

2. Therry to James Macarthur, 24 June 1856, Macarthur papers, vol. 34, ML

3. SMH, 23 January 1857. The paper pointed out that, as President, Plunkett would in effect work for nothing and at the same time sustain the loss of his practice. It was surely a situation to which Plunkett had become accustomed in his relations with the Crown over 25 years.

4. Ibid.
again. Nonetheless his introduction into the Council with his Letters Patent as its President was in a low key. Thomson and Holden introduced him and Stephen was pleased to welcome to the high office a subject of the Queen whose 'loyalty, zeal and integrity' made him eminently suitable for the responsibility. Plunkett was regarded as an old man by the rising generation like Deniehy and Dalley, despite the fact that he was only fifty-five. But he had come a long way since he arrived in Sydney in 1832. His appointment as President said a great deal for his own capabilities and integrity. It said even more for those who held responsible positions in the government of New South Wales. Only twenty-eight years after Roman Catholics were allowed to hold office under the British Crown, a Roman Catholic was elevated to a post in which he shared the reins of government in the absence of the Governor and indeed acted for a while as Lieutenant-Governor during Denison's absence at Norfolk Island in 1837.

The Session of the Parliament in 1857 was brief and was prorogued on 17 March; the business of the Council had been so meagre that it frequently had sat for only fifteen minutes or less. Plunkett was unable to make use of the break by resuming

1. Australian Banner, 3, 24 January, 25 April 1857. FitzRoy allegedly 'handed the reins of Government...to the guidance and determination' of Plunkett. If there were any truth in the accusation its outcome in the form of stable and progressive government redounds to Plunkett's credit. The role of the youthful and brilliant Dalley in the 1850s and early 1860s appears to have been a puzzle to many of his contemporaries and it has remained so to some historians, c.f. O'Farrell, History, p.92; Suttor, Hierarchy and Democracy, p. 174. Dalley's life mirrors much of the texture of New South Wales colonial society 1840-90. See article 'William Bede Dalley' by Bede Nairn to be published in Australian Dictionary of Biography, vol.4.

2. SMH, 29, 30 January 1857, reports of Legislative Council proceedings of 28,29 January 1857. The Letters Patent of Plunkett's appointment as President of the Legislative Council of New South Wales are in the Plunkett papers.

3. SMH, 13, 14 February 1857, reports of Legislative Council proceedings of 12, 13 February 1857.
his private practice and, according to Cowper who met him in Sydney, he was 'furious at the idea of our not being summoned for the Despatch of Business before August'. In the meantime, however, he involved himself in two matters connected with the University, neither of which enhanced his hitherto well-merited reputation for prudence and coolness of judgment.

In April 1857 a ceremony to confer degrees was held at the University. The Senate, of which Polding, Therry and Plunkett were all members, was seated, when Bishop Barker arrived on the platform and was ushered to a seat on the Governor's right hand. At this the Catholic contingent, consisting of Polding, Plunkett, Therry and Abbot Gregory, expressed its disapproval by leaving the hall. Barker was not a member of the Senate and Plunkett had protested against the intended seating arrangements some days prior to the ceremony. Dr Woolley was either unable or unwilling to comply with the request, although aware that Polding's membership of the Senate gave him some claim to seniority in this instance. John West defended Plunkett's behaviour with his customary loyalty, but the Church of England Chronicle must have expressed the opinion of many when it dubbed the performance an instance of 'Roman intolerance'. The Banner looked upon it in another light entirely and rejoiced at 'The Rout of the Popish Host'. In itself the incident was no more than a continuation of the arguments of earlier years between Broughton and Polding about rights to titles and the use of

1. Cowper to Parkes, 11 May 1857, Parkes correspondence, vol.60, pp.355-62. Cowper and Plunkett seem to have maintained good relations in this period, at least outside the House. Acting as a kind of go-between Plunkett mediated in a misunderstanding that arose between Cowper and Parkes when the latter was omitted from Cowper's ministry in 1856, see Cowper to Parkes 19 September, 18 December 1857; Parkes to Cowper, 18 December 1857, Parkes correspondence, vol.7, pp.431-8, 502-5, 506-7.ML

2. SMH, 21 April 1857; Church of England Chronicle, 1 May 1857; Australian Banner, 25 April 1857.
episcopal insignia, arguments that hinged on the central question of the validity of papal authority on a theoretical as well as practical level. The difference in this case was that for the first time in their careers Plunkett and Therry were aggressively Catholic to the extent that they were prepared to cause public embarrassment in order to express a claim to equality. Neither could or would have argued that equality was lacking on all points of importance, which makes it even more strange that they should have so behaved over a matter of minor protocol. It is possible that as Plunkett began to realize that his real power within the community was slipping from his grasp, he began to insist more upon the outer manifestations of power not only for himself but also for the head of the religious community to which he was so deeply committed.

In August 1857 another incident occurred in which Plunkett showed that the years, together with the changing circumstances, were having their effect upon him. A meeting was held at which he was the principal spokesman on behalf of an appeal for the building of St John's College within the University. Plunkett had spoken frequently in the past with a sense of gratitude towards Trinity College, Dublin, as the Alma Mater that had given him his opportunity in life as a Roman Catholic Irishman. Even more markedly he had said that he had benefited from the fact that his education there had been received in a community of scholars with differing religious convictions, and this preparation had enabled him to take a broader view of contemporary problems in New South Wales when he came there. Yet on this occasion he proclaimed that at Trinity there was 'no atmosphere that was suited for Catholics' and that as in New South Wales everyone was given a fair chance Catholics therefore ought to take their opportunity and erect their own College.\footnote{SMH, 4 August 1857.} It was a
peculiar twist to the reasoning that Plunkett had so often used in the past both in regard to Trinity itself, the system of National Education in New South Wales and the ideal society, approximate to a modern pluralist society, that he had envisaged as desirable. He asked for £10,000 for the College and £13,033.6.0 was subscribed with Plunkett himself giving £100.¹ The figure perhaps illustrates something of the nature of Catholic society in the Colony at the time, in that it indicated the wish on the part of a financially-sound minority to give to their children the opportunity of a tertiary education within the framework of a Catholic institution. The Banner was again vociferous in its disapproval, and in particular deplored Plunkett's remarks 'knowing his aristocratic origin', whilst Therry's speech was allegedly no more than ought to have been expected of him. There was some semblance of truth in its statement that Plunkett and Therry had 'relit the torch of discord throughout the land'.² Their behaviour is even more surprising when it is realized that no two men in New South Wales had benefited more through the years by the absence of religious discrimination, on an official level at least.

It was in this somewhat irascible frame of mind that Plunkett entered a period that was to be the turning point of his life. During the next few months he almost ruined his reputation, his health, his financial stability and his position within the Colony. In the process he put to the test the very essence of the concept of responsible government that centred upon the right and duty of the executive to administer the public funds of the people. By his actions he cast odium upon both the Governor and the Colonial Secretary, he almost brought down the government and he caused sectarian, social and political conflicts to arise that in the past he would have been the first to deplore. Obliquely he proved that the old order of colonial society had passed for

¹. Ibid., 17 August 1857.
². Australian Banner, 22 August 1857.
ever in that ultimate decisions were no longer taken in the offices of Downing Street. He proved also that he still belonged to that old order despite his own important role as an architect of the new.

Since 1848 Plunkett had been an indefatigable Chairman of the National School Board. In the early years the going was not easy as a whole new system had to be set up alongside the Denominational System and thus it required financial support of a substantial nature. At the same time the opposition to the National system, led initially by Broughton and to some extent supported by Plunkett's own church, varied only in its intensity. Progress was steady nonetheless and by the end of 1850 there were 43 National Schools functioning in the Colony with 52 in course of construction. Perhaps the most significant step was taken with the opening of the Model School for teacher training in Sydney in 1851 with William Wilkins in charge. The Board itself, with Plunkett as Chairman, acted as an autonomous body in the erection and promotion of the system, although it depended upon the government of the day for its funds. As early as 1849 Plunkett was applying for funds in terms which must even then have given some grounds for disquiet, although they were apparently not expressed at the time. He wrote to the Colonial Secretary on 18 June 1849 asking for £3000 for schools in the settled districts, £1500 for the squatting districts and £1500 for the district of Port Phillip. He concluded his request with 'The Board feeling the impracticability of estimating the probable expenditure of the National School Establishment, in detail, have

estimated in gross the discharge of the sums voted to be afterwards accounted for by them.  

As the years went on the National System continued to grow both as to students enrolled and consequently as to the sum outlaid for the erection and maintainence of schools and the payment of teachers. By 1858 there were 7814 pupils in the National schools and the outlay was £22,193.18.8. Clearly the comparative cost to the government of the two systems was causing some concern as a detailed analysis of the figures made in 1858 revealed that 34,327 pupils enrolled in the National System from 1848-58 had cost £114,974.6.6, whilst in the same period 145,067 had enrolled in the Denominational System costing the government only £149,689.7.3. By the same token the unwillingness of the National Board to be more explicit as to the amount of money it required, and the manner in which it was spent, was no longer as acceptable to a ministry under responsible government as it had been in the days before 1856. Several letters were sent to the Board from 1856 onwards asking for detailed budgets for the ensuing years, and on 8 April 1857 the Colonial Secretary was quite explicit when he asked the Secretary of the Board to inform him precisely how the Board intended to carry out 'the intention of the Legislature' in regard to the disposal of money granted to it. There is no evidence that the Board, under Plunkett, ever gave any satisfaction to the various ministries in this matter before 1858.

1. Plunkett to Colonial Secretary, 18 June 1849, National School Board Miscellaneous Matters 1849-54, NSWA 4/7176.
2. Comparative Statement of the Expenditure on account of the National and Denominational Schools from 1848 to 1858, NSWA 4/7177.
3. Ibid.
4. See letters from Colonial Secretary to Secretary of National Board, 10 March, 4 July, 12, 22 December 1856, 14 January, 8 April 1857, in Copies of Letters to the National School Board, 4 January 1848-27 December 1866, NSWA 4/3702. When the Board asked for £25,000 in June 1857 the Government, understandably, became anxious, ibid., 27 June 1857.
Beyond the dissatisfaction with the proceedings of the Board in regard to financial matters the whole question of the educational system itself had been cast into doubt. The dual system with two independent boards responsible in no real sense to the government caused unease, and when Cowper again became Colonial Secretary in September 1857 it was not long before the Herald warned 'The Cowper Ministry has expressed an opinion against the use of Boards in Government'. Furthermore it was not simply the structure of the system in regard to boards that was in question, but for some time discussions had gone on within the Executive Council concerning a total revision of the educational system.

The move towards a revision of the system in New South Wales seems to have been initiated by the Governor himself. In 1856 Denison submitted a minute to the Donaldson ministry regarding a new proposal along general lines which would unite both the two current systems in one. At that time Cowper was the Chairman of the Denominational Board and James Macarthur clearly thought that Therry, whom he considered more judicious and temperate than Plunkett, would be more useful in discussing the proposed changes than 'old Hubert'. It is probable that he thought also that trying to get Cowper and Plunkett together on the question would be like trying 'to unite oil and water', a simile he used when rejecting the idea of asking Polding and Barker to meet on the matter. During 1857 the Executive Council...

1. SMH, 13 November 1857.
2. See James Macarthur to Donaldson, 2 July 1856, Donaldson Ministry letters, pp.73-84, ML. Macarthur thought that Denison's proposal would be much the same as the Dutch or Irish systems, but if called 'the Australian system of General Education' it would cause no comment and 'A rose by any other name would smell as sweet'.
4. Ibid., Macarthur thought it regrettable that Robert Allwood had not become metropolitan because Barker was 'wedded to the views formed in a Lancashire Parish' which, he said, were useless there and absurd here.
met at Denison's suggestion and considered draft proposals for a new system of General Education which were approved by the Governor on 20 August 1857. Again, however, these initiatives came to nothing so that by June 1858 Denison was writing 'In my opinion the Govt. ought to take the whole system of education into its early and earnest consideration with the view of establishing such a general system as can be made to harmonize with the feelings as well as the wants of all classes of the community'. Although this latter note dates from after the events of December 1857 and January 1858 which brought about Plunkett's downfall it illustrates Denison's persistent interest in the education question and his involvement in it. At the same time several letters in May, June and July 1857 addressed to the Herald by 'The National School Teachers' defending the Board of National Education plainly indicate that the concern of the government with the Board was a matter of common knowledge. Finally Burton, who had returned to the Colony and taken a seat in the Legislative Council, issued another ominous warning when he moved for a return of the religious denominations of the teachers in the National System. If Plunkett had been able to read the signs at all he would have realized that prudence and conciliation were required in order to preserve a system of education to which he had dedicated so much zeal, devotion and even his own private funds. That he chose this very moment to outrage beyond endurance the feelings of both Cowper and Denison indicates that he lacked the political judgment necessary to work within the new era of responsible government.

