An Architect of Freedom

John Hubert Plunkett

in New South Wales 1832-1869

JOHN N. MOLONY

Irish-born John Hubert Plunkett, descendant of an ancient family and a Trinity College-trained lawyer, came to New South Wales in 1832 to take up the position of Solicitor-General.

A quiet, cultivated man, and a Roman Catholic, he was an incongruous figure in the hurly-burly of colonial life. He was an idealist, a man of determination and integrity, a liberal before his time. In the fields of law, government, and education, and particularly as Attorney-General from 1836 to 1856, he played a vital role in the transition period that saw New South Wales shaking free from its penal past and developing into a free society.

An Architect of Freedom is more than the study of one man. It is a scholarly and readable account of a so-far much neglected period of colonial history, invaluable to the student of political and social history, and to the lawyer, and fascinating reading for the layman.

View of George Street, Sydney, c. 1844, by J. S. Prout. From the Rex Nan Kivell Collection; reproduced by permission of the National Library of Australia, Canberra.

John Hubert Plunkett as President of the Legislative Council, 1857.
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1832-1869

JOHN N. MOLONY

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In memory of three others whose work has endured

Vincent Fennelly

Brian Gallagher

Joseph Hayes

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One further acknowledgment is demanded by the nature of the work. Had it been written ten years ago it would have been necessary to pause constantly in the narrative to explain so many of Plunkett's contemporaries whose names were obscure in our history. That I have been able to assume this knowledge today, or at least hope that the interested reader can acquire it easily, is due to the contribution made to historical research and writing by the publication of the first four volumes of the *Australian Dictionary of Biography*.

Canberra
1972

J.N.M.

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Abbreviations

ANU	Australian National University
CO	Colonial Office
HRA	<i>Historical Records of Australia</i>
LA	Legislative Assembly (NSW)
LC	Legislative Council (NSW)
ML	Mitchell Library
NSWA	New South Wales Archives
RAHSJ	<i>Journal of the Royal Australian Historical Society</i>
SAA	Sydney Archdiocesan Archives
SH or SMH	<i>Sydney Herald</i> , later <i>Sydney Morning Herald</i>
VPLA	<i>New South Wales Votes and Proceedings of the Legislative Assembly</i>
VPLC	<i>New South Wales Votes and Proceedings of the Legislative Council</i>

Introduction

BEFORE 1965, when I began research on a topic dealing with Australian Catholic history in the nineteenth 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 Australian Capital Territory. 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* over 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 published in the *Freeman's Journal* soon after Plunkett's death. It was inserted by his widow and it stated that, because of her straitened 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

¹ SMH, 14 March 1856.

² *Freeman's Journal*, 2 December 1871.

wife in such circumstances. Another 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.³ 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 book is not my answer to that question because I do not believe that a 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. The papers 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 a very little Plunkett material, consisting of a few letters, mainly to 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 socialising 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, his time went to his work or 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

³ SMH, 27 April 1870.

Street and its offices that Plunkett really 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-five years as Solicitor and Attorney-General. It is chiefly on such sources that I have perforce relied in the writing of this book.

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.⁴ It was graciously copied out and 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 Anglesey 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 the descendants of De Castella.

Plunkett arrived in New South Wales in 1832 at the moment when the colony was about to shake free from its penal past and to offer its inhabitants great opportunities for material prosperity. As it turned out it was a prosperity Plunkett never shared because he gave his whole life to the exercise of his office, and his one successful business venture was the sale in 1839 of about 1,200 acres of land near Wollongong. Material possessions never attracted him and after his one attempt as a land owner 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

⁴Hubert De Castella wrote three works on Australian colonial life: *Les Squatters Australiens*; *Notes d'un Vigneron Australien*; and *John Bull's Vineyard*.

and companion on the voyage to Australia, Father John 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 his wife and a few other relatives. The headstone on the grave bears no testimony to the fact that it is Plunkett's last resting place.⁵

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 was part of him and he part of it. 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.

⁵ I am indebted to Mr G. P. Walsh of the Royal Military College, Duntroon, for this information.

Part 1

Servant of the Crown

The Township by the Waterside

THE making of a man is a simple thing. He is shaped, for good or for ill, by the family he is born into, the things he is taught to hold dear and the physical surroundings that make up his world. John Hubert Plunkett was born the younger of twins at Mount Plunkett, Roscommon in June 1802. Fifty years later the elder twin, baptised Christopher George, was accused of lacking in dignity and ability; worse still, he employed an abandoned woman. Christopher George was then the Police Magistrate at Kilmore in the newly proclaimed colony of Victoria. Despite the plea that his conscience told him that he never erred towards the public he was transferred to Swan Hill on the Murray, from which he disappeared in a few months to drop out of history as he dropped out of his younger brother's life. Over a century later an old lady in Switzerland summed up those twins in simple words when she sang the praises of her 'Dear Cousin John' and dismissed Christopher as a ne'er do well with whom the family had no connection.¹

Only men who grow together in that likeness cast by common origin in the one womb can say what bonds unite their spirit as well as their flesh. The Plunkett twins went their separate paths in their youth, John to the University and Christopher to the Army. Plunkett never said what sorrow the escapades of his elder twin brought him, but one thing is certain—John Hubert never formed close human bonds throughout his life. To other men he was singularly aloof, feeding his spirit on abstractions and ideals rather than on human friendship. Perhaps Plunkett felt that if he could not hold fast his twin as brother and friend

¹ See Reports from Police Benches 1852, 52/2016 and 52/2668, State Library of Victoria, and Claire Schnyder de Wartensee to John N. Molony, 25 September 1969.

no man would take the place given to Christopher in Roscommon in 1802.

George Plunkett was a farmer who could say to his twin sons, 'Your ancestors have toiled on this piece of land for seven hundred years', for the Plunketts had owned their land since the early twelfth century when Bernard was entrancing Europe with the divine madness of Citeaux, the Conquest was settling down to good order in England and the Black Monks were chanting their office at Peter's Abbey in nearby Athlone. Four centuries later the Reformation passed over Ireland and the Plunketts were eventually dispossessed, but their land was held in trust for them by just and gentle Protestants until they took it up again in the eighteenth century. So it was that the twins grew up in the security of moderate comfort and the knowledge that long ages had made them part of their land. Not only the land but the name too gave them security, for on their father's side they were related to the Earls of Fingall and on their mother's to the Princes of Aughrim. Again it was through their mother, Eileen O'Kelly, that they were related to that awesome figure, Oliver Plunket, Archbishop of Armagh, whose last agony was not lessened by his knowledge that the charges of treason brought against him were false. Plunket was hanged, drawn and quartered at Tyburn on 1 July 1681, but politics and Rome still deny him his hard-won claim to holiness.²

Despite their strong religious connections the twins were educated in non-Catholic schools and it was to Trinity College, Dublin, founded in 1585 by Elizabeth I, that John Hubert was admitted in 1819. They were kind years for young Plunkett as he enjoyed the treasures of Trinity's famous library, walked the streets of a city that had been clothed with Grecian glory in the eighteenth century, or looked beyond to the stoic calm of the Dublin mountains with their Lenten reminder that all things pass, whether cities or men. In his holidays he visited the glen of Kilkelly and sounded the echo seven times between the ash trees and the whitethorn bushes, boated on Lough-key with its

² For Plunkett's background see his family tree, Archives of the Sisters of Charity, Potts Point, Sydney; *Freeman's Journal*, 15 May 1869 and the letters of Claire Schnyder de Wartensee to John N. Molony 1969-70. For Oliver Plunket see *Dictionary of National Biography*, vol. XV, pp. 1328-31.

eight wooded islands, and fished the Shannon and its streams. The piece of parchment they gave him on 17 February 1823 to signify that Trinity now called him an Arts man was precious to him. As a mute testimonial to the fact that Plunkett recognised his debt to an alien Alma Mater, it survives yet amongst the few pathetic remains that he left behind him.³

The Ireland into which Plunkett was born had been welded to England by the Act of Union in 1800 and it was on the anvil of that very Act that the forces of Irish nationalism and republicanism were hammered into being to reach their apogee in Easter 1916. When Plunkett came out from Trinity he chose law in that trio of Church, Army or Bar that so many of his kind followed, and he was plunged immediately into the heady atmosphere engendered by the formation of O'Connell's Catholic Association in 1823. For the next five years he went on the Connaught Circuit with its Assize towns of Roscommon, Carrick, Sligo, Castlebar and Galway, and he took an increasing role in politics and the crusading activity that resulted in Catholic Emancipation in 1829. With O'Connell, Plunkett believed that to win freedom for his country did not warrant the spilling of blood so that the new tactic through the ballot box became an imperative strategy. In 1830 Plunkett worked successfully for the election of an O'Connellite, the O'Connor Don, in Roscommon, and he was publicly thanked by the Liberator and feted at a dinner on 20 September 1830.⁴ A generation was to pass before Plunkett stood again on a political platform, because the destiny that took him to New South Wales had already been shaped by a personal drama that led to a hasty marriage and a decision to leave his native land.

By 1830 Plunkett was popular, charming and successful, both at the Bar and in politics. He was engaged to be married, and he enjoyed the prospect of a useful and rewarding career in Ireland. At this precise moment he requested an appointment outside of Ireland and then accepted one at a penal colony on the far end of the earth. The simple explanation was that

³ The degree parchment is amongst the Plunkett papers which were in the possession of the Sydney legal firm Mackinson and D'Apice. They have now been deposited in the Mitchell Library, Sydney.

⁴ *Freeman's Journal*, 15 May 1869.

Plunkett suffered from a broken romance that wounded both his heart and his pride. It is an explanation that rings true precisely because it is so simple.⁵

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 heritage. Unwisely she acquainted Plunkett with the letter, a quarrel ensued and Plunkett, 'offended and too proud to offer any explanation', 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. Her schooling in Paris was financed by her uncle, Bishop Plunkett of Elphin, and De Castella thought she was sent to Paris too young and left there too long! Plunkett met her when she came forth 'as a beautiful girl of nineteen with the additional attraction of a genteel education', and pique, an effort to prove that he was not money-grubbing, or the simple fact that he was smitten induced him to propose to her. Needless to say the Widow McDonougha did all she could to foster the match. The marriage took place quietly in London, and Plunkett acquired a wife with his own background and religion to accompany him to New South Wales. It was left to time to reveal the incompatibility of their temperaments.

The appointment which was offered to Plunkett was that of Solicitor-General of New South Wales. It was open to him by the fact of Catholic emancipation, the patronage that O'Connell and Plunkett's kinsman, Lord Fingall, were able to exercise in London with the Whigs in power, and the dereliction of Edward McDowell who had been appointed to the post but relieved of it because he had delayed his departure from England for a year.⁶ Plunkett went to London, dined with O'Connell, was introduced to William IV by Fingall, accepted the appointment and returned to Ireland to prepare for his departure. A good deal

⁵ Charles Hubert de Castella gives the account of Plunkett's engagements in his 'Memoirs'.