Acting on a suggestion made by William Wilkins the National

2. Denison's note on letter from National School Board, 3 June 1858, ibid.
Board decided in December 1857 to extend its activities even further. Wilkins proposed that grants ought to be made by the Board for selected non-vested schools, that is schools owned by individuals or societies, which hitherto had been given no assistance by the government. It was a reasonable extension of government aid viewed in the abstract, but in the circumstances it was one likely to receive little support from a government hard pressed financially and partially committed to a review of the whole education system. The Board met, agreed to the proposal and drafted a set of Regulations to cover the new field of operation. These Regulations were then sent, on 18 December 1857, to Cowper with the request that they be made official by publication in the Government Gazette, and laid before Parliament in the manner prescribed. In these proceedings the Board acted in its normal fashion as, by its creation through an Act of the old Legislative Council, it could act independently. Its actions merely required official gazetting to give them authority. One thing however had changed which Plunkett and his Board gave no recognition to: responsible government had come to New South Wales since the Board was created. Denison had long since realized the anomaly in the situation and he was explicit in his condemnation of it, 'There is one matter which this correspondence proves clearly - namely that the system of handing over large funds to irresponsible Boards is contrary to all sound principle and at variance with the system upon which responsible Govt. has been established.'

Cowper took no immediate action upon receipt of the Regulations, so that, on 4 January 1858, Plunkett, as Chairman, wrote a firm but polite note requesting that the matter be expedited.

1. This and the ensuing correspondence was printed in New South Wales VPLA, vol. 2, 1858, pp. 435-43. It is reproduced here as Appendix II, pp. 337-47.
2. Denison to Cowper, 9 January 1858, in Removal from Office of the Chairman of the National Board, NSW 4/7176.1.
This letter crossed with one of the same date in which W. Elyard, the Under Secretary, writing on behalf of Cowper, gave two reasons for not submitting the Regulations to the Government Gazette. Cowper thought firstly that no new rules ought to be published until Parliament itself approved the further expense envisaged and secondly, that the rules themselves appeared contrary to the Act by which the Board was established. This elicited a blunt, almost belligerent reply from Plunkett in which he confirmed the Board's amenability to Parliament but refused to be 'guided by the individual opinion of the Colonial Secretary in the exercise of their duty'. He said that he had sent a copy of the Rules to the Gazette and expected no opposition to their insertion in that publication because, in the Board's opinion, they conformed to the Act which governed the Board. Cowper complied with the request regarding publication but avoided responsibility by having the Rules printed 'as a publication by the Commissioners'. He reiterated his belief that the Board was acting ultra vires, and said that the matter would be submitted to Parliament.

Upon receipt of these final communications Plunkett replied with a letter to Elyard, whereas all previous communications had been addressed to Cowper. Plunkett began by rejecting the concept of cabinet responsibility on the grounds that several members were unavailable at the time of the 'Government' decision to repudiate the Board. He thought that he could be pardoned for not 'attaching much weight to the "deliberate opinion of the Government"' when he recollected Cowper's long standing hostility toward National Education. At the same time he expressed the Board's readiness to abide by any decision Parliament may make in the matter, 'in the full confidence that the representatives of the country will not take the same narrow-minded view of so all-important a subject as that which you assert is taken by the

1. W. Elyard to Plunkett, 4 January 1858, ibid, p. 337
2. Plunkett to Cowper, 5 January 1858, ibid., pp. 339-40
3. Elyard to Plunkett, 5, 7 January 1858, ibid., pp. 338, 340
present Government'. He added further fuel to the flames when he pushed the matter onto the stage of public opinion by having the Rules and all the correspondence published in the Herald.

In the circumstances Cowper's reaction was natural enough, even allowing that for many years past there had been hostility between himself and Plunkett on the education question. He determined that Plunkett had to be relieved of his position as Chairman because 'if such insulting conduct can be allowed, the Head of the Government cannot congratulate himself upon being the holder of a dignified office', and he was prepared to do what he deemed his 'right' even if the Board resigned in toto. A small number of the Executive Council met on 27 January at which the decision to relieve Plunkett of his position was confirmed by Cowper, Denison, Martin, Robert Campbell and Alfred P. Lutwyche. There can be no doubt that the Governor wholeheartedly concurred in Plunkett's removal, which he considered necessary 'to vindicate the Govt!! It is even possible that, given his own interest in a reform of the system of education, he considered the removal of Plunkett one of the first necessary steps towards that reform.

Plunkett immediately resigned all his public offices including his position as President of the Legislative Council. In his letter to Cowper, whom he always addressed as 'Chief Secretary', he resigned as a Justice of the Peace and as a member of the Board of Management of the Catholic Orphan School at Parramatta, and he illustrated how far the whole affair had affected

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1. Plunkett to Elyard, 8 January 1858, ibid., pp.341-2
2. SMH, 8, 11 January 1858.
4. Executive Council Meeting Minutes, 27 January 1858, ibid.
5. Denison's note on letter from G.K. Holden to Cowper, 6 February 1858, ibid. See also Denison's note on letter from James Macarthur to the Governor, 8 March 1858, ibid.
6. Plunkett to Denison, 11 February 1858. Plunkett papers.
his own poise. He said that he was resigning all public office under a government by which 'the reign of terror has commenced'. John West was scarcely less forceful in public with his defence of Plunkett and his denunciation of Cowper who 'has sown to the wind; he will reap the whirlwind'. Other newspapers like The Illawarra Mercury, the Goulburn Chronicle, and the Maitland Mercury were united behind the Herald in their repudiation of Cowper and their appreciation of the services to education of Plunkett. West in a few lines summed up this latter sentiment. 'He has consecrated his time, his money, his official and private influence to bring within reach of all sects and classes that teaching which he believes will tend to their well-being'. Public meetings were held at several places, the one in Sydney attracting 3 - 4000 people to hear James Macarthur and others protest the dismissal. One meeting at Morpeth must have pleased Plunkett even more than those at which there was a greater and more notable attendance. It was held in a room of the Presbyterian School, and the Reverend Robert Blaine addressed it at great length. Mr Blaine said that through Plunkett 'a blessing had been conferred upon the hearths and the homes of the poor of the land'.

James Macarthur took the leading role in the public defence of Plunkett and preserved his interest in the matter for posterity by keeping a large file of correspondence and newspaper clippings

1. Plunkett to Cowper, 6 February 1858, in Removal from Office, NSW 4/7176.1.
2. SMH, 10 February 1858.
3. See ibid., 13 February 1858.
4. Ibid., 16 February 1858.
5. Ibid., 6 March 1858. See also R. Flanagan The History of New South Wales, 2 vols., London 1862, 'a dispute which roused the attention of the colonists more generally, perhaps, than any other personal quarrel since the days of Bligh and Darling', vol. II, p.425.
extending over a period of some months.\(^1\) He organized petitions from various parts of the Colony addressed to the Governor asking him to 'take some effective steps for the retention or restoration of Mr Plunkett's inestimable services', but the petitions were met with the invariable answer that, in Denison's mind, Plunkett's behaviour made his removal 'a matter of necessity'.\(^2\) Macarthur was in constant contact with West regarding his activity on Plunkett's behalf and he led the opposition to the government in the ensuing Legislative Assembly debates.\(^3\) He managed to win the debate, which issued in a partial censure of the government in concluding that the Regulations issued by the Board were legal and properly issued, but it did not go any further regarding Plunkett himself than regret his loss and hope for his restoration.\(^4\) This was as much as Macarthur, Plunkett and West could hope for and perhaps more than was deserved. Public opinion certainly favoured Plunkett as is evident from the newspapers, the public meetings and the petitions. But the public was also wearied of the constant changes of government and not even John

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1. See National Education and the Dismissal of J.H. Plunkett, Macarthur papers, vol.87. This volume lacks pagination. ML
2. For the petitions see VPLA, vol.2, 1858, pp.443-57; and Removal from Office, NSWAL 4/7176.1. In the latter the petition of 8 March 1858 from Camden signed by James Macarthur has Denison's handwritten answer on it. Denison thought that 'if Mr Plunkett is willing to withdraw his letter and apologise for having written it this might alter the case'. At the same time Denison was convinced that, short of an apology, Plunkett's removal was necessary to the extent that he was prepared to stand up to a Privy Council appeal if Plunkett made one. He was however slightly concerned that the small attendance at the Executive Council meeting that removed Plunkett may pose some problem in the event of an appeal; see ibid., Denison's notes on W.C. Wiles to Cowper, 16 February 1858, and on Plunkett to Cowper, 6 February 1858.
3. See Macarthur papers, vol. 87, passim, and debates of Legislative Assembly in SMH, 23, 27, 28, 29 April 1858.
4. Ibid., 29 April 1858, report of Legislative Assembly proceedings of 28 April 1858.
West wanted Macarthur to pull Cowper down on the matter. Above all, although a majority of the Assembly was prepared to give muted agreement to the proceedings of the Board in regard to the past, it was nonetheless clear to all that responsible government could not operate satisfactorily without the concept of cabinet responsibility for the behaviour of those who made use of the public funds of the Colony.

Macarthur's last attempt was to try to bring about a reconciliation between Cowper and Plunkett. Murray and Holden endeavoured to act as intermediaries, but to no avail. Even Martin, despite Plunkett's 'hostility to us in every way', would have gladly availed of an opportunity to restore him. Plunkett would not apologize and without an apology Cowper would not reinstate him, a situation that certainly suited Cowper's interests despite the odium that had been stirred up because of his actions. Macarthur's last words to Cowper were, 'It is of no use to...you that he [Plunkett] considers the course adopted by Govt. as unjust, harsh and wanting in generosity - nor can I think this is an overstatement of the situation'. For years Plunkett had been justly considered by many as 'the great patron of education' and his work in that field entitles him to be numbered amongst the founders of the State School system in Australia. At the same time it is an exaggeration to view his dismissal as 'a tragic blow to National Education' for the simple reason that, as a system, its days were numbered by 1858. Insofar as Plunkett himself was concerned his dismissal was a personal tragedy in

1. Ibid., 10 August 1858.
2. T.A. Murray to Macarthur, n.d., but probably May 1858; Holden to Macarthur, 13 May 1858; Macarthur to Cowper, 16 July 1858, Macarthur papers, vol. 87, ML; Martin to Cowper, 8 July 1858, Removal from Office, NSWA 4/7176.1.
3. Macarthur to Cowper, 16 July 1858, ibid.
that it revealed to others, and perhaps even to himself, that he could not contain the new wine fermented by a society he had helped to plant. It was true, in John West's words, that Plunkett was 'more respected than loved'; it may have been true also that there were those in New South Wales 'who grudge that lustre should be reflected from his career upon a denomination which is the object of their intense abhorrence'.¹ But it was not true that Plunkett was removed by Cowper simply because of his 'strenuous, uniform, long continued and successful advocacy of a hated institution'.² Indeed, the people who met at Port Macquarie in March 1858 and hoped that Plunkett would soon be back in the Assembly as head of a genuine liberal government had not begun to realize that 'old Hubert' had almost spent his course in the service of New South Wales.³

The events of January to July 1858 did not deter Plunkett from another attempt at the resumption of public office when the opportunity presented itself in September of that year. Henry Parkes resigned for the North Riding of Cumberland so Plunkett offered himself for the seat, and won it unopposed. He had already managed to see his removal as Chairman with a sense of proportion. He thus expressed his happiness that Macarthur had not brought down the government because of it, and he promised that he would let the matter rest as 'he had determined to sink self altogether, and to think only of public matters'.⁴ The old guard, in the persons of Donaldson, Hay, Jones, William and George Macleay, and James Macarthur, were all on the platform to hear him say that he was again prepared to serve a country which he could not leave because 'the very fibres of his heart had

¹ SMH, 23 April 1858.
² Ibid., 13 February 1858, quoting Illawarra Mercury, 11 February 1858.
³ Ibid., 12 March 1858.
⁴ Ibid., 14 September 1858.
taken root in it. As if to prove that he retained something of Ireland he began to give public lectures on its Ancient Music in aid of the Donegal Relief Fund. He illustrated his theme on the violin, basing himself on the original Irish music and he pleaded with his audience to make music, that 'most innocent companion' the inheritance of the poor as well as the rich.

At the same time another race made public recognition of his impartiality towards race and creed over the years when the Jews met in Sydney to rejoice at the admission of Baron Rothschild to a seat in the Imperial Parliament. The speakers all stressed that 'the Jews of New South Wales owed a debt of gratitude to Mr Plunkett, for the liberal views he had ever entertained towards them as a body', and they thought that he was mainly responsible for the fact that they were treated as equals in the Colony.

The increasing inability of Plunkett to grapple with the changed circumstances of society became apparent even in regard to his relations with his own Church. Through the years he and Roger Therry had been the leading Catholic laymen of Sydney, although both had been careful to act always as responsible citizens in the public arena, and to keep the principles and practice of their religion in private. This had not been difficult in a society in which Christian principles permeated the whole development of public polity, and before the struggle over State Aid to religion, any argument had been over minor matters such as prayers in the parliament, the precedence of bishops and such like. Within the Roman Catholic Church itself however all was not well with divisions between Irish and English, secular and religious, and finally and inevitably, clergy and laity.

1. Ibid.
2. Ibid., 1, 6, 11 October 1858. See also manuscript book of music in Plunkett's hand in Plunkett papers.
3. SMH, 9 November 1858.
with its English archbishop, who was at the same time a Benedictine surrounded by priests who were in increasing numbers secular and Irish, was naturally the centre of discord. It came to a head in 1858 when the three bishops, Polding, Goold and Willson met in Melbourne and issued a Monitum Pastorale warning against turbulent elements amongst the laity, which it likened to 'foxes who destroy the vineyard of the Lord', or even 'roaring lions' stirring up dissent. Plunkett was not amongst these like Duncan, Heydon and Edward Butler at whom the pastoral was directed, and although he was a member of a committee appointed to lay a list of grievances before the Archbishop, he was not in Sydney when it was drawn up and did not sign it. Indeed he must have still stood high in the favour of Polding when he argued, as he had always done, for religious equality during a debate in the House in October 1858.

In 1859 an event occurred that forced Plunkett to align himself, albeit temporarily, with the 'foxes' and the 'lions'. In March Roger Therry, whom Plunkett described at a banquet as his 'oldest friend' departed the Colony and thus left him bereft of perhaps the one Catholic layman upon whom he could rely for temperate advice. At the same time Daniel Deniehy, with whom Plunkett was now in transient political collusion, found himself excommunicated over a somewhat petty protest meeting held in the Victoria Theatre. An election was in the offing, at which Plunkett was to stand in Sydney with Deniehy as his partner, and at this precise time the much confused event of the Protestant Bibles took place.

1. Freeman's Journal, 30 June 1858; SMH, 2 July 1858.
2. Ibid., 2 August 1858.
3. Ibid., 30 October, 3 November 1858, reports of Legislative Assembly of 29 October, 2 November 1858.
4. Ibid., 3 March 1858. By the 1850s, or perhaps from the days when Therry became a judge the two men seem to have been much closer than during Plunkett's early years in the Colony.
5. Ibid., 2 March 1858.
6. It has been described, with differing emphasis by T.L.Sutton, Hierarchy and Democracy, pp.188-192; Mary Shanahan, Out of
Since their arrival in Australia in 1838 the Sisters of Charity had always been favoured with Plunkett's especial benevolence and care. A plaque on the wall of their Mother House at Potts Point, Sydney, still attests the Sisters' gratitude for his solicitude. In 1856 he was the main initiator of a scheme to start a hospital in Sydney under their care and he contributed £200 to the public fund set up to buy 'Tarmons', formerly the property of Charles Nicholson. One of the original group of nuns of 1838 was Sister de Lacy who became Rectress of the Religious Community as well as Superior of the new hospital, St Vincent's. Plunkett and his wife were very friendly with Sister de Lacy and he held her in high esteem, testifying publicly that 'from the first coming to the colony of that Christian woman her conduct he knew was most saintly'.

The hospital itself opened its doors to both Catholics and Protestants and one of its principal surgeons was James Robertson, a Protestant. Given the nature of the hospital, it was customary for Protestant Bibles to be provided for the use of patients who were Protestants, and this situation continued until May 1839 when a hospital chaplain, Father P. Kenyon, removed them from a ward he was visiting. Thus far the story is quite straightforward and both sides accepted the plain fact of the removal as undeniable. What occurred after that was then in dispute, and must remain in dispute given the variant accounts from the major participants.

Two later events made the matter one for public and acrimonious discussion in which Plunkett became involved. Dr Robertson resigned, and Sister de Lacy returned to Ireland with financial aid provided by Plunkett, Deniehy, Butler and others, including non-Catholics.

Time Out of Place, pp.87-100, and C.H. Duffy, 'The Incident of the Moving of the Bible at St Vincent's', 1970, SAA.

1. Freeman's Journal, 1 June 1859.
2. Ibid.
3. Ibid.; SMH, 7 June 1859.
4. Ibid., 2 June 1859. The Herald likened de Lacy to a Nightingale, ibid., 6 June 1859.
On the one hand there is no doubt that Archbishop Polding did not favour the establishment of the hospital itself, thought the appointment of Robertson injudicious and deplored the behaviour of Sister de Lacy in her relations with her own community of nuns, and others outside it, such as Robertson and Plunkett. As he wrote 'Mrs de L's propensity throughout has been to give externs and favourites the confidence wh. should be given alone to her Sisters and Superiors'. ¹ He thought also that the whole affair 'in which unfortunately Plunkett has taken a principal part' was 'one of the most convincing instances of the folly of lay persons however good mixing in Church matters'. ² Yet if there were prejudices on one side they were also evident on the other, and the account of what occurred, given by Plunkett, Butler and Deniehy at a meeting of Catholics in a home in Sydney, was equally clouded by a lack of judgment and charity. Plunkett went so far as to recommend that the hospital, in fairness to all, ought to be closed because Catholics and Protestants had contributed to its foundation.³

It is difficult, if not impossible, to speculate fairly where truth lay in the matter. Undoubtedly Polding and Abbot Gregory had an unhappy history of relationships with religious orders other than Benedictines, although it seems clear that Gregory was not directly involved in this particular affair despite the accusations made against him. Kenyon was rash and imprudent, Robertson was quick to take offence and Sister de Lacy may have been no more than tired-out and lonely for Ireland. On the other hand Plunkett seems to have acted with unusual imprudence and almost wilful disregard for elementary standards of fairness in taking evidence from the one side only. Apart from

1. Polding to an unnamed bishop, 20 June 1859. SAA.
2. Ibid.
3. See Freeman's Journal, 1 June 1859 for report. In fact the Bibles were restored and the hospital continues to this day.
his general distemper, dating to some extent from the elections of 1856 when he lost the Sydney election, the only other explanation for his behaviour rests on the fact that all this took place within two weeks of another Sydney election. Perhaps Plunkett thought that he could display his well-known thirst for religious equality, strike a blow at the Benedictine establishment, and consolidate the Irish-Catholic vote, as well as part of the Protestant vote, behind himself and Deniehy. When all is said that can ever be said about the incident of the Protestant Bibles little doubt remains that on the Catholic side there was an element of intolerance, and intolerance in religious matters was always an anathema to Plunkett. Polding was unjust when he included Plunkett in the 'cable hypocrite' which he said was responsible for the public clamour. 1 Proud and quick to resentment he certainly was, but there was never any evidence that hypocrisy was amongst his failings. Poor Polding felt himself unable to heal the breach between himself and his hitherto trusted layman. He wrote to Bishop Geoghegan,

The chief object, my dear Lord, I had before me, when I pressed you to come up was the hope I had, by your intervention, to have made things right between Plunkett and the Church. I fear this cannot be effected. He seems to consider that he may say and do whatever he deems right, but that the Church or Churchmen may not resent statements made publicly by him and wh. are injurious to Religion or might be if not noticed. He has lost much of that he so much loves, popularity - by his interference about St Vincent's and the very haughty position he has assumed in reference to all parties. 2

Plunkett was successful in winning a seat for West Sydney at the elections in mid-June although Deniehy, still under his sentence of excommunication, lost and the indefatigable Doctor

1. Rough draft of a letter, in French, by Polding to the Cardinal Prefect of Propaganda, n.d., but probably early 1860. SAA

2. Polding to Geoghegan, 9 July 1859. SAA.
Duigan again brought up the field of seven candidates.\(^1\) Again, as so often before, the *Herald* stood by Plunkett who 'never feared the face of man, but defended the right cause', and he went back into the Assembly rejoicing once more in representing his beloved Sydney and proud to speak as 'the oldest member of all the Councils of the country'.\(^2\) Meanwhile he kept up his law practice, wrote a short work called *The Magistrates' Pocket Book* in which he explained that he had no time to bring out the former *Australian Magistrate* again, and kept up his interest in music as President of the Philharmonic Society.\(^3\)

Perhaps he may have even begun to indulge in the delights of Bacchus a little more freely than in the days when he felt bound to set an example of upright sobriety to the whole community. It is harsh to condemn his description of Deniehy before the June 1859 elections as a 'giant intellect' as due to the inspiration of wine, but it is reasonable and pleasing to see some mellow influence at work when the same Plunkett, who attended the Mayor's Fancy Dress Ball dressed as 'a gentleman of the 19th century', chaired the St Patrick's Day Banquet and, proposing the toast to the Fatherland said, 'as he grew in age he recollected the green fields in which he had played, the land, aye, and the girls that he had left behind him'. This brought loud cheers from the assembly and Deniehy, perhaps more fully 'wine inspired', echoed West and repaid the compliment of 1859 with 'Wherever the history of New South Wales was read, all honour would be done to the unsullied name of John Hubert Plunkett' because he was a man who belonged to all classes and all creeds.\(^4\)

\(^1\) SMH, 16 June 1859. Duigan seconded his own nomination, see *Southern Cross*, 12 November 1859.

\(^2\) SMH, 14 June 1859 and 2 September 1859, reports of Legislative Assembly of 1 September 1859.


\(^4\) T.L. Suttor, *Hierarchy and Democracy*, p.171, for the pejorative reference; *Southern Cross*, 24 March 1860. See also the 'unanimous' invitation from the Committee to Plunkett to chair the Banquet, William M. Davis to Plunkett, 17 March 1860, Plunkett papers.
In 1859 Cowper was again back in the Assembly as leader of a government which suffered its first defeat when Murray and Plunkett opposed the government nominee, William Arnold, as Chairman of Committees. Arnold was not 'a gentleman who could command his respect and confidence' thought Plunkett, but William Piddington was, and Piddington won the post by three votes.\(^1\) A few days later Cowper was again defeated on a motion regarding the repeal of the customs on tea and sugar and tendered his resignation. Murray was called to form a ministry with Plunkett urging him to accept 'though expressing a strong disinclination to accept any office himself' despite the hope of the Herald that he would become either Colonial Secretary or Finance Minister under Murray.\(^2\) The absurdity of even contemplating the possibility of Plunkett being connected with an office involving finance is an indication of the fluctuating nature of responsible government in this period of factions, the paucity of competent men offering themselves for positions to which so few had been given training in the previous decades, and the desire of the older, solidly established elements in society to see government based on proven, trusted men with 'Liberal Conservative' views.\(^3\)

Murray was unable to form a ministry, so Cowper carried on until 20 October when he resigned over the defeat of his education bill which was designed to subject the system to Parliament in a responsible way.\(^4\) Plunkett feared that the measure would result in subjecting the education system to the Anglicans through their preponderance on the Executive Council and he flung at Cowper the charge that 'in former times [he] was never called anything but the member for the Church of England, so entirely one-sided was he'.\(^5\) Forster, a man who thought that

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1. *SMH*, 2 September 1859, report of Legislative Assembly proceedings of 1 September 1859.
2. Ibid., 5, 6 September 1859.
3. Ibid., 13 July 1859. Plunkett is named amongst 21 so-called liberal conservatives.
4. Ibid., 23 September, 20, 21 October 1859, reports of Legislative Assembly proceedings of 22 September, 19, 20 October 1859.
5. Ibid., 6 October 1859, report of Legislative Assembly proceedings of 5 October 1859.
'To be a tool of anyone is mean. To be a tool of Cowper's doubles the dishonour', took office, after Hay and Jones were unable to form a ministry.¹ It was an exaggeration to lament that 'Our political position is fast advancing to the ridiculous', because no one could devise another means by which the democratic process could work and grow to maturity.² The new government offered Plunkett his old post on the Board of National Education, which must have pleased him; but he refused the offer. He also heard that back in 1856 when Stephen applied for leave Martin had suggested him as acting Chief Justice. The leave had been refused, but to know that Martin possessed that degree of 'magnanimity' perhaps soothed the pains Plunkett suffered through his dismissal from the National Board, and perhaps also healed the old wound that rankled from the days when he had hoped in vain to be Chief Justice.³

Throughout 1860 there were new faces and new ministries but in the main, as Plunkett observed, 'it was all 'the old thing over again, with simply another shuffle of the cards'.⁴ Forster had lasted in power long enough to introduce another bill to abolish state aid to religion that was just a follow-on from the one introduced by Cowper in the previous session but postponed because of the opposition. The new bill guaranteed compensation to individual clergy who would suffer because of the abolition and, although there was considerable support for the bill, Plunkett opposed it on the grounds that state aid had not been given originally to individuals but to churches and this bill

¹. W. Forster to Parkes, 4 October 1857, vol.52, pp.20-26, Parkes correspondence, ML. Forster thought Cowper employed only 'men of inferior character and capacity to himself', ibid., p.21.
². SMH, 22 October 1859. Deniehy, in the Southern Cross, 29 October 1859, thought that the new men in office had 'no career like poor Mr Plunkett's before the epoch of free institutions'. Deniehy was correct but his use of the 'poor' and the reference to pre-1856 indicates Plunkett's increasing inability to move with the times.
³. Ibid., 10 December 1859; SMH, 10, 11 November 1859.
⁴. Southern Cross, 10 March 1860, report of Legislative Assembly proceedings of 8 March 1860. Plunkett said this after John
furthermore would weaken the churches by pensioning the clergy.\textsuperscript{1}

Opposition to the bill was unnecessary as Forster did not survive long enough to promote it, and the question that had long been close to Plunkett's heart was temporarily postponed.