⁶ Goderich to Bourke, 24 September 1831, *HRA* (1), XVI, pp. 373-4.

of the time that remained to him in Ireland must have been spent on the viewing, wooing and wedding of Maria Charlotte for together they sailed from Cork on the *Southworth* on 6 February 1832. Plunkett's young sister Kate Amelia, his friend Father John McEncroe, and a female domestic came aboard to accompany them.

As was the custom a large crowd assembled to farewell the vessel and to bid Godspeed to their loved ones. George Plunkett was there for his last parting with his son as he died before John Hubert returned. Perhaps it was borne in on Plunkett then that, despite his youth, he had a heavy responsibility towards the simple ones who accompanied him as emigrants. They shared his birthplace and his faith, but their world was that of the cottage or the dark towns, filled with their 'little people' and their saints. With their chosen relics of Ireland, some even bearing a branch of the witch hazel to ward off the reptiles in the far distant land, they set out on a journey of such immense proportions that only ignorance could have softened its terrors. Ireland 'mavourneen' quickly faded and 129 days later, on 14 June 1832, they came ashore at Sydney.⁷ Plunkett was just thirty, Maria Charlotte yet a girl of nineteen. And the mature husband, about to take up an onerous position as a law officer in a penal colony, had spent a good deal of his time on the voyage out composing a curious allegorical tale dedicated to his bride. It was entitled 'Longbow's Narrative of his Voyage and Travels to the United States of Matrimony' and it proves that Maria held his heart as well as his name.⁸

What kind of man was the young Plunkett who left Ireland in 1832? He was of medium height with a slight frame, black hair and dark complexion with narrow, aquiline features. Even then he rarely relaxed and he smiled infrequently unless in the company of his family, or McEncroe, with whom he was friendly in the half-certain manner of an Irishman with his priest. The one passionate love of his life that he retained to the end was for the violin and music, especially the classics and Irish folk music. For Ireland itself he bridled his attachment. He returned

⁷ SH, 18 June 1832.

⁸ The unsigned manuscript 'Longbow's Narrative of his Voyage and Travels to the United States of Matrimony written by Himself' is dated 1832 and the dedication is to Mrs J. H. Plunkett (B. 77, ML).

briefly to his native land in 1842, but so firmly had he implanted himself in Australia that even in harsh disappointment twenty years later he could not relinquish his adopted land.

More than anything else it was Plunkett's background and his convictions that marked him off from his contemporaries in New South Wales for, in the combination of his ancestry, his religion and his legal training he was, and remained, unique. Roger Therry had preceded him to Sydney and Therry was both a Catholic and a man of the law who became Australia's first Catholic judge. But Therry was not a Plunkett whose whole background was of the Irish Catholic aristocracy which was both tempered and honed by his education in secular, or at least non-Catholic institutions. Plunkett had heard the whispered stories of priests who said Mass in the mountains and sometimes died for it; he had a kinsman archbishop who was judicially murdered for politics and religion; his family had lost prestige and lands through repression. But his background also included an acknowledgment that Catholic emancipation had brought a 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 simply by saying that he had a sense of duty, an unflinching dedication to his task, an understanding of the role of the individual in society. 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 mattered to Plunkett and the teachings of his

church bolstered that concept, while the developments of European civilisations since the French Revolution had done little to lessen it. As a result he was prepared to work for change and gradual progress in New South Wales. Years later Gavan Duffy said that 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 now the opinion De Castella entertained of Maria Charlotte would serve no purpose unless it helped to illustrate the life of Plunkett himself. As a good lawyer he himself 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 gossip-monger, and that his eye for detail was acute. He wrote that Madame Plunkett was not easy to describe, so it is better to give his own words which, clouded with partisanship as they were, 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 while 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 the austere Plunkett playing solo on his Cremona violin 'the plaintive and harmonious airs of Ireland'.

Yet the prospects of a childless marriage and a difficult wife were far from Plunkett's thoughts as he stepped ashore at Sydney. The township by the waterside, with its clattering windmills, tortuous sandstone streets and innumerable licensed and still more unlicensed houses, was already a different Sydney to that of a few years previously.⁹ The ramshackle dwellings of former years were rapidly giving way to houses and cottages of neat construction in brick or the readily available sandstone, many with their flower and vegetable gardens in sub-tropical profusion. Parrots screeched from verandahs, early stars of the Australian theatre declaimed in the Royal Hotel, there were circulating libraries, the beginnings of a museum, and Richard Cunningham soon began to replace the turnips and carrots in the Botanical Gardens with flora more suited to their purpose.

When Plunkett arrived he took up temporary residence in a house at Water View, or present-day Balmain. It was convenient enough to his work, but he had to take a ferry to Erskine Street and walk up to his office in Macquarie Street. In any case he hoped to build his own home and with that in mind he

⁹ The changes that had taken place in the three years 1829-32 are remarked upon by George Bennett in his *Wanderings in New South Wales*, vol. 1, ch. III.

immediately applied to the Governor for a grant of land and a building allotment near Sydney. He was unfortunate in that he had come to the colony when, apparently, the days of plenty were over, and the request was refused as such grants had been expressly forbidden by regulation.¹⁰ It was thus a case of settling in at Water View until more suitable lodgings could be found and in the meantime the attempt had to be made to adjust to a society that bore minimal resemblance to County Roscommon or a Parisian finishing school.

The year itself had opened on a note of optimism in the colony. After the vicissitudes of drought or flood of the former years, 1831 had 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 Richard Bourke on 3 December 1831 seemed to provide the opportunity for the 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 2,804 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'.¹¹ 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.

The growth from 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

¹⁰ Bourke to Goderich, 22 September 1832, HRA (1), XVI, p. 751.

¹¹ SH, 30 January 1832.

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 workforce. 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 stain 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 1830s, 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 reflect the transition of aspirations and ideals on the one hand 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. From the day he landed in Sydney in 1832 until his death thirty-seven years later Plunkett was amongst those men.

From the very beginning of his service in Sydney Plunkett was in the invidious position of having replaced McDowell, of whom the Governor thought highly. Bourke appointed McDowell Solicitor-General of Van Diemen's Land, but Plunkett, relatively unknown and an Irish Catholic to boot, had yet to prove that he was a worthy replacement, even in the eyes of the broad-

minded Anglican, Bourke. 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 Lord Goderich's attention to Kinchela's deafness, 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'.¹² 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.¹³

Nonetheless, while Kinchela continued as Attorney-General it fell to Plunkett's lot to fill the breach, and 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 only paid £800 a year and Bourke, constantly given occasion to keep in mind the necessity of curtailing expenses, did not recommend any increment in salary for Plunkett though he recognised that the Solicitor-General was carrying out most of the duties of Attorney-General.¹⁴ In later years Plunkett said that the burden of work he carried when he first came to the colony did injury to his health and almost broke his spirit.

Plunkett's salary was adequate but scarcely sufficient to keep Maria Charlotte in the comfort to which she was accustomed, especially in a colony where luxuries, at least, were dear. Some compensation came through the low wages paid to domestics

¹² Bourke to Goderich, 19 September 1832, HRA (1), XVI, pp. 745-6.

¹³ 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 Felonry of New South Wales*, 2nd ed., Walter Stone (ed.), pp. 148-9. Kinchela's son, James, later horse-whipped Mudie for ridiculing his father.

¹⁴ Bourke to Stanley, 5 December 1833 and Plunkett to Stanley, November 1833, HRA (1), XVII, pp. 282-6. See also enclosures 1-3, pp. 286-94; also SH, 17 March 1834. As Attorney-General Kinchela received £1,200 p.a.

whose services could be augmented by convict labour. Plunkett ventured only once into the employment of convict labour, to his own and his wife's distress. In 1832 he applied for one convict, who was assigned to him. Francis Forbes in the same year applied for ten and received nine. Edward Deas Thomson applied for six and received three, while W. C. Wentworth received fifteen after twenty-nine applications.¹⁵ Yet even in the instance of the one convict assigned to him it seems that Plunkett was unfortunate. While he and his wife were absent from home on 24 December 1833 one of Plunkett's servants was murdered. The convict assigned to Plunkett, Bryant Kyne, was charged with the murder and Plunkett was forced to conduct the case against him as Roger Therry, who could have acted for him, was absent from Sydney. He spoke favourably of Kyne in court on 12 January 1834, but to no useful purpose as a military jury found him guilty before Judge Burton who passed the death sentence. Kyne was hanged three days later with the Reverend William Cowper in attendance.¹⁶ From then onwards Plunkett avoided personal contacts with convicts as he remained mindful of the pain of prosecuting a man with whom he had held close and familiar converse.

In 1834 Plunkett bought a house in Elizabeth Street, and for the next twenty-five years he lived in various residences in the heart of Sydney where he was close to his work, his worship and his wife. To the old Court House in Elizabeth Street he went almost daily to expose himself to the winds that blew incessantly through the dilapidated building, to the baleful gazes from the inmates of the iron cage who awaited trial, and to the unrelieved tedium of innumerable legal depositions. Across the park, in ready walking distance of his home, stood St Mary's where Plunkett worshipped his God, mixed on good terms with the Black Monks Ullathorne and Polding and grieved when McEncroe fell foul of the demon drink that cursed so many of his countrymen. It was to Plunkett's home that McEncroe went

¹⁵ See the 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'. NSW Governors' Despatches, vol. 22, 1833, pp. 617-708, ML.

¹⁶ 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.

when the madness was upon him and there the young Solicitor-General soothed his priest's pains with the 'divine juice of the grape' in the form of the light, white wine of the country.

Those early years with Maria Charlotte were happy ones as they settled to the climate of New South Wales, awaited the quickening signs of a child and mixed in the narrow company they found congenial in Sydney. Her health was still good, music and books were fruitful bonds and the tantrums of later years were but faint shadows as yet. Plunkett's sister, Kate Amelia, was Maria's friend although Francis Merewether soon began to vie for Kate's attention and her response to the advances of a Protestant caused some unease amongst her staunch Roman Catholic family. Roger Therry and his wife were others upon whom they called, but here again Plunkett was reserved and Maria Charlotte had at times to console Mrs Therry for the small misdemeanour of her husband which had resulted in a daughter who bore another woman's name.¹⁷ Perhaps Maria Charlotte pondered on the bitter fate that could make a womb so fertile to the chance encounter while her own longing for honourable fulfilment went unrequited.

Plunkett himself quickly began to take an interest in the wider affairs of the local community both as a citizen and as a Catholic. He was interested in the setting out of a new racecourse on Botany Bay Road, and contributed to its construction. 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 fostered 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

¹⁷ See certificate of Kate Amelia Merewether, Essex, 25 July 1890, at 17/13, ML.

Plunkett numbered amongst them. His activities soon came to the notice of the *Sydney Herald* which coupled him with the odious Whig government at home, together with the more objectionable regime under Bourke in New South Wales. Tory as it was, the *Herald* nonetheless recognised Plunkett as 'a Gentleman who is known to be distinguished for his strict morality and a high sense of honour'.¹⁸ Perhaps these were regarded by the narrow-minded as rare and precious attributes in the Sydney of the 1830s.

In 1833 the judges of the Supreme Court had complained to Bourke that constant attendance at its sittings would ruin anyone's health because of the lack of even frugal comfort offered by the makeshift building.¹⁹ Plunkett soon offered the Bench proof of its judicial prognosis by suffering from 'a very serious and protracted indisposition' towards the end of 1834. 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'.²⁰ Leave was granted, the air took its effect to such good purpose that Plunkett bought three and a half acres of salubrious Bungonia for £36 18s, and he returned to Sydney in time to participate in the revival of St Patrick's Day festivities. During the previous two years 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.²¹

A few weeks before Plunkett's arrival in the colony Richard Bourke lost his wife. Invalid though she was, to Bourke no 'gentler or more affectionate Creature' ever lived.²² Bourke

¹⁸ SH, 28 January 1833, 6, 24 February, 12 June, 17 July 1834. For notes on the newspapers of the period see the Bibliography, pp. 281-2.

¹⁹ See C. H. Currey, *Sir Francis Forbes*, p. 437.

²⁰ Bland to Colonial Secretary, 19 January 1834, in Dixon Library Archives, Estrays List 15, also Plunkett to Colonial Secretary, Attorney-General's Letter Book, 1835-36, p. 155, NSWA, 4/473.

²¹ SH, 19 March 1835.

²² See Hazel King, *Richard Bourke*, pp. 166-7.

grieved her parting deeply and sought solace in his work and his friends amongst whom, with the passage of time, Plunkett was numbered. Parramatta was a pleasant retreat for a weekend, although the hospitality was spartan enough with 'no feasts and no Cook', but there was always room to spare and on occasions, such as the opening of the Lansdowne Bridge or the Parramatta Races, a dinner with a dance in the evening could be organised. 'I will not promise you great sport but the Country Air will do you all good', wrote Bourke when inviting Plunkett, Maria Charlotte and Kate to come and stay the week with him.²³ In this way the Irish-born governor tried to assuage the pangs of his sorrow and the two men formed the kind of friendship that Irishmen in exile hold dear.

If the atmosphere in Parramatta was congenial it proved increasingly less so in Sydney itself; by 1834 Bourke was already out of favour with the exclusivist elements in society, and the rancour towards him spilled over on those who were judged to be in collusion with him. Amongst such men Plunkett was quickly counted, especially when 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. While 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 but excepted 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'.²⁴

The *Sydney Gazette* approved of transportation as the 'surest

²³ Bourke to Plunkett, Friday, n.d., Sunday, n.d., Thursday, n.d. Plunkett papers, ML.

²⁴ SH, 13, 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.

hope of a radical transformation of character' for some classes of offenders. It supported Bourke and wanted him to deal with any instance of 'insubordination' on the part of the convicts, but 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.²⁵ By some the *Gazette* was called 'the Government Mouthpiece' and by others the 'Prisoners' Journal'.²⁶ 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, and of the convicts.²⁷

It did not prove difficult to provide evidence to both the friends and the foes of transportation that the system had either to 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.²⁸ 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.²⁹

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. Their findings, which deemed the charges unproven in the main, still moved Bourke to reprove both Mudie and Larnach for their behaviour, and not to reappoint Mudie

²⁵ *Sydney Gazette*, 13 February, 20 March 1834.

²⁶ *SH*, 13 October 1834.

²⁷ *Sydney Gazette*, 8 March 1834 and *SH*, 7 August 1834.

²⁸ For an account of the affair see B. T. Dowd and A. Fink, 'James Mudie, Harlequin of the Hunter', *RAHSJ*, vol. 54, pt 4, 1968, pp. 368-86 and vol. 55, pt 1, 1969, pp. 83-110.

²⁹ Executive Council Minute 41, 12 December 1833, NSW, 4/1518,

to the magistracy.³⁰ 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 removed, and the stage was set for the eventual Select Committee on Transportation in London in 1837.³¹

The other event of 1834 that shocked the whole community was the murder of Doctor Robert Wardell on his Petersham estate on 7 September. To Plunkett it proved the necessity of a better police force, while the *Monitor* thought that a great deal would be achieved if all assigned servants were made to wear a distinctive mark on their dress.³² 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.³³ 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.³⁴

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.³⁵ The *Herald* thought the whole thing was a waste of money.

³⁰ Bourke to Stanley, 20 September 1834, HRA (1), XVII, pp. 542-3.

³¹ The pamphlet war culminated in the publication in London 1837 by James Mudie of *The Felony of New South Wales*.

³² Quoted in *Sydney Gazette*, 11 September 1834.

³³ SH, 15 September 1834. With some foresight the *Herald* saw transportation as 'the only obstacle to a House of Assembly', *ibid*.

³⁴ *Ibid*, 25 September, 13 November, 13 October 1834.

³⁵ Papers of Rev. T. Sharpe, N.I. 1826-41, December 1835, p. 35, ML, and *Australian*, 27 November, 4 December 1835, 15 January 1836. The journey to Norfolk Island gave Plunkett the opportunity to visit Colonel Joseph Anderson, then commandant of the Island. Anderson's daughter, Elizabeth Anne, later married Paul de Castella, brother of Charles de Castella.

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 thus 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, while the *Herald* was unwearied in its attacks, the *Gazette* remained steadfast, the *Australian* frequently sprang to their defence and even Lang's *Colonist* spoke in their favour on some issues.³⁶

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. 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, a supposition that proved correct.³⁷ The departure of Forbes, although thought then to be temporary, necessitated a rearrangement in the judicial and legal office-bearers. James Dowling became acting Chief Justice, Kinchela—despite his deafness—acting puisne judge, and Plunkett acting Attorney-General.³⁸ James Macarthur paid a warm, public tribute to Plunkett a few days later at the St George's dinner. He was 'a man that Australia must be proud to have at the head of the

³⁶ SH, 24 August, 30 November 1835, 10, 21 January 1836; *Australian*, 15 July and 13 September 1836; *Colonist*, 16 June and 25 August 1836.

³⁷ SH, 21 April 1836 and Edward Plunkett to Colonial Secretary, 14 July 1831, Colonial Secretary In-letters, NSW, 2/7951. The two Plunketts were not related.

³⁸ Bourke to Glenelg, 12 April 1836, HRA (1), XVIII, pp. 377-8.

bar'. In his reply Plunkett regarded Macarthur's words as 'the ebullition of the feelings of a private friend' but it was a friendship that, despite their differing religious loyalties and the gulf between their attitudes to colonial liberalism, was retained for life. Plunkett wrote to Macarthur thirty years later, 'There is no one whose good opinion I value more than yours or for whose judgment I have a greater respect'.³⁹

In this new appointment Plunkett was again the victim of the circumstances that arose from the necessity impressed upon Bourke by Glenelg of reducing the expenses of the judicial establishment.⁴⁰ While he was now expected to perform officially 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 paid to the Attorney-General, although he requested £1,400 to hold both offices as his attention to both duties meant that he was compelled to neglect the private practice that had hitherto proved a source of substantial income to him.⁴¹ His appointment to replace Kinchela was also motivated by Bourke's desire to have someone upon whom he could rely in the Legislative Council, as, with the departure of Forbes, the Governor lost the main support he had there. He could not look to the Colonial Treasurer, Campbell Riddell, or to Alexander Macleay, Colonial Secretary, both of whom were opposed to his liberal measures on 'many important Colonial questions', but he relied on Plunkett whom he thought would prove of 'very valuable assistance'.⁴² Furthermore the state of the Bench, on which Dowling and William Burton lived in a temporary but uneasy truce, and to which Kinchela could contribute that minimum imposed by his

³⁹ Plunkett to Macarthur, 2 September 1865, Macarthur papers, vol. 30, p. 151, ML.

⁴⁰ Glenelg to Bourke, 26 February 1836, HRA (1), XVIII, pp. 298-9.

⁴¹ Plunkett to Colonial Secretary, 31 March 1836. Opinions of the Attorney-General, pp. 198-201, NSWA, 4/473. 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, ML. 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.

⁴² Bourke to Glenelg, 12 April 1836, HRA (1), XVIII, pp. 377-8.

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 while at the same time retaining his temporary appointment to the Bench, and Plunkett trying to act in an independent but conciliatory manner.⁴³ 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 1836.⁴⁴

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', accused of giving work to Therry that he ought to have done himself, and thereby ensuring that Therry's own salary was augmented, and, in general, berated for his private professional activities.⁴⁵ No consideration was given to the fact that it was inevitable that competent men would only reluctantly undertake a 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 the Attorney-General, Alfred Stephen, resigned in the knowledge that his private practice would be more profitable to him. Plunkett meanwhile made no further attempt to defend his own position, but when Sydney Stephen accused him of monopolising the Crown briefs in

⁴³ Bourke to Glenelg, 3 October 1835 and enclosures, *ibid.*, pp. 110-30. Also John Kinchela to Rev. Thomas Reddall, 26 March 1836, Reddall papers, pp. 153-4, ML.

⁴⁴ SH, 7 February 1840.

⁴⁵ *Ibid.*, 6 February, 17, 21 November, 22 December 1836 and 3 July 1837.

consort with Therry, he 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'.⁴⁶

Perhaps the most important aspect of Plunkett's 'pluralism' was in a field far removed from public litigation in the courts. By 1836 he was the constant adviser to Bourke who turned to him 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 the Anglican Bishop, William Grant Broughton, was legally competent to sit in the Legislative Council and whether the Bishop ought to have an officially recognised Consistorial Court.⁴⁷ Ultimately the Governor 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.⁴⁸

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.⁴⁹ Essentially the Church Act granted state aid to religion in New South Wales at a time when it had become necessary to clarify the position of the Church of England in regard to the state on the one hand, and on the other to assist the churches in providing that benign formative influence in the colony that

⁴⁶ *Ibid.*, 20 February, 3 April 1837.

⁴⁷ Bourke to Plunkett, Wednesday n.d., Friday n.d., Friday n.d., Saturday 2 pm n.d., but all probably 1836 and 1837, Plunkett papers, ML. To both questions on Broughton Plunkett replied in the negative.

⁴⁸ Bourke to Plunkett, 23 October 1837, *ibid.*

⁴⁹ SMH, 21 March 1856. Plunkett claimed that he and Bourke had the Act drafted some months before even the Colonial Secretary, Macleay, saw it.

many 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.⁵⁰ It was argued by contemporary writers that the Act was one 'by which religious equality was firmly and permanently established in the colony' and called the 'Magna Carta' of Australia's religious liberty.⁵¹ 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'.⁵² 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 between Protestants and Catholics, appeared to be hazarded'.⁵³ 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'. Plunkett, formerly a gentleman 'mild as mother's milk' was now all 'bounce' and 'humbug' and he was amongst those

⁵⁰ For a valuable, scholarly history of the Act see Naomi Turner, *Sinews of Sectarian Warfare? State Aid in New South Wales 1836 to 1862*.

⁵¹ See R. Flanagan, *The History of New South Wales*, 1, pp. 512-13 and *Colonist*, 25 August 1836.

⁵² SH, 6 June 1836.

⁵³ Bourke to Glenelg, 8 August 1836, HRA (1), XVIII, pp. 474-8, and Bourke to Glenelg, 8 August 1836, plus enclosures, *ibid.*, pp. 466-70.

'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.⁵⁴ 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.