At the end of 1860 Plunkett faced an electorate for the last time. It was the third general election since 1856, the first under manhood suffrage and the tide of democracy was flowing fast. Plunkett had been incautious enough to proclaim that he was sick of all the talk about new land bills, because the election hinged to some extent on Robertson's land bills, containing the principle of free selection before survey.\textsuperscript{2}

McEncroe, who had voted for Cowper against Plunkett in 1856, was back on the side of his old friend and wrote to William Macarthur for support for Plunkett who possessed 'high Legislative qualifications'.\textsuperscript{3} It was to no avail because Plunkett was regarded on the land question as an instrument of the squatting interests, a judgment given some justification by the public support Macarthur gave him. The Empire was out for Plunkett's blood and ran an advertisement 'TO THE LOVERS OF SLAVERY IN THE WEST SYDNEY ELECTORATE' urging them to vote for Plunkett who had allegedly done so much to promote the slavery of the workers.\textsuperscript{4} Plunkett was beaten and McEncroe consoled William Macarthur with the thought that they had to be resigned to the ways of Providence who 'Knows how to bring good out of evil'.\textsuperscript{5}

Robertson replaced Forster in March 1860.

1. SMH, 22 February 1860, report of Legislative Assembly proceedings of 21 February 1860.
2. Ibid., 24 December 1859, report of Legislative Assembly proceedings of 23 December 1859. Plunkett thought the agitation regarding land was little more than complicated political manoeuvring, a judgment that had some validity, but which was essentially additional evidence that he had lost touch with the times.
4. Empire, 11 December 1860, 'Mr Plunkett has, during the last twenty years, done all he could to elevate the master and oppress the servant'. It may have been a good electioneering ploy but it was unfair to the old liberal.
5. McEncroe to William Macarthur, 28 December 1860, Macarthur papers, vol.41, pp.171-3, McEncroe hoped 'that before long the people may return to their senses', ibid.
For Plunkett himself the defeat of 1860 was not unwelcome in that the day had passed in which he felt strong and competent enough to sustain the heat and fury of battle. His own health was good, but that of his wife gave him increasing concern. He must have felt also that, in a city in which 'you cannot walk down George's Street without treading on the toes of a knight', he had been passed over by a Crown and a government which he had loyally served. Roger Therry heard the results of the election and wrote to James Macarthur from Florence. He thought that 'The vagabond franchise and vote by ballot' had injured the Colony immensely and that respectable men would be driven to leave it. As for Plunkett 'He is out of Parliament, out of business in his profession and I cannot conceive for what purpose he remains there. His career since his harsh removal from office has not been judicious or dignified'. Like the old tree to which he had likened himself, Plunkett had one source of dignity left - he would remain in the land in which Providence had placed him.

William Denison left for England early in 1861. Of the four governors under whom Plunkett had served Denison was the one with whom he had the least rapport, although they maintained reasonable relations, at least until 1858. Denison had the unenviable task of mothering the new form of government in the Colony and it was unfair to state that he left it 'in a state of perfect chaos' as Nicholson wrote to Macarthur. In the Assembly, despite the changes in ministry amounting to seven in just over four years, Cowper had given some degree of stability and the

1. Therry to James Macarthur, 6 May 1861, Macarthur papers, vol.34, pp.91-4. ML. Plunkett, unlike Therry, had not chosen the dignified and judicious career of a judge. That he had had to mix in the less rarified atmosphere of colonial politics and use, unwillingly, some of its methods was not to his discredit. Therry had imbibed from Macarthur the interesting opinion that 'the democratic influence in Australia is traceable to the mischievous theories of Wakefield', ibid., Therry to James Macarthur, 24 March 1862, pp.172-5.

2. Nicholson to James Macarthur, 1 January 1861, Macarthur papers, vol.28, ML.
departments of government had worked satisfactorily with a solid core of permanent officials to guarantee their normal functioning. The main source of irritation was between the Council and the Assembly over matters like appropriation bills. As a result the two houses were on a collision course when Governor Sir John Young arrived in place of Denison. The Council amended the land bills that had passed rapidly through the Assembly and rejected four other bills, with the result that the ministry advised Young to 'swamp' the Council by appointing twenty-one new councillors. The manoeuvre failed when President Burton led a walk-out from the Council, but as the five years appointment of existing councillors expired soon afterwards it was possible for Young and Cowper to reconstitute the Upper House on more liberal lines.1

Plunkett at this time had made plans 'for the future' which probably included a visit to Ireland.2 He was still drawing his pension of £1200 and his legal practice augmented this sum so that with his moderate requirements, given that he had no family, his means were ample enough to do practically as he wished. The example of Therry, who had retired, was touring the continent and preparing his Reminiscences, certainly attracted him, and after his loss at the elections he had no wish to re-enter public life. At the same time it was clearly necessary that a reconstituted Council numbered in its ranks a member who was acceptable to the large Roman Catholic minority; and, despite the de Lacy affair, Plunkett still possessed the confidence of Polding and many influential Catholics. With this in view Cowper approached Polding and asked him to persuade Plunkett to accept a

2. Plunkett to Young, 13 June 1861, Plunkett papers.
seat in the Council.\textsuperscript{1} As a result, when the formal invitation was extended two weeks later, Plunkett was clearly delighted with the offer and replied to Young that he now felt bound to alter his plans for the future and that he accepted the seat.\textsuperscript{2} Thus Plunkett found himself back in a Council from which he had resigned in pique two years previously. The fact that Burton had left and was replaced as President by Wentworth probably made it humanly possible for Plunkett to do so, as it is scarcely conceivable that even his sense of public duty would have induced him to sit in a house presided over by Burton. On the other hand, although he had not always agreed with the old patriot, he rightly estimated Wentworth's great contribution to the Colony.

Back in the Council Plunkett tried again to be what Parkes had described him as in the first days of responsible government - the only genuine cross-bencher who judged every question that came up on its merits rather than on factional or personal interests. But Plunkett too had his personal interests and none was more deeply imbedded than his conviction that the State was bound to foster religion, at least in those fields in which there was common agreement amongst Christians. He had modified his views since the days when he and Bourke had worked together to effect religious equality through the aegis of the state, but his basic tenets remained unshaken. Thus when the final act in the development of the secular state took place in 1862, by which all aid to religion as such was abolished, Plunkett argued forcibly for the retention of the 'Magna Carta' - Bourke's Act, because he believed still in its underlying principles and because he thought that through its abolition 'we would still have one established

\textsuperscript{1} Cowper to Polding, 28 May 1861, Cowper correspondence, vol. 1. ML.

\textsuperscript{2} F. Turville, Private Secretary to Plunkett, 12 June 1861 and Plunkett to Young, 13 June 1861, Plunkett papers.
Church due to the numerous endowments of the Anglican Church. He did not think the voluntary system would work well in the Colony and he spoke forebodingly of an infidel country of the future if the abolitionists had their way. Joined by Deas Thomson and Manning he did his best to avert what he thought would be a disaster, but no parliamentary manoeuvring could now save state aid and the bill was sent for royal assent in January 1863.

The other major field of public polity in which Plunkett had never lost his interest was that of education. The National Board continued its work after Plunkett’s removal, but his influence remained to shape the future. It has been justly said that

The influence of such men as J.H. Plunkett, G.W. Rusden, and W. Wilkins was imprinted upon the State’s educational administration evolved during the nineteen years of the National Board’s existence. The administration was not perfect, but from the chaos of 1848 such dedicated men created a system which laid the foundation of our modern system of education in New South Wales.

It could even be asserted that not only New South Wales but Victoria as well benefited by their work as the new Colony took from the parent much that Plunkett and his coadjutors contributed to education in New South Wales.

The most unusual feature of Plunkett’s advocacy of the National System of education was the fact that from its very inception the System was viewed unfavourably by the leaders of his own religious denomination. As early as 1851 it was judged

by the *Freeman's Journal* as a System that would lead to 'religious indifference' and that its basis was a lack of belief of any kind.\(^1\) This kind of criticism never seemed to perturb Plunkett who continued to foster the System with all his energies. At the same time he also believed that alongside the National System the Denominational one should be allowed to continue and indeed be given every help to do so. It was only when the course of events made it clear that the Denominational System was destined to find itself bereft of public funds that Plunkett gradually began to change his mind.\(^2\) This was strengthened by the change in Irish attitudes to non-denominational systems of education initiated under Cullen, archbishop of Dublin, and by the support given to those views by Cullen's proteges, James Murray and others in New South Wales.

In the case of Polding it was perfectly clear by 1859 that he rejected the National System and his stand was reiterated by the four Catholic bishops when they met in Melbourne in 1862. The bishops condemned in forthright language the National System - 'a manifest misnomer' which they judged 'not only defective' but also 'corrupting and dissipating'. They then called for a determined effort on the part of Catholic parents because 'we must have for our children, Catholic schools, Catholic teachers, and, as fast as we can supply them, Catholic books'.\(^3\) Thus at least several years before the Public Schools Act of 1866 it was evident that the Catholics were determined to uphold their own system of education. It was only a question of how far they would go and to what extent they would be supported by the State. With this stand Plunkett was always in perfect agreement as it had never been his desire to have one, all embracing system of education. It was only when he realized that a new system of

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2. See E.J. Bragget, op. cit., passim.
Public education would deprive Catholics of assistance in setting up schools of their own choice that he turned back on his steps. He was always committed to the proposition that religious bodies ought to have the right to set up schools and receive aid through the aegis of the Denominational School Board. He failed to realize that inherent in this system were the seeds of failure and that ultimately public opinion would force astute and determined politicians like Parkes to create one, over-riding system for education.

When the inevitable Bill 'to make better provision for Public Education' was finally introduced by Parkes into the Assembly on 5 September 1866 there was little that Plunkett or anyone else could do to prevent its passage through both houses. Plunkett studied Parkes' speeches on the second reading and made careful annotations on the text with 'Totally wrong!', 'Bosh' and exclamation marks studding the pages. The old liberal still came through when alongside Parkes' argument that children were being forcibly taken out of the National Schools, not by their parents but by 'a power which I think ought not be allowed to interfere' he noted in the margin 'A proper subject for Enquiry'.

In his view the system he had worked for in his early years in the Colony, by which education should be the responsibility of two boards, was still desirable. It was too late to secure that, so Plunkett took his ultimate stand on the question of an authority in which he had never ceased to believe. It was not a 'full and weighty recantation' but a reaffirmation of a long held belief when Plunkett said in the Council,

'Every Catholic layman, believing the pastors of the Church to have a divinely constituted authority, not derived either from the congregation or the state, cheerfully allows their right to teach all revealed doctrines, and to prevent the propagation of error'.

1. Public Education Speeches of the Hon. Henry Parkes, Sydney 1866. The pamphlet has Plunkett's personal notes throughout, Plunkett papers.

If 1866 saw the passing of Plunkett's ideal system of education the tribute that had been paid to him by Rusden in 1853 remained valid, then as now. Rusden gratefully testified that 'to yourself and your several coadjutors, the Australian Colonies are deeply indebted for their present prospects of sound educational institutions'. Indeed that the question of state aid to education still bedevils Australian society over a century later is some indication that the weighty aspects of the problem that preyed on Plunkett's mind admitted of no quick or easy solution.