In 1837 a minor drama was played in the official circle of government in New South Wales from which few, if any, of the actors emerged with their honour unscathed. Its main result was the resignation of Bourke who considered that he had been slighted by the Colonial Office, but who was also motivated by his personal desire to retire to the tranquillity of private life. It had its origins late in 1835 when an election was held for the position of Chairman of the Quarter Sessions. Campbell Drummond Riddell, Colonial Treasurer, and consequently a member of the Governor's Executive Council, was persuaded by those who opposed the Governor to stand against Bourke's chosen candidate for the office, Roger Therry.⁵⁵ Riddell won and was promptly suspended as an executive councillor by Bourke. The Governor also imprudently struck from the Commission of the Peace almost all the civil officers, many of whom had opposed Therry's election, and passions were aroused on all sides. 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, but his commitment to his decision was revealed by his threat to resign were Riddell restored to his position on the Executive Council.⁵⁶

In March 1837 sixteen of the magistrates who had successfully opposed Therry wrote to the press 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

⁵⁴ SH, 3, 14, 17 November 1836.

⁵⁵ For a brief account of the affair see Hazel King, *Richard Bourke*, pp. 237-40.

⁵⁶ Bourke to Glenelg, 1 December 1835, and enclosures, HRA (1) XVIII, pp. 216-23; Bourke to Glenelg, 2 December 1835, *ibid.*, pp. 223-4; Glenelg to Bourke, 11 August 1836, *ibid.*, pp. 479-83; Bourke to Glenelg, 24 January 1836, *ibid.*, pp. 264-5; Bourke to Glenelg, 1 March 1836, *ibid.*, pp. 333-41; SH, 7 January 1836.

Commission of the Peace, thus blocking his nomination. Plunkett himself must have given some indication that he would have 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 regarded by the paper as 'a political and religious partizan'.⁵⁷

Whatever his attitude to the affair in 1835 Plunkett was quick to show where he stood when the argument between Bourke and the magistrates was renewed in 1837. By this time he was a member of a Legislative Council whose constitution was quaintly alleged to be 'purely Roman Catholic' and pervaded by 'papistical influence'.⁵⁸ 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.⁵⁹ Thus when another candidate of Bourke, William Montagu Manning, stood in another election for the position of Chairman of the Quarter Sessions in 1837 Plunkett threw the full force of his position as Attorney-General behind 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 said of Manning

⁵⁷ 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 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*, pp. 65-6.

⁵⁸ SH, 12 September 1836.

⁵⁹ *Ibid.*, 12 September, 6 October 1836. The *Herald* may have had some grounds for its assertion. McEncroe admitted, 'I have one advantage, anything reasonable I ask of the Governor, he immediately grants!' McEncroe to Archbishop Murray of Dublin, 2 November 1832, SAA.

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 seventeen votes to eight, but his passage through the other districts was closely contested with the result that he finally won the position after some rather tortuous legal manoeuvres by Plunkett.⁶⁰

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.⁶¹ 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 perpetrating 'unheard of outrages upon British feeling, upon British rights, upon British justice'.⁶² 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 was itself little more than the rash effusion of a man pained by the attack made upon him by Plunkett. 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. With some justification Plunkett was attacked as 'a man who first *provokes* and then prosecutes!' But he went ahead with the action nonetheless.⁶³

At the trial the local legal celebrities came out in force with à Beckett and Windeyer acting for the prosecution and Foster and Broadhurst for the defence. Again Macalister did not help himself by intemperately stating in court that the *Australian* was simply the organ of Plunkett and Therry and that they used the paper for their own unworthy purposes. Judge Willis, a

⁶⁰ SH, 9 November, 17 December 1837.

⁶¹ Ibid., 16 November 1837.

⁶² *Sydney Gazette*, 11 November 1837. Macalister was referring specifically to a case in which Plunkett had charged a group of wealthy land holders with cattle stealing.

⁶³ SH, 21 November 1838.

new arrival in the colony, 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 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 distinctions 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.⁶⁴ At the same time there must have been some men in New South Wales who wondered at the use of the legal machinery to uphold the rights of one side in a dispute which was essentially political.

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 an amity 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, 1835-7, and there is an urgency with which Bourke constantly urges Plunkett to come to Parramatta and stay with him, even to eat his fish with him on a Friday, as if there were few others to whom the Governor could extend such an invitation.⁶⁵ There is a pathetic note in the way in which Bourke assured 'My dear Plunkett' that he would not 'be classed amongst the *ungrateful* ones', as if they both had something to forgive and too few from whom to expect forgiveness. Their business ranged 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

⁶⁴ *Ibid.*, 23 November, 3 December 1838, and *Australian*, 20, 22 November 1838.

⁶⁵ There are twelve such invitations between March 1836 and November 1837 in Bourke's letters, Plunkett papers, ML.

as the propriety of allowing the Catholic Bishop, Polding, to appear at a levee 'in *Pontificalibus*' although it is unlikely that even Polding would have contemplated an appearance in mitre, chasuble and buskins. Mostly, however, it offered an opportunity to both men to relax in congenial company and to ponder on the perversity which induced some men to disagree with their views.

Towards the middle of 1837 it was known that the Governor's resignation, made conclusive by London's 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 'communities' ought to address the Queen at his last levee in 'this land of religious freedom'.⁶⁶ In this, his last letter, Bourke reveals the buoyancy with which he anticipated his departure and his thrill in thinking that he would soon ride over the pampas to Buenos Aires. There is no hint that a void would be left in Plunkett's life that never again would be filled. The only evidence for that void is the bundle of dusty letters that Plunkett clearly treasured through the next thirty years and left to history as the main body of his personal remains. In his 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.

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.⁶⁷ Bourke's departure in December 1837 gave his 'shirtless and shoeless friends' the chance to fete him and the more affluent the opportunity to

⁶⁶ Bourke to Plunkett, Friday night, n.d. but November 1837, *ibid*.

⁶⁷ Glenelg to Bourke, 3 July 1837, *HRA* (1), XIX, p. 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*.

erect a statue in his honour.⁶⁸ To others it 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'.⁶⁹ The *Herald* reviewed the years of Bourke's stewardship and singled out several matters as warranting especial odium. 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.⁷⁰ 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 press had treated Bourke. Unmindful of his own behaviour in the past in regard to Darling, Wentworth said, 'I feel that the Governor and the Attorney-General have done an irreparable injury to the freedom of the press in this Colony, in not putting a stop to this system of attack'.⁷¹ 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 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, to Deas Thomson, Bourke's son-in-law whom he had promoted to Alexander Macleay's position as Colonial Secretary, and to a handful of other men with liberal ideals, it may have appeared that the evening of their ascendancy in the colony had come. Yet they should 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 initially with

⁶⁸ *Sydney Gazette*, 7 December 1837. The bronze statue with its fulsome inscription stands today outside the Public Library of New South Wales.

⁶⁹ *SH*, 1 January 1838.

⁷⁰ *Ibid.*, editorials, 'Sir Richard Bourke's Government', 7, 11, 14, 21 September 1837.

⁷¹ *Ibid.*, 4 December 1837.

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.

The Years of Transition

By the time George Gipps arrived in the colony in February 1838 Plunkett had already settled to his office as Attorney-General, an appointment he held for almost twenty years. Those initial years of transition were to see the passing of the system of transportation that had given to New South Wales its own particular social character. With it passed also the harsh tones of conflict to which it gave birth with the division of society into exclusivists and emancipists. The struggle for the right of the Aboriginal to be regarded as a human being, with the consequent right to his own life, was fought out in the colony in those years, and its partial solution was one of the less shameful events that marked the relationships between the two races from 1788 onwards. Finally it was a period in which the white man drew upon the wellsprings of his own civilisation in order to lay the foundations of a free, ordered and prosperous society on the British model in the old continent he had invaded. In these and related fields Plunkett played his role, so that when he ended his days as a public servant in 1856 he could look back to a society centred on the felon, and forward to one wherein the white man at least could shape his destiny in freedom.

The new Governor arrived in time to see the reflection of the divisions in society manifested in the partisan nature of support for a statue of Bourke, and he was quickly warned that to be a colonial Whig was to align oneself with 'shoeless drunks' who talked in maudlin tones about 'poor blacks', convicts and such lesser mortals.¹ This did not deter him from taking a step within a few months of his arrival for which most colonists had awaited years in vain.

¹ *Australian*, 15 May 1838; *SH*, 8 March 1838.

The Legislative Council of New South Wales had always conducted its business behind closed doors, and even Bourke found it expedient to continue the practice. Apparently Gipps did not take much convincing that a time for change had come because it was with his approval that Plunkett, in the Legislative Council on 29 May 1838, presented a petition praying that strangers be admitted during debates, and a few days later the Council accepted the proposal although there was some technical opposition to it enunciated by Dowling on minor legal grounds.² 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 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.³ As a result of the opening of the Council its proceedings were made known by the press to a much wider audience than to those few persons who were able and interested enough to attend its sessions. For almost thirty years Plunkett was a member of the Council, or after 1856, of the Legislative Assembly. It is, consequently, upon the 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.

For Gipps himself the years of his administration were plagued by natural and economic calamities stemming from drought and depression. He had the additional burden of struggling to defeat what he regarded as the 'larcenous intention' of the squatters in regard to Crown Lands and he was determined to beat them 'even though their name be "Legion"'.⁴ The Colonial Office was constantly vigilant of his fiscal policies, and he was aware

² *Australian*, 1, 8 June 1838, and SH, 17 July 1837.

³ Gipps to Glenelg, 5 June 1838 and Glenelg to Gipps, 5 November 1838, HRA (1), XIX, pp. 433 and 646.

⁴ Gipps to La Trobe, 13 April 1844, Gipps-La Trobe correspondence, vol. 4, no. 272, La Trobe Library.

that in Downing Street 'an extravagant Governor will find no mercy' as was illustrated in 1841 when Russell chastised him for his 'improvidence'.⁵ In the end he was sure that he would be thrown 'overboard', but he refused to resign, despite the 'outrage' he suffered at the hands of Russell, because he was determined to see the colony return to the prosperity that had been evident in the days of Richard Bourke.⁶ All of this took its toll of the flinty governor as indeed it did of those who were closest to him. Financial strain meant that some had to overwork, and overwork meant illness for Gipps, leading him to a premature death. For Plunkett, who was expected to perform the duties of both an Attorney and a Solicitor-General as well as attending regularly at the sittings of the Legislative Council, it also brought overwork and illness although his comparative youth meant that he escaped Gipps's fate.

At the end of August 1838 Plunkett was ill and 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.⁷ 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. 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'.⁸ Surprisingly, given their usual mutual antipathy, the conservative merchant and pastoralist, 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.⁹ Plunkett's speech, in the mind of the *Herald*, amounted to 'one huge capital I'. He was simply part of the 'Bourkite Stew' and

⁵ Gipps to La Trobe, 24 July 1841, *ibid.*, vol. 3, p. 102, and Russell to Gipps, 16 July 1841, *HRA* (1), XXI, pp. 198-200.

⁶ Gipps to La Trobe, 16 September 1841 and 15 February 1842, vol. 3, nos. 112 and 129, Gipps-La Trobe correspondence, La Trobe Library.

⁷ *Australian*, 29 June 1838, and *SH*, 31 August 1838, reports LC.

⁸ *Ibid.*

⁹ *Ibid.*

one Roman Catholic law officer in the colony was enough as there was a 'want of confidence' in them.¹⁰ The Council, however, passed a resolution praising Therry's abilities as it was recognised by most that Plunkett needed assistance in a law department which had to handle an enormous amount of work, especially in the administration of criminal justice.

Illness again dogged him at the end of 1838 so Plunkett applied for leave and pointed out that in almost seven years he had only been absent from his post for the fortnight in 1835. He wanted to return to Ireland to attend to personal matters resulting from the death of his father but, conscious of the responsibilities of his office, 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'.¹¹ After seven years he was undoubtedly weary and sometimes despondent about his task as the chief law officer although he did not try to share his burden with Maria Charlotte. The colony itself was still groping towards free institutions, an acceptance of civilised values and an understanding of its own status *vis-à-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 on to 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'.¹²

In such an atmosphere it was easy to overestimate the division of New South Wales society based on the exclusive-emancipist, or liberal-conservative tags; it was not so easy to view it with the

¹⁰ Ibid., 28 September 1838.

¹¹ Plunkett to Colonial Secretary, 20 December 1838, NSW Governor's documents 1838, vol. 30, pp. 699-701, ML.

¹² SH, 26 February, 21 May 1838.

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 based essentially on convict labour. 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, and the *Herald* of the other. Both outlooks were necessary, and it says something for Plunkett that, despite the continued attacks made upon him, especially by the *Herald*, he was able to see this, particularly 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 every day's 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.¹³

It was one thing to apply for leave but, with such a paucity of talent willing to sacrifice a lucrative legal practice for the underpaid and onerous duties of an Attorney-General, it was another thing to have leave granted. By August 1839 Plunkett was plaintive in his complaints about the labours that had 'nearly laid him in his grave'. Chief Justice Dowling conceded that the office of Attorney-General had never been more satisfactorily filled, but 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.¹⁴ By 1840, when Gipps was finally able to make satisfactory arrangements for the replacement of Plunkett by Therry, despite his misgivings concerning their identical religious affiliations, Plunkett had spent nearly nine years in the colony

¹³ *Australian*, 6 July 1838.

¹⁴ SH, 28 August 1839, reports LC.

and even the press was sorry to hear that he was leaving. He was regarded as 'one of the very few really *working* government officers', 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'.¹⁵ 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 10s 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.¹⁶

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 in 1832, 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'.¹⁷ 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 1841.¹⁸ He had apparently decided that his days in New South Wales were over as before he left he sold almost all his personal

¹⁵ *Australian*, 31 December 1840; *SH*, 30 October, 25 December 1840, 1 January 1841.

¹⁶ *Sydney Gazette*, 25 February 1841; *SH*, 5 March 1841; *Australian*, 4 March 1841. The *Australasian Chronicle*, edited by William Augustine Duncan, a convert to Roman Catholicism, conceded that the dinner was 'the grandest and most respectable ever given in the Colony' but was much displeased that it took place in Lent! *Australasian Chronicle*, 4 March 1841.

¹⁷ *Australian*, 18 March 1841.

¹⁸ *Sydney Gazette*, 25 March 1841.

belongings, his piano, violin and law books as well as a britzka and a double bodied phaeton.¹⁹ 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 services in its development for the rest of his days.

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 affect 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'.²⁰ Even Gipps had begun to share in the general despondency and he admitted to La Trobe that many members of his Legislative Council who had suffered severe financial pressure 'look with a jaundiced eye upon everyone who receives a salary from Govt . . . everyone who is able to pay his Butcher's Bill'.²¹

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 since the cessation of transportation in 1840 turned the minds of some to solutions that could have resulted in the substitution 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', although there was no support for it in the Council.²² The rejection of

¹⁹ *Australasian Chronicle*, 11 March 1841.

²⁰ SH, 1 November 1841.

²¹ Gipps to La Trobe 12 November 1843, Gipps-La Trobe correspondence, vol. 4, no. 258, La Trobe Library.

²² SH, 21 July 1841, reports LC.

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.

The most significant event that tended to dissipate some of the prejudice of the past by revealing the ascendancy of the free colonists was the census of 1841. It was published in September and showed that the free made up 80 per cent of the population, whilst the bond were only 20 per cent. In Sydney itself the proportions were even more gratifying with only 7.6 per cent bond and 12.1 per cent emancipist. Even the proportion of Protestant to Catholic was reassuring with 72 per cent to 27 per cent being the relative figures for both the colony and Sydney itself although Dr Lang still trumpeted 'No Popery'. 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.²³ 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 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 in 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 civilisation. 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

²³ See R. Mansfield, *Analytical View of the Census of New South Wales for the year 1841*, and SH, 7, 11, 13, 21 September 1841.

indicated the ability of New South Wales to slough off the characteristics of convictism and take on those of capitalism. Even the *Herald*, long the constant champion of the exclusives, with the census results as proof that the vision of the past was no more than a chimera, wrote an editorial 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 forgo 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'.²⁴

It was all very well to call for unity; it was another thing to implement it, and the first steps had to be taken in England. 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 South Wales.²⁵ As a result the Act by which New South Wales was governed, 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'.²⁶ 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 Legis-

²⁴ *Ibid.*, 11 January 1842.

²⁵ Russell to Gipps, 21 July 1841, *HRA* (1), XXI, pp. 440-2.

²⁶ *SH*, 2 September 1841.

lative Assembly for at least ten years'.²⁷ The disorder sprang from the fact that there were those present, like Henry Macdermott, Irish-born leader of the Sydney working class, 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'.²⁸ 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 Carta were preserved from the inroads of the rights of man, republicanism and Tom Paine. A commission was set up, upon which James Macarthur 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'.²⁹

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 the 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 in so far as the forthcoming elections were concerned was largely left in the hands of Gipps and the existing Legislative

²⁷ Ibid., 15, 16, 17 February 1842.

²⁸ Ibid., 17 February 1842.

²⁹ Ibid., 17, 21, 28 February, 1 March, 20 June 1842.

Council.³⁰ 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.'³¹

Plunkett had arrived in England in July 1841 and immediately reported his presence to Russell.³² 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.³³ Plunkett replied stating that, as the exorbitant 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.³⁴ On the back of this letter the under-secretary James 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'.³⁵ When Stanley saw Plunkett's letter he noted on it: 'I think this suggests the necessity of excluding weekly occupants. If we do

³⁰ The Act, 5 and 6 Vict., cap. 76 was printed in full in *SMH*, 5 January 1843. The *SH* changed to *SMH* on 1 August 1842.

³¹ Stanley to Gipps, 5 September 1842, *HRA* (1), XXII, pp. 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 permanent happiness and contentment of Her people', *ibid.* To the *Australasian Chronicle* (8 October 1842) the 'gracious boon' was 'far from satisfactory' with 'its thoroughly oligarchical tendencies'.

³² Plunkett to Russell, 29 July 1841, Original Correspondence, Secretary of State N.S.W., CO 201/314, National Library.

³³ Hope to Plunkett, 20 January 1842, *ibid.*, CO 201/329.

³⁴ Plunkett to Hope, 2 February 1842, *ibid.*

³⁵ Stephen to Stanley, *ibid.*

not it is evident that even a £20 qualification will be almost universal suffrage in Sydney.³⁶ The weekly occupants were eventually excluded, but the £20 qualification remained on a freehold or leasehold basis, and this, to the *Herald*, was 'universal suffrage'.³⁷

Over the next few months Plunkett was 'employed and consulted by Mr. Hope in drawing up the N. S. Wales Act'.³⁸ In fact he successfully used his commitment to this work to argue for an extension of leave, which Stanley did not hesitate to grant.³⁹ 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.⁴⁰ 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.⁴¹

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 steps towards the implementation of its ideals. Sydney itself had become excited about the prospects of being a city because a bill to incorporate it was passed on 20 July 1842, to become law on 1 January 1843, and the citizens set about preparing for their first elections.⁴² James Macarthur and the emancipated medical practitioner William Bland, whom some hoped would be amongst those from the

³⁶ Ibid.

³⁷ SMH, 8 October 1842.

³⁸ Stephen to Stanley, 3 October 1842, Original Correspondence, Secretary of State N.S.W., CO 201/329, National Library.

³⁹ Plunkett to Stanley, 12 April 1842; Hope to Stanley, 26 June 1842, and note from Stanley to Hope, 26 July 1842, *ibid*.

⁴⁰ Stephen to Stanley, 3 October 1842 and note of Hope to Stanley 6 October 1842, *ibid*.

⁴¹ *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'.

⁴² SMH, 21 July 1842.

'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.⁴³ By the following day 'the evil consequences of 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 conservatives he was in nowise as obnoxious as that 'rampant Dictator' Macdermott, who was also elected.⁴⁴ 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'.⁴⁵

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 Bishop Broughton declined a seat in the new Council. Gipps rejoiced, rightly in the main, that the old Council 'had never legislated for a class', and he wrote to Stanley asking him to take note of the fact that 'From a Penal Colony [New South Wales] has become a free one'. The Governor rejoiced in good seasons now prevailing, together with political and religious harmony, all of

⁴³ Ibid., 1 November 1842, and *Australasian Chronicle*, 1 November 1842.

⁴⁴ *SMH*, 2, 10, 22, 29 November, 31 December 1842.

⁴⁵ Gipps to Stanley, 27 November 1842, *HRA* (1), XXII, pp. 376-7.

which augured well for the future despite the present financial difficulties.⁴⁶

Campaigning for the elections began in a speculative 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'.⁴⁷ 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.⁴⁸

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 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.⁴⁹ Despite the strong opposition to him Therry won Camden from Charles Cowper with the *Australasian Chronicle* championing Therry as a Catholic candidate and proclaiming 'Well done, honest men of Camden!'⁵⁰ Therry mingled his electioneering with a campaign of his own on behalf of colonial propriety. He conducted and won the first prosecution in New South Wales for an obscene publication against three gentlemen who 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

⁴⁶ SMH, 25 February 1843, reports LC, and Gipps to Stanley, 19 August 1843, HRA (1), XXIII, pp. 84-7.

⁴⁷ SMH, 5 January 1843.

⁴⁸ Ibid., 27 January, 23 May, 16 June 1843.

⁴⁹ Ibid., 6, 10 January 1843.

⁵⁰ *Australasian Chronicle*, 27 June 1843.

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'.⁵¹

The Sydney election on 15 June was marked by 'mild riots' and the loss of one life.⁵² In Port Phillip the only noteworthy feature, apart from a riot, was the election of John Dunmore Lang, and the defeat of Major Mitchell who, together with Charles Windeyer, was the other public servant rejected by the electorate. Therry was, 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 by Cowper in Cumberland he could not act 'as a Nominee of the Crown, either with advantage to the Public or satisfaction to himself'.⁵³ By 8 July Wentworth, who had won a Sydney seat, 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'.⁵⁴

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.⁵⁵ 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'.⁵⁶ Wentworth did not need to say that Macleay, formerly Colonial Secretary, was, as early as 1828, an opponent of his brother, William Charles. Furthermore

⁵¹ SMH, 17, 19 April 1843.