Despite his gradual departure from the public stage Plunkett made three other appearances between 1861 and 1865. The first was in October 1863 when he became Vice-President of the Executive Council, a position he retained until February 1865. The day had long passed by 1863 when the Executive Council was a deliberative body but through it the Governor was still able to 'comment in detail on the general policy and the precise form of the measures that ministries proposed to submit to the legislatures'. Yet on two occasions the Executive Council contained members holding the post of Vice-President who were in that position precisely as representatives of the government. The two in question were Thomson and Plunkett, some recognition in both cases that the men upon whom the Colony depended in its formative years before responsible government were regarded still as valuable representatives before the Governor. In Plunkett's case the fact that Martin was Premier at the time caused some confusion as it was thought that he would never have served a man with whom he had differed so profoundly in earlier years. But the explanation given by Therry is probably true, and it serves

1. See dedication to Plunkett of G.W. Rusden, National Education, Melbourne 1853.
2. See P. Loveday, op. cit., p. 394.
to indicate that as time went on even Plunkett was able to learn the lesson of using power for higher ends. Therry wrote, 'Plunkett's joining Martin certainly constitutes a strange alliance. I can only account for it on the presumption that it may assist him in his advocacy of the State aid question, to which Plunkett is devoted and Martin favourable'. In the event his term in the Executive Council, as also in Martin's cabinet, proved ineffective, if indeed that had been his motive in joining it.

In April 1865 Plunkett again assumed a role that he had not undertaken since he visited Norfolk Island thirty years before. During the Criminal Sittings of the Maitland Circuit Court Judge Milford became ill and Plunkett took his place on the Bench. It was the only occasion on which the old prosecutor of so many thousands was called upon himself to dispense justice on the Australian mainland. He did it with mercy tempered by the fact that he had given wholehearted support to Murray in his attempts to abolish capital punishment in the Colony. In the event he was not called upon to pronounce a death sentence as those who were so accused were convicted only of manslaughter. One woman, Sarah Lane Hawkins, was charged with murder and found guilty of concealing a birth. Plunkett awarded her twelve months in Maitland Gaol. His largest sentence, a touch of the puritan coming through, was three years hard labour to Charles Herring for obtaining money by false pretences. Ironically it was Cowper who had the last word on Plunkett as a judge. He had taken over from Martin as premier in January 1865 and in a communication to Stephen he lamented the fact that Stephen had authorised the payment of £18 to Plunkett for his services as judge. Cowper sanctioned the payment but did not admit the right

1. Therry to James Macarthur, 12 January 1864, Macarthur papers, vol. 34, pp.291-7. ML
'of the Judges to appropriate any sum to particular individuals on Circuit'. Greater irony is added by the fact that at that time Plunkett was rendering Cowper an even larger service by taking office as his Attorney-General.

It had never been an easy task for a ministry to find a man fitted and capable to assume the office of Attorney-General under responsible government. Besides the problems inherent in the office itself, given that the Attorney-General was responsible for the administration of justice, advising the ministry on legal matters, acting as prosecutor and as a grand jury, it must also be remembered that men as eminent in their profession as suitable Attorney-Generals were likely to be, had also large professional practices. Plunkett however, by 1865, had not succeeded in building up a wide practice and he possessed the background, experience, integrity and reputation that would make him a desirable Attorney-General in any ministry. The occasion arose when Cowper found it impossible to induce any leading member of the bar to accept the office. Young gave another possible reason for their refusal when he said that they were all 'opposed to the policy of the liberal party'.

Plunkett gave James Macarthur his version of what happened. He had met Young in Macquarie Street, the only likely place for the two to meet if it is correct that the Plunketts did not visit at Government House. Young asked Plunkett what could be done to obtain an Attorney-General and Plunkett suggested Manning as

3. Therry to James Macarthur, 10 August 1864. Macarthur papers, vol. 34, pp. 317-20 ML. Therry heard from someone in Sydney, other than Plunkett, about the Plunkett's reluctance to visit. His informant said 'several families...are much displeased with both their Excellencies, the lady being, it seems, by far the greater Excellency of the two. Her Queen like airs have amused some and annoyed others'.

the most suitable choice. The next day Young asked him to call at Government House where he explained that Manning had refused 'solely on the grounds of ill health', and he asked Plunkett to take the position 'and by so doing it would confer a favor on him as Governor, and be doing a service to the country'. Plunkett consented after seeing Cowper 'with whom I have been on good terms for the last two years'. Plunkett was anxious to clarify his situation vis-a-vis Cowper so 'Tho' I had something to forgive, I did so without any trace of vindictiveness but until the Govr. thus pushed me I had no more notion of ever acting with Cowper as Atty. Gnrl. or in any other way than I had of being Archbishop of Sydney'. Thus he accepted the nomination 'for the honor of the Bar, and for the credit of the country...until a younger and more suitable person [could] be found to take it'.

In the event Cowper's ministry was short-lived and its place was taken by a Parkes-Martin coalition in January 1866. At the time Plunkett made his last attempt as an elder statesman to bring about a form of coalition that he thought 'so essential for the country' but he found it a hopeless task. It illustrates the almost quixotic mentality of the old liberal who believed still in the perfectibility of human nature and the ability of men to rise above the pettiness of their own vested interests. It perhaps also indicates that Plunkett was unable to understand that factions went deeper than personalities, and that underlying it all were differing concepts of how to shape a future society.

1. Plunkett to James Macarthur, 2 September 1865, Macarthur papers, vol. 30, pp.151-3. ML. Young verified these statements in Young to Cardwell, 21 September 1865, C.O.201/335, National Library microfilm. The press generally approved of the manoeuvre, see SMH, 29 August 1865, Empire, 26 August 1865, Plunkett's appointment dated from 25 August 1865, see W. Owen to Plunkett, 25 August 1865, Letters from Colonial Secretary to Judicial Department, vol.29, NSW A 4/3764.

Cowper, despite his differences with him, was closer to Plunkett than either of them was to Henry Parkes. Both of them, in their own ways, looked to a past form of society in which the pillars of state and church bolstered each other so that society was stabilised on the basis of authority, good order, the British way of life and gradual, but directed, progress. Henry Parkes, with others, thought differently and his way was to be that of the future. In his letter to James Macarthur Plunkett expressed his disillusionment and his fear for that future,

I felt it almost hopeless to bring about the coalition I thought so essential for the Country. I did what I could and I regret that I did not succeed. If Cowper could have joined it would be all right. Instead of the battles between the Ins and the Outs with all their acrimonious accompaniments the business of the country would be attended to and we would make some true and unmistakeable progress. As it is I have no great hope of improvement.

He hoped that he would be able to continue his own work as Chairman of a Committee engaged in the consolidation of the Criminal Law, after which he intended to join his wife in Melbourne or Van Diemen's Land, 'either of which agree with her better than Sydney'. His last words were almost a valedictum to public affairs, 'P.S. The new Ministry was sworn in today. I delivered up my office with mutual satisfaction to my successors and myself'.

In the next two years Plunkett, true to his word and the love he bore his wife, spent the greater part of his time in Melbourne. It was his personal tragedy that throughout their life together his wife's health was a constant preoccupation to him and he deemed no sacrifice too high if it comforted her. From

1. Ibid.
2. Ibid.
3. In 1863 Mrs Plunkett had 'a return of her [unspecified] sad malady'; in that same year she 'met with a severe accident [when] her carriage hit a Railway Cart and she was thrown out', see Therry to James Macarthur, 25 March, 19 October 1863, Macarthur papers, vol.3^n, pp.260-3, ML. In 1865 she returned to live with Plunkett after 5 months in Van Diemen's Land and 3 months in Melbourne. Plunkett was pleased to tell
Melbourne he returned frequently to sit in the Legislative Council, deploring its 'discreditable' behaviour when no quorum could be gained for important bills, especially when he was their initiator.¹ Honours passed him by although his appointment as vice-chancellor of Sydney University in 1865 pleased him, and he preserved in his papers his 'ad eundem' degree of Melbourne University, together with a notification that a section of the Western District of Victoria was named after him.² Money had never really concerned him and his last bank book bears testimony to the fact that, though he lived within his means, the residue at the end was little enough and a great deal was given away to charity.³

In April 1869 the Catholic bishops of Australia met in Provincial Council at Melbourne. It was fitting that they chose Plunkett as the lay secretary on this occasion; it was fitting, too, that Plunkett's last public work should have been for the Church to which his loyalty had never lessened. So few remained in Church or State of those with whom he had worked through the years, but he needed no human testimony now to grant him its

James Macarthur that she was in 'renovated health', Plunkett to James Macarthur, 2 September 1865, Macarthur papers, vol. 30, pp.151-3, ML. It is worth noting that she outlived Plunkett by nearly thirty years.

1. Plunkett to Parkes, 8 November 1867, Autograph letters to Parkes, pp.42-4, ML. Plunkett's Bill was on Capital Punishment and he was returning some books Parkes had lent him on the subject. At this time the two men were on very friendly terms. See Plunkett to Parkes, n.d., but probably 1868, in Autograph letters, pp.106-7. ML.

2. He was vice-chancellor until his death in 1869, and Deas Thomson said he 'ever took an active part in the management of the University', see Thomson's speech at Sydney University 18 June 1869 in Thomson's papers, vol.4, p.829. ML. For the Melbourne degree and the details of the land see Plunkett papers.

3. The final cash balance was £87.14.2. The Hebrew School, St Vincent's Hospital and the Good Shepherd Convent were amongst his charities. See Bank Book 1869 in Plunkett papers.
laurels. If any were needed he, like the ancients, could have said no more than 'Look around you', for in the society that he had helped to build, in the freedom that he had cherished and won for others, in the respect that he gave every man, and was now denied by none, he had his monument. He died a few weeks later on 9 May 1869 and his remains were brought back to rest with McEncroe in Sydney. Eight centuries earlier, when Gregory VII lay dying in exile, he said of himself, 'I have loved justice and hated iniquity'. One wonders whether John West had those words in mind, or was it mere coincidence, when he wrote a week after Plunkett's death, 'If one characteristic more than another was marked in his administration it was an intense hatred of oppression and love of justice'.¹ It was a fitting epitaph to one who, in the annals of this country, must assuredly be numbered amongst the architects of its freedom.

¹. SMH, 15 May 1869.
ATTORNEY-GENERAL PLUNKETT TO SIR GEORGE GIPPS

Attorney-General's Office, 23 October, 1844.

Sir,

It is with considerable astonishment I learned that Mr. William a'Beckett addressed a letter to your Excellency, for the purpose of being laid before the Executive Council, on the subject of my recent application for the office of Chief Justice and in opposition to that application. Some days since I requested your Excellency would allow me to peruse that letter, which you were pleased to do. As I am now aware of its contents, I think I am called on to notice certain parts of it, from which it appears that that Gentleman has put a construction on some private and confidential conversations of mine, which I cannot acknowledge they admit of, and which I certainly did not intend they should be open to.

Among other matters he states in substance "that I gave pledges and assurances to him that I would not under any circumstances take a Seat on the Bench, but that, even if I were appointed by Her Majesty, I would resign in his favor"; and on this assumption he founded his own claim to a seat on the Bench and justified his opposition to mine.

Had Mr. a'Beckett intimated to me in any way that he had such an impression on his mind, I could very easily have removed it by reminding him of what really did pass between us on such a subject; and, as the conversations he alludes to were strictly private and in the confidence of friendly intercourse, I have the greater reason to complain that he did not in some shape give me such intimation, before he wrote his letter. He cannot excuse himself by saying he had no opportunity of doing so, for, as soon as I determined to put in my claim for the office of Chief Justice, I immediately made my intention known to him. I apprized
him of it several days before I made my formal application to your Excellency. I thought it but fair and candid towards him as my Colleague in Office and one whom I regarded as a friend. I talked over the matter with him for a considerable time, and he did not utter a Syllable that led me to suppose the impressions, already alluded to respecting any pledges or assurances from me, were on his mind, or that he had any the slightest ground or intention to make opposition to my claim. The only conversation that ever occurred between Mr. a'Beckett and me, which could in any way be tortured into a hint that I would resign in his favor or any one's favor, took place on my first hearing of Mr. Dickinson's appointment. The conversation itself (it will be seen) bears internal Evidence of its being confidential, and it is painful to me now to feel myself compelled to mention it as follows:

With reference to Mr. Dickinson's appointment, "I expressed to him my feelings of disappointment at not being offered the vacant seat by the Secretary of State; that I considered it a reflection on me that it was not offered for my acceptance; that I could only attribute it to the circumstance of my being a Roman Catholic and, though it was unjust towards me, its operation was also prejudicial to him and the rest of the Bar; that I would have been satisfied if I had the refusal of it; and that my personal ambition to get on the Bench was not very great; and that, as I feared I was a Stumbling block to the promotion which ought to be expected to be left to the Bar, in consequence of my having precedence by Rank, Seniority and length of service, that I would even resign my office in this Colony in exchange for one elsewhere rather than be the innocent cause of injury to other members of the Bar."

This was the substance of all my conversations with Mr. a'Beckett on the subject of the vacancy on the Bench, and I deny most positively having ever intended to go farther "in making Pledges or giving assurances" than can be fairly deduced from this summary of our conversation.
As to the circumstances attending Mr. a'Beckett's going on the Bench, I perceive by his letter that his recollection is not quite accurate. It was on the 11th day of July (Four days before the commencement of the Civil Term), I first informed him of your Excellency's wish that one of the Law Officers should act as Judge in the emergency at that time requiring it, and, as no other competent person could be expected to do so for only a single term, that I conceded The Governor had a right to command the services of one of us, and that it would devolve on him to accept it, as it would lead to much inconvenience if I were to go on the Bench, because my seat in the Legislative Council would be thereby vacated and all the Criminal prosecutions then going on would be deranged.