⁵² Gipps to Stanley, 18 July 1843, HRA (I), XXIII, pp. 42-5.

⁵³ Ibid. Cowper, piqued at his defeat in Camden, for which he partly blamed Macarthur, stood against Macarthur in Cumberland.

⁵⁴ SMH, 8 July 1843.

⁵⁵ Gipps to Stanley, 29 June 1843, and enclosures, HRA (I), XXII, pp. 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 LC.

⁵⁶ SMH, 2 August 1843, reports LC.

Macleay was 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.⁵⁷ Gipps refrained from comment when he conveyed news of Macleay's election as speaker to Stanley.⁵⁸ 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'.⁵⁹ Plunkett and Maria Charlotte 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 a temporary 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.⁶⁰

While on leave Plunkett had spent most of his time with his own and his wife's relatives in Ireland. He came across to London frequently on the business of the 1842 Act and in September

⁵⁷ Ibid.

⁵⁸ Gipps to Stanley, 9 August 1843, *HRA* (1), XXIII, pp. 74-5.

⁵⁹ *Australasian Chronicle*, 9 August 1843.

⁶⁰ *SMH*, 9 August 1843, reports LC.

1842 he applied for an appointment in Ireland or England. It is likely that he withdrew the application as his letter is noted as received in the Colonial Office Records but it cannot be located. His journey home 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, or with his other relatives.⁶¹ The bonds with the past were cut and Plunkett knew that he had returned to New South Wales at a time that was to be decisive for its future development.

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,⁶² 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 before the first session weakened the government.⁶³ 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 Judge Stephen had earlier made it clear that he did not wish to have a hand in framing legislation.⁶⁴ This meant that the government looked to Plunkett to advise on the legality of bills introduced by it;

⁶¹ Letters to John N. Molony from the present Earl, 13 October, 1 December 1969.

⁶² 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.

⁶³ Gipps to Stanley, 1 January 1844, HRA (1) XXIII, pp. 309-11.

⁶⁴ Stephen to Therry, 27 June 1842. Sir Alfred Stephen's Letter Book, vol. 5, p. 88, ML.

indeed he was frequently called upon to draft them, and at the same time he had to act as invigilator 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'.⁶⁵

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.⁶⁶ Windeyer, who moved the motion, also 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 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'.⁶⁷ In the event both his own salary and that of Gipps remain unvaried, although a bill was passed to reduce the salary of future governors by £1,000.⁶⁸

The opposition to the government in the Council was led by Wentworth, R. Windeyer and Cowper, with Lang vacillating between the two sides. In essence it was anti-Gipps, 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 which regulated

⁶⁵ *SMH*, 4 November 1843.

⁶⁶ *Ibid.*, 2 October 1843, reports LC.

⁶⁷ *Ibid.*, 14 October 1843, reports LC.

⁶⁸ *Ibid.*, 15 June 1844, reports LC.

government spending, 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 opponents fairly weighed'.⁶⁹ 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.⁷⁰ It was a quirk of fate that made 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.

Yet to judge the Legislative Council in the years 1843-56 simply on the grounds of opposition to the governors, or on the minor divisions based on the personalities that made it up, is to overlook the permanent contribution it made to the development of New South Wales in those critical years. In the days before anything like the modern party system of politics had been developed, and especially when, before 1856, a third

⁶⁹ *Ibid.*, 20 December 1844, reports LC. 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. Lowe's opinion of Gipps was much the same, *Atlas*, 26 July 1845, 4 July 1846.

⁷⁰ *SMH*, 20 December 1844, reports LC.

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,⁷¹ 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.⁷² 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 *Votes and Proceedings*, is in some senses to read the history of New South Wales in the period. The 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

⁷¹ *Ibid.*, 6 October 1847.

⁷² There were 322 select committees from 1844 to 1855 on 107 of which Plunkett sat. George Nichols and W. C. Wentworth sat on the same number, but Charles Cowper outdid them with 159. See *Votes and Proceedings of the Legislative Council of New South Wales*, 1844-55.

May and December and in 1845 when he sat on six of the nine committees appointed by the House. 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 proof that he was dedicated to his belief that the then available 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 it in the essential concepts vital to its development, was the press. The *Herald* had lost no time in appointing a reporter to the Council, and from 11 June 1838 it provided a service to the community which it maintained until 1879 when *Hansard* was commenced in New South Wales. In this respect the paper 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. So 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 Robert Lowe and Wentworth called for a select committee in 1845 to inquire 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.⁷³

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

⁷³ SMH, 13 September 1845, reports LC.

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 laid down by the Colonial Office 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, was 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 upon which the colony would further develop. Gipps and 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*'.⁷⁴ 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 thralldom which . . . will cause generations yet unborn to rue the day he ever set foot upon our shores'.⁷⁵ 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 states-

⁷⁴ *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 'debasement of 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.

⁷⁵ *SMH*, 4, 6 July 1846.

man with great breadth of vision, a strong governor, fearless of public opinion, and a man with an almost uncanny foresight'.⁷⁶ With Watson's judgment Plunkett would have wholeheartedly agreed, because he knew that 'it was under the present administration the colony had received free institutions' and thus 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 Gipps's critics were unwilling to recognise, 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, 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 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 Judge Willis whom he had removed from his Bench in Port Phillip 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

⁷⁶ Frederick Watson in his *Introduction to HRA* (1) XXIV, p. xvii. 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', *Historical Studies, Selected Articles*, First Series, p. 102.

told Sir George the case would go against him, Mr Willis not having been heard personally'.⁷⁷ Their Lordships of the Privy Council conceded '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'.⁷⁸ 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.⁷⁹ 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'.⁸⁰ 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'.⁸¹ Plunkett thus took the seat in 1847, thereby adding to what could be reasonably termed already adequate responsibilities and commitments.

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'.⁸² A dinner was held on

⁷⁷ SMH, 31 May 1847, reports LC.

⁷⁸ Order-in-Council, communicated by William L. Bathurst to Stephen, 1 August 1846, HRA (1), XXV, pp. 204-6.

⁷⁹ 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.

⁸⁰ Gipps to Stanley, 28 March 1846, HRA (1), XXIV, pp. 829-31.

⁸¹ Grey to FitzRoy, 28 August 1846, *ibid.*, XXV, pp. 175-6.

⁸² SMH, 1 January, 17 February 1846.

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. Richard 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'.⁸³

When the Council opened in May, Alexander Macleay resigned as speaker. 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, a 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 the Squatting Act.⁸⁴

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 Francis Lord. It contained the words: '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 recognise it as a tax or to answer the Address. An attempt was made to address Her Majesty to thank her for

⁸³ Ibid., 28 January 1846.

⁸⁴ Ibid., 21 May, 4 June 1846, reports LC.

removing Stanley from the Colonial Office, but 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 25 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.⁸⁵

The *Herald* clearly had Plunkett in mind when it said that 'if any Government member had voted against the Bill his name would have been transmitted to posterity stamped with imperishable fame'.⁸⁶ 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, 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.⁸⁷ 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'.⁸⁸

⁸⁵ *Ibid.*, and Gipps to Gladstone 25 June 1846, *HRA* (1), XXV, pp. 109-12.

⁸⁶ *SMH*, 6 June 1846.

⁸⁷ *Ibid.*, 12 June 1846, reports LC.

⁸⁸ Gipps to Gladstone, 25 June 1846, *HRA* (1), XXV, pp. 116-17.

Be this as it may, when the former sergeant of a 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 only 80 were independent in the sense that they were in no way contingent upon government support. In all they subscribed £1,018 18s of which Polding gave £20, Plunkett £10 10s and Broughton, to his credit, £10.⁸⁹

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 nineteenth 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. At least as early as 1841 Gipps had held that Port Phillip ought to be allowed its own chance for separate development so in April 1846 he used his casting vote in the Executive Council to recommend that it be erected into a separate colony.⁹⁰ 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.⁹¹ 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 with largeness of heart he pleaded that a certain obscure individual, Mr Homersham, be reinstated in a minor government situation 'as an act of justice'.⁹²

⁸⁹ SMH, 11 July 1846.

⁹⁰ Gipps to Stanley, 29 April 1846, *HRA* (1), XXV, pp. 26-33, and Gipps to La Trobe, 24 July 1841, 25 December 1845, 30 January 1846. Gipps-La Trobe correspondence, vol. 3, no. 102, vol. 5, nos. 390 and 394, La Trobe Library.

⁹¹ Gipps to Gladstone, 19 May 1846, *HRA* (1), XXV, pp. 59-61.

⁹² Gipps to Gladstone, 26 May 1846, *ibid.*, p. 72; Gipps to Gladstone, 28 May 1846, *ibid.*, p. 73; Gipps to Gladstone, 10 July 1846, *ibid.*, pp. 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.*, p. 393.

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 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'.⁹³ It was a narrow and 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-founded 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'.⁹⁴ 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'.⁹⁵

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.⁹⁶ 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. Nonetheless Plunkett was still able to play an important role in the development of New South Wales precisely because he remained a member of the public service. During the last years of Gipps's administration the opportunity was his to ascend to the Bench of New South Wales, and whether through chance or a deliberate policy of indecisiveness he lost it. Those years, therefore, shaped the remaining course of his career in that had he become a judge his social and political

⁹³ SMH, 13, 17 July 1846.

⁹⁴ Gipps to Stanley, 29 April 1846, HRA (1), XXV, p. 31.

⁹⁵ 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'.

⁹⁶ Gipps to Stanley, 11 December 1844, HRA (1), XXIV, pp. 123-7. As explanation for Plunkett's nomination Gipps apparently considered it enough to remark of him, 'known at the Colonial Office', *ibid.*, p. 126.

involvements would have been of an entirely different kind. As a consequence they bear some examination.

In July 1843 William Jeffcott was appointed the Resident Judge at Port Phillip in place of the deposed Willis. Gipps told La Trobe that Jeffcott was 'a man of mature age, very quiet, and I hope, prudent in his demeanour, *though an Irishman*'.⁹⁷ Deep within this Irishman there were other obscure fears that twisted his soul. Cheerfully he took the four oaths required of him as a judge and also 'made and subscribed the Declaration against Transubstantiation' because he lived in an age when such things still mattered amongst Christians.⁹⁸ Jeffcott then withdrew from the Executive Council's presence and 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 convicted criminals to death.⁹⁹ 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 Jeffcott had 'acted in this matter from the purest and most conscientious motives'.¹

In June 1844 Judge Burton left for a higher appointment on the Madras Bench; Chief Justice Dowling was so ill at the time that only one effective judge was left in Sydney, 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

⁹⁷ Gipps to La Trobe, 1 June 1843, Gipps-La Trobe correspondence, vol. 4, no. 230, La Trobe Library.

⁹⁸ Executive Council Minute 12, 19 June 1843, and 1 July 1843, pp. 268-75, NSW 4/1521.