I would beg leave here to observe that Mr. a'Beckett is mistaken in the assertion "that, when he consented to go on the Bench, Mr. Dickinson's appointment was not known." Private letters were received by Sir James Dowling from his son mentioning the appointment, and it was even announced in the Sydney Herald so far back as June 25th. The following Paragraph appeared in the Paper of that date: -

"The new Judge

"Private letters stated that Mr. John Nodos Dickinson of the English Bar had been appointed to the Supreme Court of New South Wales. The learned Gentleman was to leave England by the Packet on May 1st, and may consequently be expected here in September."

I have a distinct recollection also that he and I were under the impression, derived from the private intelligence received, that Mr. Dickinson would in all probability arrive even before the ensuing term would be ended.

At the time Mr. a'Beckett was thus offered the temporary Seat, Sir James Dowling had not applied for leave of absence at all, and I believe did not at that time intend to do so; and, though he was laboring under an attack of illness, no one imagined
it was of a very serious nature. Indeed I considered at that
time he was likely to live as long as myself, so that the events
which have since happened, instead of being matters of "reasonable
calculation," as Mr. a'Beckett states, could only have operated
on a mind gifted with prophetic power.

Among the grounds of opposition which Mr. a'Beckett Stated
to my claim, he mentions "that I did not tell him I would apply
for the Chief Justiceship in the event of Sir James Dowling's
death." It is sufficient for me to say that I did not anticipate
such an event, and it would be highly indecent of me to speak of
it, even if it were probable.

I am unwilling to obtrude on your Excellency the relative
position of Mr. a'Beckett and myself in respect to each other.
I will only say that I first brought him under the notice of your
Excellency recommending his appointment as Solicitor General,
and I carried out that original recommendation by saying and doing
all I could in his favor, while I was in England, and I know he
had no friend to speak for him at the Colonial Office but myself.
He publicly acknowledged this at a complimentary dinner with
which I was honored by my brethren of the Bar on my return to the
Colony.

The letter in question was written behind my back, and at
a time I least expected it; it was circulated to do me injury and
I had no knowledge of it until it succeeded in its object. I
shall say no more; but I solemnly declare that, if it were to
procure me the Office of Lord High Chancellor of England, I would
not use such means to accomplish it, as Mr. a'Beckett has descend-
ed to, in order to obtain the Seat he now fills. I have, &c.

JOHN H. PLUNKETT, Attorney-General.

P.S. - If Mr. a'Beckett's letter has been forwarded by Your
Excellency to Lord Stanley, I request this letter may also be
transmitted by the first opportunity.

Source: HRA, 1, XXIV, pp.48-50.
APPENDIX II

NATIONAL EDUCATION BOARD
(Removal of Mr. Plunkett from)

Ordered by the Legislative Assembly to be printed, 25 March 1858.

No. I

The Chairman of the National School Board to The
Principal Secretary

National Education Office, Sydney,
18th December, 1857.

Sir,

On behalf of the Board of National Education, incorporated
by Act of Council, 11 Vict., No. 48, I have the honour to transmit
herewith some additional Rules made by them, under the power
conferred by that Act, and to request that the same may be publish-
ed in the "Government Gazette", and laid before the Legislature,
in manner thereby prescribed.

2. It will be perceived that these Rules have reference
to the proposed extension of aid to Schools which, in their
origin, may be other than National, and of which the property may
not be vested in the Board, upon condition, nevertheless, that
instruction of the same efficient and unsectarian character as
that required in Schools purely National be therein given, without
distinction of sects, during an adequate number of hours in each
day (exclusive of Sunday), and that any sectarian religious
exercises or instruction be given either before or after the
ordinary school business, and to those children only whose parents
approve of their receiving it.

3. The Board has been induced to initiate these Regulat-
ions partly in compliance with applications of a pressing nature
from conductors of Schools excluded from assistance by the
previous Rules, but willing to accept aid on the terms now
proposed; partly from a public avowal by those promoting Denomin-
national Schools of a principle quite in accordance with the system proposed, although wanting, in their hands, the sanction of uniform and binding regulation; but chiefly by finding in the Reports of the Commissioners for National Education in Ireland evidence of the extensive prevalence and great success of a similar plan there in operation.

4. It is at the same time evident, that, in order to enable this Board effectually to carry out their proposal, it will be requisite that additional funds be placed at their disposal by the Legislature. The application of the new Rules will open out a new field of operations, and of consequent expenditure, while their existing means are barely adequate to the building and maintenance of Schools strictly their own.

5. It will, however, be manifest, that exactly in the proportion in which non-vested Schools may conform to these new Rules, and thus obtain aid through this Board, the requirements of those who seek aid in a character avowedly Denominational will be reduced; and, as our plan merely substitutes positive regulation for individual caprice, in a matter affecting the public expenditure, and really exacts nothing more from Denominational Schools than the more enlightened and liberal of their conductors already profess to concede in practice, we venture to hope that the operation of these new Rules will tend to reconcile the conflicting wants and difficulties which have hitherto occasioned so large an expenditure of the public money in maintaining two systems, and pave the way for a simpler organization, comprising the advantages of both.

I have, etc., JOHN H. PLUNKETT, Chairman.
Sir,

I am directed by the Colonial Secretary to acknowledge the receipt of your letter of the 18th ultimo, forwarding, with a request that they may be published in the "Government Gazette", and laid before the Legislature, certain additional Rules framed by your Board, having reference to a proposed extension of aid to Schools which, in their origin, may be other than National, and of which the property may not be vested in the Board, and to observe, that as it is stated in the fourth paragraph of your communication, that in order to enable the Board effectually to carry out their views, it will be requisite that additional funds should be placed at their disposal, it seems to the Colonial Secretary desirable that the Rules alluded to should not be published by the Government until an opinion shall have been elicited from Parliament whether or not the class of Schools alluded to, aided as they are proposed to be from the Public Revenue, would receive the approval of the Legislature.

2. The Colonial Secretary desires me to add, that the Rules transmitted in your letter do not appear to the Government to be of the character contemplated by the third clause of the Act incorporating the Board of Commissioners of National Education.

I have, etc. W. ELYARD.

No. 3

The Chairman of the National School Board to The Principal Secretary

National Education Office, Sydney, 4th January, 1858.

Sir,

Together with our letter of the 18th December, 1857, I
transmitted to you certain Rules framed by the Board of National Education, under authority of the Act of Council, 11th Victoria, No. 48, with a view to a compliance with the law as thereby enacted, requiring that such Rules shall, within one month from the date thereof, be published in the "Government Gazette".

As these Rules have not hitherto appeared in the "Government Gazette", I have the honour to recall your attention to the subject; and if you should, for any reason unknown to the Board, consider that they have been mistaken in regarding you as the proper channel for carrying out their intention to obey the law, we have the honour to request you to direct the printer of the "Gazette" to obey such instructions as the Board may give to him in this matter.

I have, etc., J.H. PLUNKETT
Chairman of the Board of National Education.

No. 4

The Under Secretary to The Chairman of the National School Board
Colonial Secretary's Office, Sydney,
5th January, 1858.

Sir,

In acknowledging the receipt of your letter of the 4th instant, I am directed by the Colonial Secretary to refer you to my communication of yesterday's date, on the subject of the Regulations transmitted in your letter of the 18th ultimo, having reference to a proposed extension of aid to Schools which, in their origin, may be other than National, and of which the property may not be vested in the Board.

2. The copy of the Rules which appear to have been sent by the Board to the Government printer will be inserted by him in the "Gazette", as a publication by the Commissioners.

I have, etc., W. ELYARD
The Chairman of the National School

to The Colonial Secretary

National Education Office, Sydney,
5th January, 1858.

Sir,

In acknowledging the receipt of your letter of the 4th instant, in reply to mine of the 18th ultimo, I have the honour to observe that the Board of National Education do not perceive in its contents anything which could justify them in withholding the request contained in my letter to you of the same (yesterday's) date, and which had been despatched before receipt of that now under reply.

That request simply consists of an intimation of the wish of the Board to obey the directions of the Act by which they have been incorporated, "by publishing in the 'Government Gazette' within one month," Rules framed by them under the powers confided to them, and considering that those powers are vested in them for the express purpose of carrying out "Lord Stanley's System of Education," they are at a loss to imagine on what ground the doubt of their authority, conveyed in the last paragraph of your letter, can rest, inasmuch as the new Rules are in exact accordance with the system of Lord Stanley, as administered under the sanction of the British Legislature.

The members of the Board are perfectly aware of their being amenable to Parliament in this matter, as well as dependent upon its continued bounty for funds to continue their labours for the public welfare, either under their present or any improved Regulations; but, in the meantime, it is impossible they can be guided by the individual opinion of the Colonial Secretary in the exercise of their duty, whether in framing those Rules or in giving them publicity (as far as they have the power), in the mode required by the Act.
If the publication in the "Government Gazette" be withheld, this breach of the law will not rest with them.

In order to expedite the publication of the Rules "within a month" (which will expire on the 14th instant), I have sent a copy to the printer of the "Government Gazette", and the members of the Board expect that no obstacle will be placed in the way of their insertion.

I have, etc., JOHN H. PLUNKETT, Chairman.

No. 6

The Under Secretary to The Chairman of the National Education Board.

Colonial Secretary's Office, Sydney, 7th January, 1858.

Sir,

I am directed by the Colonial Secretary to inform you, in reply to your letter of the 5th instant, that it is the deliberate opinion of the Government that the Commissioners for National Education have no authority, under their Act of Incorporation, to make such Rules and Regulations as those transmitted in your letter of the 18th ultimo, and that, in this respect, they have exceeded their power.

2. The Government, I am instructed to add, desires it to be distinctly understood, that it is in no way pledged to provide funds for the class of Schools proposed to be established, without the express sanction of Parliament, to which the subject will be submitted as early as possible after its assembling.

3. The copy of the Regulations alluded to in the second paragraph of my letter of the 5th instant, forwarded to the Government printer by the Board, has, you will observe, been inserted in the "Gazette" as a publication by the Commissioners.

I have, etc., W. ELYARD
No. 7

The Chairman of the National School Board

to The Under Secretary

National Education Office, Sydney,
8th January, 1858.

Sir,

I have the honour to acknowledge the receipt of your letter of yesterday's date, stating that you are directed by the Colonial Secretary to inform me, in reply to my letter of the 5th instant, that it is the deliberate opinion of the Government that the Commissioners for National Education have no authority under their Act of Incorporation, to make such Rules and Regulations as those transmitted in their letter of the 18th ultimo; and that, in this respect, they have exceeded their powers; and further stating that the Government desires it to be distinctly understood, that it is in no way pledged to provide funds for the class of schools proposed to be established, without the express sanction of Parliament, to which the subject will be submitted as early as possible after its assembling.

2. In reply, I have the honour to state, that I am in doubt as to what individuals are included in the word "Government," as it is generally understood the office of Secretary for Lands and Public Works is still vacant, and the office of Finance Minister was vacant until Monday last, and I have been informed that the Attorney-General has been out of town some days, preparing for his election; therefore, under such circumstances, I may be pardoned for not attaching much weight to the "deliberate opinion of the Government" on the Rules in question, more particularly when I recollect the hostility which the present Colonial Secretary has uniformly evinced towards the system of education which the Legislature has entrusted to the Board.

3. The names of the members of the National Board are appended to the new Rules; and it is scarcely necessary for me to say, that each and all of those members entertain an equally
"deliberate opinion" as to their powers to frame those Rules, as well as the expediency of promulgating them; and they do not think they lay themselves open to any charge of vanity in asserting for their conjoint opinion an equal weight with that which you have announced.

4. I have already intimated, in my letter of the 5th instant, "that the members of the Board are perfectly aware of their being amenable to Parliament in this matter, as well as dependent on its continued bounty for funds to continue their labours for the public welfare, either under their present or any improved Regulations". They are therefore quite prepared, and perfectly willing to abide by the decision of the new Parliament, in the full confidence that the representatives of the country will not take the same narrow-minded view of so all-important a subject as that which you assert is taken by the present Government.

I have, etc.,JOHN H. PLUNKETT, Chairman.

No. 8

The Colonial Secretary to The Hon. John Hubert Plunkett, Esq.

Colonial Secretary's Office, Sydney,
5th February, 1858.