⁹⁹ Executive Council Minute 23, 16 September 1844, p. 488, *ibid.*; Enclosure C to Minute 23, 1844, pp. 84-6, *ibid.*, 4/1449.

¹ Gipps to Stanley, 28 December 1844, HRA (1), XXIV, pp. 149-50. The resignation of Jeffcott 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, p. 15.

honour' which was the *Herald's* way of saying that they ought not be offered it again.² 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 à Beckett, the Solicitor-General, to act until Burton's successor was appointed.³ à 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 à Beckett's favour.⁴

The temporary appointment of à 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 minds 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.⁵ 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 à 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

² SMH, 9 July 1844.

³ Gipps to Stanley, 18 July 1844, HRA (1), XXIII, p. 684.

⁴ à Beckett to Gipps, 3 October 1844, *ibid.*, XXIV, pp. 12-15.

⁵ Gipps to Stanley, 6 September 1844, *ibid.*, XXIII, pp. 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.

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'.⁶ His death left the office of Chief Justice vacant and surprise was feigned by some 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 be Attorney-General, if this plan succeeds'.⁷

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.⁸ 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 in 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

⁶ Gipps to Stanley, 6 October 1844, *ibid.*, XXIV, p. 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.

⁷ 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.

⁸ Statement by Stephen, 4 October 1844, HRA (1), XXIV, pp. 8-11.

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'.⁹

The other complication that bedevilled the situation was the knowledge that Dickinson's arrival in the colony was imminent. à 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 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 à 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.¹⁰

Not to be outdone, Therry also wrote staking his claim for the office of Attorney-General, based 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.¹¹ 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, O'Connell, Bishop Broughton and the Colonial Treasurer, Riddell, voted for Stephen, whilst Colonial Secretary Thomson asked that his dissent be recorded. He did not hold

⁹ Plunkett to Gipps, 4 October 1844, *ibid.*, p. 12.

¹⁰ à Beckett to Gipps, 3 October 1844, *ibid.*, pp. 12-15.

¹¹ R. Therry to Gipps, 5 October 1844; W. M. Manning to Stanley, 7 October 1844, *ibid.*, pp. 15-16.

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.¹² When Gipps relayed this decision to Stanley, 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 earned the position through his 'good service to the Government and the Colony'.¹³

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.¹⁴

On 21 October Stephen was sworn in as Chief Justice, together with John Noddes Dickinson who had arrived on 13 October, and à Beckett who was reappointed to act temporarily until London had decided on whether Stephen's appointment was to be permanent.¹⁵

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

¹² Executive Council Minute No. 28, 5 October 1844, pp. 504-8, NSW 4/1521.

¹³ Gipps to Stanley, 6 October 1844, *HRA* (1), XXIV, pp. 6-8.

¹⁴ *SMH*, 7 October 1844.

¹⁵ Gipps to Stanley, 23 October 1844, *HRA* (1), XXIV, p. 42.

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 1839.¹⁶ Stephen also wrote 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'.¹⁷ Therry too wrote to Stanley when he found that à Beckett had been again appointed. He pointed out that his long service entitled him to a seat on the Bench before à Beckett, and at the same time he was not loath 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 . . . 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.'¹⁸ Gipps admitted that he had only appointed à 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.¹⁹

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 à 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

¹⁶ Plunkett to Stanley, 7 October 1844, *ibid.*, pp. 21-3.

¹⁷ Stephen to Stanley, 9 October 1844, *ibid.*, p. 28.

¹⁸ Therry to Stanley, 21 October 1844, *ibid.*, pp. 43-6.

¹⁹ Gipps to Stanley, 23 October 1844, *ibid.*, pp. 42-3.

admission that, in view 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 à 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 à 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 à Beckett has descended to, in order to obtain the Seat he now fills.²⁰

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'.²¹ Whatever the truth of this accusation, it is certain that Gipps had serious misgivings about the course of events, because, 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 à Beckett to those of Mr Plunkett and Mr Therry, I had done violence to my own feelings'.²² Gipps was clearly relieved that at

²⁰ Plunkett to Gipps, 23 October 1844, *ibid.*, pp. 48-50.

²¹ *Port Phillip Patriot*, quoted in *SMH*, 13 January 1845. Gipps thought that Therry was 'a well disposed man — and though an Irishman and a Catholic, discreet and moderate'. Gipps to La Trobe, 7 December 1844, Gipps-La Trobe correspondence, vol. 4, no. 318, La Trobe Library.

²² Gipps to Stanley, 28 December 1844, *HRA* (1), XXIV, p. 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.

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.²³ 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 à Beckett in Equity he 'humbly yet earnestly' advised Gipps to send Plunkett to Port Phillip.²⁴ 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'.²⁵ A couple of years later Stephen made it clear that in 1845 it was Plunkett rather than Equity that he did not want. 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'.²⁶ 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.²⁷

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 à Beckett',

²³ Gipps to Stanley, 5 March 1846, *HRA* (1), XXIV, pp. 803-5.

²⁴ Stephen to Gipps, 6 October 1845, Alfred Stephen's Letter Book, vol. 5, pp. 202-5, ML.

²⁵ Stephen to Plunkett, 25 November 1845, *ibid.*, pp. 213-15.

²⁶ Stephen to Manning, 26 November 1847, *ibid.*, no pagination.

²⁷ Stephen to Colonial Secretary, 14 January 1848, *ibid.*, no pagination.

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 hard-working gentleman, but had become so much out of touch that he was now incapacitated for the 'labours of a Judge of the Supreme Court'.²⁸ In the event Therry returned to Sydney to take his seat on the Bench, and à Beckett, as Therry's junior, went reluctantly to Port Phillip. The Bar gave à 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 à 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 à Beckett said 'He had never sought promotion to the Bench'.²⁹ Therry was sworn in on 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.³⁰

The whole episode was a dismal affair in which few of the actors seem to have emerged with their honour unscathed. 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 to 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.'³¹ 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

²⁸ SMH, 19 September 1845.

²⁹ Ibid., 27 January 1846.

³⁰ Ibid., 27 February, 17 March 1846.

³¹ See note signed J.S. dated 29 March in Stephen's handwriting on Gipps to Stanley, 6 October 1844, CO 201/350, National Library.

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 on 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.

Towards Responsible Government

WITH the departure of Gipps and the arrival of the more flexible Charles Augustus FitzRoy in August 1846 the colony began to settle down and develop further the characteristics needed for the advent of responsible government. The early years of FitzRoy's administration were marked by conflict over the proposals to revive transportation to New South Wales. By 1850 it was clear that the days of the penal colony were gone forever and that New South Wales would never again welcome the grey ships with their pale cargoes of human jetsam. With that question settled it was possible for the colonists to bend their energies to the more congenial task of winning from Westminster a form of government more suited to the requirements and capacities of a free and flourishing society.

During the administration of FitzRoy, 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, which 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.¹ In this last case it began to use its prerogative

¹ See *Executive Council, 1825-1935*, Record Group NEC Archives Authority of New South Wales.

with greater generosity so that executions dropped from 69 in the five years to 1843 to only 23 over the succeeding five years.²

As Attorney-General Plunkett was required to give constant legal opinions of massive proportions. From 15 September 1847 to 22 April 1850, alone or with the help of Manning, he wrote over 700 letters to the Colonial Secretary on matters ranging from the occupation of Crown lands to illicit stilling.³ As a result 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 to 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.⁴ The days had passed in which some segments of the public saw Plunkett 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 recognised both in court and in the Legislative Council as a formidable opponent.⁵

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 1840s the realisation 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

* SMH, 10 October 1849. Criminal convictions in New South Wales dropped 43% in the same period.

* Letters from the Attorney-General to Colonial Secretary, 15 September 1847-22 April 1850, NSW 7/2678.

* SMH, 15 April, 24 November 1848.

* Ibid. A letter signed 'Justitia' used these words when praising Plunkett for his work in the Circuit Courts. The *Sydney Chronicle* (10 March 1847), on the other hand, took him to task for charging with a mere misdemeanour a man whose 'hungry dogs of a most ferocious kind' ate a man alive.

economic setbacks due to drought and depression and utilise the seemingly limitless resources that nature had placed at its disposal. Events in other places, such as the 1848 Revolutions 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, a partly elective legislature, equal laws, and perfect religious liberty, as proof of its assertion.⁶ 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 13 and 14 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; it met considerable opposition from Catholic quarters and from bodies such as the Total Abstinence and Temperance Societies. The bill went through the Council after Plunkett modified it to meet the wishes of interested organisations, without departing from its main principles.⁷ It achieved its 'desired effect' as FitzRoy told Grey,⁸ 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 old friend Father John McEncroe, now a confirmed teetotaller, and was only appeased when they publicly apologised for their activities.⁹ 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

⁶ *SMH*, 26 July 1848.

⁷ *Ibid.*, 15, 22 October 1846, reports LC and *Morning Chronicle*, 21 October 1846.

⁸ FitzRoy to Grey, 9 January 1847, *HRA* (1), XXV, pp. 307-9. The 'serious riots' occurred between 'the lower orders of the Catholic and Protestant Inhabitants' according to FitzRoy, *ibid.*, p. 308.

⁹ *SMH*, 5 April 1847.

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.¹⁰ 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' for the denominational system 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.¹¹ 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 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. 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 28 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. At the second reading, 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. 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

¹⁰ Ibid., 8 October 1846.

¹¹ Ibid., 12 May 1848, reports LC. The first National Board had Charles Nicholson and W. S. Macleay as members, together with Plunkett as chairman.

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. 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'.¹²

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.¹³ 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

¹² Ibid., 7, 29 September, 5, 6, 11 October 1849, reports LC and 12 October 1849. At the time Bland was not a member of the Legislative Council.

¹³ Lowe was attacked for his cowardice in not having accepted Bland's challenge. It was an unworthy charge given Lowe's poor eyesight; *Bell's Life in Sydney* (20, 27 October 1849) even scorned him as an Albino.

class whatever of Her Majesty's subjects', and concluded 'Henceforth I reject, not only your friendship, but your acquaintance'. The last communication 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*'.¹⁴ The Sydney electorate had the last word when in December, Lowe having resigned his seat in the Council, it elected Bland in his place.¹⁵

By the late 1840s Plunkett had achieved the ironical distinction of being in favour with the paper that for many years had been almost unwearied in its attacks upon him. The *Herald* had adopted wholeheartedly the ideal that progress was only possible once all vestiges of the penal past were swept away. It exaggerated its stand when it opposed Bland as a senator, but in the main its attitude, reflected in the editorials of its unofficial editor, Ralph Mansfield, had begun to show tendencies towards liberalism. Lowe regarded Plunkett and Mansfield, together with Chief Justice Stephen, as a trio of 'old women' unable to accept the radicalism he felt necessary for the advancement of the colony.¹⁶ Yet it can be argued that to have injected into the fragile fabric, of which New South Wales society was woven, elements of discord and disorder would have destroyed the slow march to independence and ultimately nationhood that began in the 1840s. Plunkett, at any rate, was committed to a form of gradualism which called for the co-operation of all elements in society in the work of making New South Wales into a free and prosperous colony within the Empire.