Sir,

I have the honour to inform you that, upon the receipt of your letter of the 8th ultimo, I considered it my duty to bring it under the special consideration of the Government, and to draw attention to its contents, and to the fact of its having been published by you in the newspapers almost immediately after the time that it was despatched to my office. The whole of the correspondence, of which that letter forms a part, having, in consequence, been brought before the Governor-General and Executive Council, I have now to acquaint you with the decision
which has been arrived at by the Government in reference to the course which you have adopted in this matter.

2. Upon a perusal of the correspondence, the Council regret to observe that you should have not only thought fit to address the Chief Secretary of the Government in terms so highly improper as those in which your letters of the 5th and 8th of last month are couched, but you should also have been induced to resort to the irregular and unseemly step of publishing your letters in one of the public newspapers while the correspondence was yet going on with the Government.

3. The course thus adopted by you the Council cannot but consider as unjustifiable in every respect, and after a calm and deliberate consideration of all the bearings of the case, they are reluctantly forced to the conclusion that it is the duty of the Government, under the circumstances, to dispense with your further services as a Commissioner of the Board of National Education; and, with the Council, His Excellency the Governor-General, by virtue of the powers conferred by the 2nd section of the Act incorporating the Commissioners, has removed you from the said office accordingly.

I have, etc., CHARLES COWPER

No. 9

J.H. Plunkett, Esq., to The Colonial Secretary

Macquarie Street,
6th February, 1858.

Sir,

I have the honour to acknowledge the receipt of your letter of yesterday's date, intimating to me that, for the reasons therein alleged, His Excellency the Governor-General, with the advice of the Executive Council, by virtue of the powers conferred by the second section of the Act incorporating the Board of
National Education, has removed me from the office of Commissioner.

I shall abstain from offering any comment on the arbitrary and despotic character of this proceeding, but as I have not either been called on to explain, or afforded the opportunity of defending the conduct which has induced the Government to adopt this course towards me, I must beg leave to submit that the decision conveyed by your letter is premature. I am prepared to defend that conduct, and also to maintain what appears to me a valid objection to the jurisdiction of the Executive Council as at present constituted and summoned.

In the well-known case of Mr. Justice Willis, his removal from office was decided by the Privy Council to have been premature and illegal, and I submit that the present decision will be found, on consideration, to be equally premature, and far less justifiable.

I have held the office in question (that of Chairman of the Board of National Education) since the first formation of the Board in January, 1848. Although a mere honorary office, I have discharged its duties as diligently as if I was in receipt of a salary for their performance.

I valued the office as a means of usefulness to the present and to future generations; and I do respectfully, but firmly, protest against my removal from it by a fraction of the Executive Council, the majority of that body (as I have reason to believe) not having been summoned, or not being present to take part in its deliberations and decision.

I have, etc., JOHN H. PLUNKETT

No. 10

J.H. Plunkett, Esq., to The Honourable The Chief Secretary

Macquarie Street,
6th February, 1858.

Sir,

I beg leave to resign, and do hereby resign, the office
of Justice of the Peace for New South Wales.

I also resign the office (if so it can be called) as one of the Management of the Roman Catholic Orphan School, Parramatta.

These are the only offices I can recollect that I hold at the pleasure of the Government; but if there are any others which have escaped my recollection, held on the same tenure, it is my desire to relinquish them all, as "the reign of terror has commenced".

I have, etc., J. H. PLUNKETT

No. 11

J. H. Plunkett, Esq., to His Excellency
Sir W. T. Denison

Sir,

Your Excellency was pleased, about twelve months ago, to confer on me, under the authority vested by the Constitution Act in the Governor-General, the high office of President of the Legislative Council.

It has now been intimated to me by a letter from the Chief Secretary of the Government, that your Excellency has been pleased, by the advice of your Executive Council, to remove me from another office which I have held for a much longer period, as member of the Board of National Education. The circumstances are such as to impress me with the conviction that I cannot, consistently with self respect or public advantage, hold the office of President of the Council; for I cannot be free from the apprehension that, on grounds as insufficient, and, in my opinion, unjustifiable, I may be removed from the office of President, by the same authority that has sanctioned my removal from the office of Chairman of the Board of National Education.

The very peculiar constitution of this Government renders it impossible for me to form a satisfactory opinion how far your
Excellency, under whom, as Governor-General, I hold the Presidency of the Legislative Council, is identified with the act of the Executive above referred to; I have, therefore, no alternative but to tender my resignation of the office of President, which I do, accordingly.

I have, etc., J. H. PLUNKETT.

No. 12

J. H. Plunkett, Esq., to His Excellency
Sir W. T. Denison

Macquarie Street,
6th February, 1858.

Sir,
I hereby resign my seat in the Legislative Council of New South Wales.

I have, etc., J. H. PLUNKETT.

No. 13

Alfred Denison, Esq., to J.H. Plunkett, Esq.

Government House,
6th February, 1858.

Sir,
I am directed by His Excellency the Governor-General to acknowledge the receipt of your letter of this day's date, tendering the resignation of your office of President of the Legislative Council. His Excellency cannot but express his regret that you should have felt called upon to resign this high office, as it appears to him that the grounds stated in your letter, namely, your removal by the Executive from your seat as a member of the Board of National Education, are not sufficient to justify the apprehensions you appear to entertain. As, however you say that you cannot, consistently with self-respect or
public advantage, retain your office of President of the Legis-
lative Council, His Excellency has no alternative but to accept
your resignation, though he does so with extreme regret.

I have, etc., ALFRED DENISON.

Source: Votes and Proceedings of the Legislative Assembly
BIBLIOGRAPHY
A. CONTEMPORARY SOURCES

Official
Non-official
  (i) Manuscripts
  (ii) Books and Pamphlets
  (iii) Newspapers

B. SECONDARY SOURCES

  (i) Books and Pamphlets
  (ii) Theses

C. ARTICLES
A. CONTEMPORARY SOURCES

Official

Alleged Fenian conspiracy re attempted assassination of
Duke of Edinburgh 1867-8. 4/768.1 NSW A.

Aborigines - Reports from Districts 1842-52. 4/7153. NSW A.

Administrative and domestic papers of the Colonial Secretary
1826-35, 1837, 1841, 1861. 2/1844. NSW A

Attorney-General’s Department: NSW A

(1) Diary of Court Cases November 1836, vol.1, 4/467.2.
(2) Deposition Books 1825-35, 4 vols., 4/467.3, 4/467.6
(3) Opinions of the Attorney-General 1836-38, 4/473.
(4) Copies of Letters sent to the Colonial Secretary
(5) Draft copies of letters sent to the Colonial Secretary
1834-35, 1 vol. 4/466.
(6) Copies of Letters sent to Magistrates 1839-49,
(7) Registers of letters received 1857-65, 4/659.
(8) Commutation of Death Sentences 1848-75. 7702.
(9) Granting of leave of absence to Supreme Court
Judges 1848-75. part 7701.
(10) Letters from the Attorney-General to the Colonial
Secretary 1847-50. 7/2678.
(11) Papers transferred from the Attorney-General's
Department, 7/2697.
(12) Copies of letters to the Judicial establishments
1826-68, 29 vols., 4/3736-64.

Attorney-General re Bill for quieting and simplifying Titles
to Land, 1851. 4/7152. NSW A.

Bill to annul the marriage of Patrick Meehan and Emmiline
Emma Blake, a minor. 1852-54. 4/714.4. NSW A.

Bill to Confer Constitution on N.S.W., 1855. 4/714.3. NSW A.

Board of National Education: NSW A

(1) Rough Minute Books 1849-66. 4 vols., Vol.1
contains Letters to Private persons. Vol.2 has
Letters of the Board to the Colonial Secretary
1848. 1/327-30.
(2) Fair Minute Books 1848-58. 1/331.
(3) Index to same. 1/332.
(4) Press copies of Letters sent by the Secretary of the Board 1850-65. 9 vols. 1/336-44.
(5) Secretary's Memoranda to William Wilkins 1855-57. 1/345.
(6) Letters received from the Solicitor to the Board 1849-51. 1/369.
(7) Letters received from Colonial Secretary and Government Departments 1848-51. 4 vols. 1/377-80.
(8) Miscellaneous letters received dealing with establishment, maintainence and inspection of schools 1848-66. 63 vols. 1/381-443.

1857 Reports of National and Denominational School Boards. 4/722.2.
Copies of Letters to the National School Board 1848-66. 4/3702.
Miscellaneous Matters National School Board 1849-54, 1858. 4/7176.
Removal from Office of the Chairman of the National School Board (J.H. Plunkett) 1858. 4/7176.1.
National Schools Board Miscellaneous Matters 1849-55. 4/7177.
N.S.W. Civil Establishments 1851-56. Return of the National Schools. 4/7379.


Case of Dr. Frederick Beer convicted of attempting to procure an abortion. 1856-75. 4/798.2. NSWA.
Census arrangements 1846. 4/2715.3. NSWA.
Colonial Secretary In-letters 1835. 4/2266.4. NSWA.
Colonial Secretary In-letters 1836. 4/2266.1. NSWA.
Colonial Secretary Index and Registers 1836-8. 2368-79, NSWA.
Colonial Secretary Index and Registers 1851, 2440-43. NSWA.
Colonial Secretary Papers re claims of Bligh's heirs 1839. 4/7013. NSWA.
Colonial Secretary re Land. 2/7951. NSWA.
Copy of Letters sent to Public Officers 1831-40. A.165, ML.
Corporal Punishments enquiry, 1833. 4/2189.1. NSWA.

Despatches from the Governor of Victoria. Enclosures to Despatches, July 1851-January 1852. A.2357. ML.

Despatches from Lieutenant Governor of Victoria - enclosures July 1851-January 1852. A.2357. ML.

Dixson Library: Archival estrays List 15, Documents 3 and 5: Letters from Plunkett to Colonial Secretary, 20 January 1835 and 6 June 1839.

In Addenda 61, Warrant of appointing Edward Deas Thomson and Plunkett as J.P's for South Australia, 24 February 1838.

In Addenda 78, Plunkett letter to R.G. Massie, 13 April 1841.

Executive Council of New South Wales 1829-70: NSWA.


Copies of Letters sent to Government Departments other than Colonial Secretary, 1849-64. 1 vol. 4/1689.

Registers of Letters sent to Government Departments 1849-58. 3 vols. 4/1680-82.

Gold Discoveries and Diggings at Bathurst and Orange 1851. 4/1146.1. NSWA.

Governor's Despatches, 1832-46, vols. 21-53. A.1210-42. ML.

Transcripts of Missing Despatches from Governor of N.S.W. 1838-46, A/1267-8.

Despatches from Governor of N.S.W. to Secretary of State 1827-44, A/1267-11 - A/1267-21.

Despatches to Governor of N.S.W. 1831-45, A/1268-96.

Hawkesbury Benevolent Society Correspondence 1850-67.A.626.ML.

Historical Records of Australia, Series 1, vol. XVI - vol. XXVI, 1831-1848.

Indian Labour, New South Wales 1842. A.2029. ML.

Judgement Book of Maitland Circuit Court 1865. 4/5763. NSWA.

Judge Willis case, Port Phillip, 1841-2. 4/988.3. NSWA.

Legislative Council Election, County of Durham 1849. 4/7148. NSWA.
Letters to the Governors of New South Wales from the Secretary of State 1847-69. Microfilm copies in the National Library, Canberra. C.O. 202/54, 56, 58, 60, 63, 66, 70, 72, 75.


Newspapers—Declarations of Printers etc., 4/1136 and 4/7143. NSWA.

Persons on early migrant ships, 1828-32. 4/4823. NSWA.

New South Wales Parliamentary Petitions. A.286. ML.


Proceedings of Executive Council re Major Mitchell 1835-38. 4/1118. NSWA.


Petitions to the King 1835-37. A. 284. ML.

Supreme Court of New South Wales: NSWA.


(2) Letters and Memorials Received, and Drafts of Letters sent by the Chief Justice and/or Judges 1831-45. 4760-61. 2 vols.

(3) Letters received by the Chief Justice and/or Judges from the Colonial Secretary 1831-42, 45, 4758-59. 2 boxés.


(5) Burton, J., Letters, Petitions and Returns received by 1834-43. 4765.

(6) Judges Notebooks:


   2/3184-3396, 2/3400-33.
   Index to notebooks 1829-44. 2 vols. 2/3397, 2/3434.
iii. Stephen, A. All jurisdictions 1839.
  3 vols. 2/6842.
Criminal 1840-56. 19 vols. 2/6999-7018.
Law Reading and notes 1827-41, 1846.
  2 vols. 2/7052-3.

Non-Official
(i) Manuscripts

A.A. Company In-Despatches, Archives, ANU.

Ancestry of John Hubert Plunkett, Genealogical description.
Translated by John Hubert Plunkett from the original Latin.
Archives of Sisters of Charity, Pott's Point, Sydney.

Australian Club. General Committee Minute Book 1838.
MSS 1836. ML.

G.B. Barton's papers. MSS. Q.128, Dixson Library.

Benedictine Journal 1840. SAA.

Bourke Papers. A.1736. ML.

Cowper Correspondence. A.676-8. ML.

Cowper Papers. D.60. ML.

Charles Hubert De Castella, Miscellaneous papers of
MSS (uncat.). ML.

Donaldson Ministry Letters. A.731. ML.

Dowling, James. Letters to, 1826-44. A.489. ML.

Duncan, W.A. Autobiography. A.2877. ML.

Diary A.2879. ML.

Forbes, Francis. Papers - Appointments, Correspondence.
A. 1381. ML.


Lang, Rev. J.D. Papers. A.2221-49. ML.

Longbow's Narrative of his Voyage and Travels to the United
States of Matrimony written by Himself. The date is 1832
and the dedication is to Mrs. J.H. Plunkett. B.77. ML.

Macarthur Papers. Vols. 27-41. In-letters to Sir James
Macarthur 1847-63. A.2923-37. ML.

Vol. 87. National Education and the Dismissal of J.H.Plunkett
A.2983. ML.

Family and Other Letters, 1828-88. A.4348. ML.

Manning Papers. MSS (uncat.) 246. ML.
Marsden, S. Bonwick Transcripts. Letters Box 54, Vol. 6. ML.

Martin, James. Miscellaneous papers 1833-64. A. 5328. ML.

New South Wales Orders and Proclamations 1791-1822. Manuscript given to Plunkett by Francis Forbes in 1835 and presented by him to the Library on 9 February 1863. N.S.W. Parliamentary Library.

Moore, J. Sheridan. Papers. Am. 38/1. ML.


Holograph letter from Plunkett to W. Macpherson, Sydney, 3 May 1847. Ap. 20/1. ML.

Polding, J.B. Papers and Letters. SAA.

Reddall, Rev. Thomas. Papers. A. 423. ML.

Sharpe, Rev. T. Papers. Norfolk Island 1826-41. A. 1502. ML.

Sloan family letters 1844-88. MSS 33/1. ML.

Stenhouse, N.D. Letters to. A. 101. ML.


Sutor, George. Diary 1831-40, A. 804. ML.

Memoirs. A. 3072. ML.

Thomson, E. Deas. Papers A. 1531-4. ML.


Windeyer Family Records. D. 159. ML.

McEncroe, Rev. J. Papers. SAA.

(ii) Books and Pamphlets


Acta et decreta concilii primi provinciae Australiensis MDCCCXLIV. Sydney (n.d.).

Allwood, R. Lectures on the Papal Claim to Jurisdiction. Sydney 1843.


Called Tract for the Times, New Series, No. 1. addressed to Lord John Russell M.P.

Australia. 'A Full and Particular Report of the Trial of Eleven Men for the...murder...of Twenty Eight Individuals ...Being one of the Blackest Stains that ever disgraced the pages of British History'. Copied from Sydney Gazette of 15th November 1838. Glasgow 1839.

Australian Catholic Directory, 1841, 1854, 1855, 1858, 1859. Sydney.


Bingle, John. Letter to the Right Honourable His Majesty's Principal Secretary of State for the Colonies, Sydney, 1832.


Broughton, W.G. Farewell Address, Sydney 1853.


Byrne, J.C. Twelve Years in the British Colonies from 1835 to 1847. 2 vols. London 1848.


De Castella, Hubert, Les Squatters Australiens, Paris 1861.

Demarr, James. Adventures in Australia Fifty Years Ago... during the Years 1839-1844. London 1893.


Notes of a Ten Years Residence in New South Wales. Pages extracted from Hogg's Instructor, 1849.


Harris, Alexander "An Emigrant Mechanic", *Settlers and Convicts or, Recollections of Sixteen Year's Labour in the Australian Backwoods*. London 1847.


Hogan, James F. *The Irish in Australia*. Sydney 1888.

Kenny, J. *History of the Commencement and progress of Catholicity in Australia up to the year 1840*. Sydney 1886.

Lang, Rev. J.D. *Brief Sketch of My Parliamentary Life and Times from 1 August 1843, till the Late Dissolution of Parliament*. Sydney 1870.


Harris, Alexander "An Emigrant Mechanic", *Settlers and Convicts or, Recollections of Sixteen Year's Labour in the Australian Backwoods*. London 1847.


Hogan, James F. *The Irish in Australia*. Sydney 1888.

Kenny, J. *History of the Commencement and progress of Catholicity in Australia up to the year 1840*. Sydney 1886.

Lang, Rev. J.D. *Brief Sketch of My Parliamentary Life and Times from 1 August 1843, till the Late Dissolution of Parliament*. Sydney 1870.


Harris, Alexander "An Emigrant Mechanic", *Settlers and Convicts or, Recollections of Sixteen Year's Labour in the Australian Backwoods*. London 1847.


Hogan, James F. *The Irish in Australia*. Sydney 1888.

Kenny, J. *History of the Commencement and progress of Catholicity in Australia up to the year 1840*. Sydney 1886.

*Analytical View of the Census of New South Wales for the year 1846*. Sydney 1847.


McIntyre, W. *The Heathenism of Popery, Proved and Illustrated*. Maitland 1860.


Murphy, Michael. *An Australian Magistrate*. Sydney 1840.


Pastoral Letter from Provincial Council. Sydney 1862.


On the Evidence of Accomplices. Containing references to all the Reports on the Subject From the Time of Lord Hot in 1696, Down to the Present Time. Sydney 1863.

The Magistrates' Pocket Book: containing The Course of Practice in All Preliminary Investigations By Justices Of The Peace, Relating To Indictable Offences Together With All The Various Forms Appertaining Thereto. Sydney 1859.


Regulations and Directions to be Attended to in Making Application to the Commissioners of National Education for Aid Towards the Building of School Houses or for the Support of Schools. Sydney 1849.


Regulations for the Establishment and Conduct of National Schools in New South Wales. Sydney 1853.


Rusden, G.W. History of Australia. 3 vols. 2nd edn. Melbourne 1897.

National Education. Melbourne 1853.


Election for the County of Camden: Speech of, Sydney 1836.


Ullathorne, W.B. *The Horrors of Transportation Briefly Unfolded to the People*. Dublin 1838.

Waugh and Cox's *Australian Almanac For the Year 1855*. Sydney 1855.


(iii) Newspapers

Australian
Australian Banner
Australian Chronicle
Atlas
Bell's Life in Sydney
Church of England Chronicle
Colonist
Empire
Freeman's Journal
Government Gazette
Irish Exile and Freedoms Advocate
Southern Cross
Sydney Chronicle
Sydney Gazette
Sydney Monitor
Sydney Morning Herald
Tasmanian Catholic Standard
Weekly Register

B. SECONDARY SOURCES

(i) Books and Pamphlets


Australian Dictionary of Biography, D. Pike, General Editor,

Barff, H.E. A Short Historical Account of the University of Sydney. Sydney 1902.


Brady, J.A.  Democracy in the Dominions. Toronto 1948
Cleary, H.W.  The Orange Society, 6th edn. Melbourne 1897.
Cleary, P.S.  Australia's Debt to Irish Nation-Builders, Sydney 1933.
<table>
<thead>
<tr>
<th>Author</th>
<th>Title</th>
<th>Publisher</th>
</tr>
</thead>
<tbody>
<tr>
<td>Elizabeth, Countess of Fingall</td>
<td>Seventy Years Young. Memoirs of Elizabeth, Countess of Fingall told to Pamela Hinkson.</td>
<td>London 1937.</td>
</tr>
<tr>
<td>King, Hazel</td>
<td>Richard Bourke,</td>
<td>Melbourne 1963.</td>
</tr>
</tbody>
</table>


See also Australian Dictionary of Biography

Richards, T An Epitome of the Official History of New South Wales. Sydney 1883.

Ritchie, John Punishment and Profit, Melbourne 1970.
<table>
<thead>
<tr>
<th>Author</th>
<th>Title</th>
<th>Edition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ullathorne, W.B.</td>
<td>From Cabin Boy to Archbishop. London 1941. Printed from the original draft.</td>
<td></td>
</tr>
</tbody>
</table>
(ii) Theses

Barrett, John
'Church, State and People in Eastern Australia 1835-50'. Ph.D., ANU. 1963.

Borthwick, C.J.

Burke, Joseph A.
'The Contribution of John Hubert Plunkett to Education in the State of New South Wales, 1832-1869'. B.A.(Hons.) Sydney University 1961.

Harrison, Brian W.
'The Myall Creek Massacre and its Significance in the Controversy over the Aborigines during Australia's Early Squatting Period'. B.A.(Hons.) University of New England 1966.

Irving, T.H.
'The Development of Liberal Politics in New South Wales, 1845-1855'. Ph.D. Sydney University 1967.

Loveday, P.

Payten, M.
'William Augustine Duncan'. M.A. University of New South Wales 1965.

Phillips, P.K.
'John McEncroe'. M.A. Sydney University 1965.

Shanahan, M.M.

Shaw, G.P.
'William Grant Broughton and His Early Years in New South Wales'. Ph.D. ANU 1970.

Suttor, T.L.

Turner, P.N.
'Forces behind the Passing of the "Grants for Public Worship Prohibition Act" of 1862 (N.S.W.)'. Ph.D. ANU 1970.
C. ARTICLES

Australian Catholic Historical Society Journal


Australian Catholic Record


Hartigan, P. 'In Diebus Illis'. 12 articles from January 1943.


Australian Economic History Review


Australian Journal of Politics and History


Australian Quarterly


Australian National University Historical Journal


Historical Studies: Australia and New Zealand


Journal and Proceedings of the Royal Australian Historical Society


<table>
<thead>
<tr>
<th>Author</th>
<th>Title</th>
<th>Volume</th>
<th>Part</th>
<th>Year</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dallen, R.A.</td>
<td>'Early Days of the University of Sydney'</td>
<td>Vol.12</td>
<td>5</td>
<td>1926</td>
<td>271-288</td>
</tr>
<tr>
<td>Dowd, B.T. &amp; Fink, A.</td>
<td>'James Mudie, Harlequin of the Hunter'</td>
<td>Vol.54</td>
<td>4</td>
<td>1968</td>
<td>368-86</td>
</tr>
<tr>
<td>Dunlop, E.W.</td>
<td>'The Golden &quot;Fifties&quot;: The Influence of the Gold Discoveries in Australia in the 1850's.'</td>
<td>Vol.37</td>
<td>1</td>
<td>1951</td>
<td>10-57</td>
</tr>
<tr>
<td>Dyster, B.</td>
<td>'Support for the Squatters, 1844.'</td>
<td>Vol.51</td>
<td>1</td>
<td>1965</td>
<td>41-59</td>
</tr>
<tr>
<td></td>
<td>'The Fate of Colonial Conservatism on the Eve of Gold Rush.'</td>
<td>Vol.54</td>
<td>4</td>
<td>1968</td>
<td>329-355</td>
</tr>
<tr>
<td>Forrest, J.</td>
<td>'Political Divisions in the New South Wales Legislative Council, 1847-1853.'</td>
<td>Vol.50</td>
<td>6</td>
<td>1964</td>
<td>466-489</td>
</tr>
<tr>
<td>Foster, William</td>
<td>'Education in New South Wales, 1838-47.'</td>
<td>Vol.49</td>
<td>4</td>
<td>December 1963</td>
<td>273-300</td>
</tr>
<tr>
<td></td>
<td>'Education in New South Wales under Governor Sir Richard Bourke.'</td>
<td>Vol.47</td>
<td>5</td>
<td>1961</td>
<td>255-80</td>
</tr>
<tr>
<td>Grose, Kelvin</td>
<td>'Sir George Gipps and Municipal Institutions in New South Wales.'</td>
<td>Vol.51</td>
<td>2</td>
<td>June 1965</td>
<td>148-153</td>
</tr>
</tbody>
</table>
Halloran, Aubrey 'Some Early Legal Celebrities'.
1st series, Vol.10, Part 4, 1924, pp.169-198
2nd series, Vol.10, Part 6, 1924, pp.301-347
3rd series, Vol.12, Part 1, 1926, pp.41-72
4th series, Vol.12, Part 6, 1926, pp.317-352


Ward, J.M. 'Foundation of the University of Sydney'. Vol.37, Part 5, 1951, pp.295-312.


Journal of Religious History


Labour History


Manna

Fogarty, R. 'Liberalism in Early Educational Legislation in Australia'. No. 6, 1963.


Melbourne Studies in Education


Pacific Historical Review

Public Administration (Australia)


Tasmanian Historical Research Association
Papers and Proceedings


The Australian University


Teaching History


Miscellaneous

Duffy, C.D.  'The Incident of the Moving of the Bible at St. Vincent's.' 9 manuscript pages, SAA.

Nairn, Bede  'William Bede Dalley', article to be published in Australian Dictionary of Biography, vol. 4.