Plunkett had mellowed with the years and he allowed nothing of his private life, with its own inherent sorrow, to show through his public activity. He was seen less at the Bar but 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

¹⁴ *SMH*, 23, 25, 26, 27, 28, 29 October 1849.

¹⁵ *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.

¹⁶ *Atlas*, 16 September 1848. In 1845 Lowe defined radicals as those who wanted immediate self-government, *ibid.*, 18 January 1845.

Therry, and together they went to Moreton Bay to hold the first Circuit Court there in 1850, a court the necessity of which Plunkett had long pleaded. He was generous in the minimal patronage he could offer and 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.¹⁷ By this time he had clearly decided that he was never to ascend the Bench, and he showed no response when Stephen was attacked by Wentworth who said that

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 innuendo 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'.¹⁸ 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 Justice of this Colony'.¹⁹ 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' and it was agreed that henceforth the Bar would attend to its own internal affairs.²⁰ Apart from this incident the two men remained on an amicable footing.

¹⁷ FitzRoy to Grey, 19 December 1847, *HRA* (1), XXVI, pp. 110-12.

¹⁸ *SMH*, 17 July 1850, reports LC.

¹⁹ Stephen to Stanley, 6 February 1846, see Alfred Stephen's Letter Book, pp. 222-5, ML.

²⁰ *SMH*, 28 April 1847.

Meanwhile the momentum towards responsible government was growing in the colony, and New South Wales, in the late forties, looked forward to the separation 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 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!²¹ 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.²² The Legislative Council was dissolved in June 1848, and 'Luckily the full complement of candidates' was available for election to the new Council although, a week earlier, five of the remoter districts lacked candidates.²³ 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 in so far as they clearly proved the impatience of the inhabitants of Port Phillip for the granting of their independence from Sydney.²⁴ 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'.²⁵ Later James Martin, who had his own difficulties about retaining his seat legally in the Council because of a lack of land qualifications, upbraided Plunkett for not having made his legal opinion on Grey public. Plunkett showed what he

²¹ *Ibid.*, 14 June 1847, reports LC.

²² *Atlas*, 16 October 1847.

²³ *SMH*, 12 July 1848.

²⁴ FitzRoy to Grey, 18 August 1848, *HRA* (1), XXVI, p. 569.

²⁵ FitzRoy to Grey, 22 September 1848, *ibid.*, pp. 609-10; Plunkett and Foster to Colonial Secretary, 22 August 1848, *ibid.*, pp. 611-12; Foster's and Plunkett's opinion to Colonial Secretary in Executive Council Minutes 25 and 26 on 2, 8 August 1848, pp. 408-16. NSW 4/1513; *SMH*, 16 May 1849, reports LC.

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'.²⁶ 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.²⁷ In New South Wales the Act of 1850, 13 and 14 Vict., cap. 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 although Lowe had termed it a 'political abortion' before his departure.²⁸

After a hesitant beginning Governor FitzRoy had eventually settled to his office, with prudence and moderation guiding his activities, at least those he conducted on an official level. It was said that the profligate jostled the virtuous when people who lived in concubinage were invited to his residence, and it took *Bell's Life* to spring to his defence.²⁹ The Sydney sporting journal was of the opinion that the Governor ought to be allowed to entertain as he pleased, but it hoped he would do something about the state of the Military Barracks which it forthrightly termed 'a brothel'.³⁰ Plunkett also showed his ability to distinguish between a man's official and private affairs and when the Governor suffered the grievous loss of his wife in an accident at Parramatta the Attorney-General hastened to his side to proffer the aid he owed to a 'personal friend'.³¹ New South Wales citizens in general were fond of the Governor who 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 alterations in the Table of Precedence prevailing in the

²⁶ *Ibid.*, 6 July 1850, reports LC.

²⁷ *Ibid.*, 23 November 1850.

²⁸ *Atlas*, 19 February 1848.

²⁹ *Atlas*, 14 November 1846; *SMH*, 9 June 1847.

³⁰ *Bell's Life in Sydney*, 18 April, 26 December 1846.

³¹ *SMH*, 8 December 1847.

colony, alterations that would not cause 'mortification in any sensible mind'.³² 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*, long the champion of the squatters but now sniffing the prevailing winds, was writing of 'that gigantic anomaly, the Squatting System of New South Wales', in which the squatters paid less than 3/16 of a penny per acre in licence fees for their runs and the average run was 29,000 acres.³³

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.³⁴ 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 analogous to the punishments under the convict system'.³⁵ 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

³² FitzRoy to Grey, 2 April 1847, *HRA* (1), XXVI, pp. 453-4.

³³ *SMH*, 15 April 1848.

³⁴ *Ibid.*, 21 September 1849. 8,922 out of 19,296 were for drunkenness. There were also 83 charges laid for 'furious driving', *ibid.*

³⁵ *Ibid.*, 27 June 1850, reports LC.

applause of Lowe who defended, unsuccessfully, in the case.³⁶

It was, therefore, as a symbol of permanence, stability and order in colonial society that Plunkett helped shape the destiny of New South Wales during those years which saw the crucial developments brought about by the discovery of gold and the consequent granting of a constitution which ensured responsible government in the colony. Though few were drawn to the Attorney-General on the level of human companionship he was certainly respected and even admired by some. The small boys of Sydney apologised to him through the pages of *Bell's Life* after they held a Guy Fawkes procession 'to the no small annoyance of Her Majesty's lieges', as a result of which, they were 'loike to catch it' from the Attorney-General. An amicable solution was arrived at, 'creditable to heads and hearts' of both sides of the dispute.³⁷ Yet he had a constant, almost obsessive determination to uphold the law; and 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.³⁸

³⁶ Ibid., 11 June 1849.

³⁷ *Bell's Life in Sydney*, 6 November 1847.

³⁸ Therry to James Macarthur, 15 September 1851, Macarthur papers, vol. 34, pp. 1-4, ML.

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.

The two main events of colonial society between 1851 and 1855 that ushered in the passing of the old order 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., cap. 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 'political abortion' for which he was in large part responsible.³⁹ La Trobe came up from Port Phillip to be 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. After a few preliminary sessions, at one of which Plunkett spoke in favour of George Nichol's motion for an expedition to go and look for Leichhardt, the first counter move was taken by Wentworth when, on 8 April, he asked for a committee to be set up to frame a remonstrance against the Act of 1850. Plunkett was absent from the Council on this day, being engaged in court work.⁴⁰

In many senses the Act of 1850 was a real 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-à-vis* the Governor and his 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. 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, in

³⁹ *SMH*, 29 March 1851, reports LC.

⁴⁰ *Ibid.*, 7, 9 April 1851, reports LC.

his opinion, had to be checked by the establishment of a second house in any future form of government in the colony. He thought that in such a way the 'conservative influence' would operate and thus temper the thrust of democracy. At the same time Plunkett was moved by other factors. He clearly distrusted America as a model, quoted at length from the Harvard professor of law, Joseph 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.⁴¹

On 1 May 1851 the House adopted the remonstrance drawn up by Wentworth's committee in which 'deep disappointment and dissatisfaction' were expressed at the Act of 1850.⁴² 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 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. Thus without fanfare or tumult an era in colonial history ended, and a vibrant, new one opened. 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

⁴¹ Ibid., 18 April 1851, reports LC.

⁴² Ibid., 2, 3, May 1851, reports LC.

1914 or 1939 because it was so sudden, so novel, so revolutionary in its social implications with its fears of famine and bloodshed'.⁴³

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 to control the goldfields.⁴⁴ Plunkett was away on circuit at the time so Manning obtained leave to consult with Edward Broadhurst on the matter. 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'.⁴⁵

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 the quick importation of 'an Infantry Regiment' to keep order on the fields.⁴⁶ 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'.⁴⁷ 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

⁴³ See Geoffrey Blainey, 'The Gold Rushes: the Year of Decision', *Historical Studies*, vol. 10, no. 38, pp. 129-40.

⁴⁴ Colonial Secretary to Attorney-General and Solicitor-General, 16 May 1851, No. 51/3331, Colonial Secretary's Letterbook, Judicial Departments, vol. 21, NSW 4/3757.

⁴⁵ Manning to Thomson, 20 May 1851, No. 51/4997, Colonial Secretary In-letters, NSW 4/2934.

⁴⁶ Stewart to Colonial Secretary, 21 May 1851, Colonial Secretary In-letters, Gold Discoveries, NSW 4/1146.1. 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.

⁴⁷ Blainey, 'The Gold Rushes', loc. cit., p. 136.

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 subsequent attitude makes it clear that he held to a view that a historian a century afterwards expressed with the words 'the population of New South Wales never suffered the impact of a real gold "rush"'.⁴⁸ In 1852 Plunkett summed up his thoughts on 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'.⁴⁹ It was an attitude 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 sole salvation of the colony'.⁵⁰ By January 1854 it was conceded that gold 'has now settled down as one of the permanent and ordinary interests of the colony . . . pursued without disorder, without excitement'.⁵¹

It was precisely this kind of normalcy that Plunkett worked to see achieved on the goldfields. 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 linchpins of stability and good order on the fields. 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. 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.⁵² The discovery of gold, which to others

⁴⁸ J. M. Main, 'Making Constitutions in New South Wales and Victoria, 1853-1856', *Historical Studies*, vol. 7, no. 28, pp. 369-86.

⁴⁹ SMH, 8 September 1852, reports LC.

⁵⁰ Pakington to FitzRoy, 15 December 1852, CO 202/60, National Library; C. F. Hemmington in SMH, 19 May 1853.

⁵¹ Ibid., 1 January 1854.

⁵² Ibid., 30 September 1853, 6 October 1854, 15 June 1855.

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 FitzRoy, a partner of Thomson and Riddell and those others who watched a community develop and grow after the discovery of gold, but who saw their role in this romance as the stabilising factor that would ensure continuity, good order and purpose to the community.

Despite the excitement caused by gold the Legislative Council was still concerned with constitutional development and 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.⁵³ 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, in so far as the petition meant that the colony wanted an executive dependent upon the legislature rather than upon the Governor this was assuredly true.⁵⁴ What precise form the 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.

⁵³ *Ibid.*, 9 December 1851, reports LC.

⁵⁴ FitzRoy to Grey, 15 January 1852, CO 201/450, National Library.

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* because in him 'the enlightened portion of the public have strong confidence'.⁵⁵ This committee had hardly begun its work when a despatch arrived from Grey, who had, however, 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.⁵⁶ Again Wentworth obtained a select committee to reply and this time the answer went as far as to make a clear parallel between New South Wales and America where arms had been resorted to in order to redress its grievances. By this time even the moderates in the Council were inclined to a mild form of protest. 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'.⁵⁷ 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 John Lamb, an elected member for Sydney, called Plunkett the 'great Intriguer-General', to which Plunkett replied that he still thought that the schedules 'ought

⁵⁵ SMH, 17, 18 June 1852.

⁵⁶ Grey to FitzRoy, 23 January 1852, CO 201/450, National Library.

⁵⁷ SMH, 5 August 1852, reports LC.

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 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'.⁵⁸

The sense of resentment in the Council was sufficiently strong to induce FitzRoy to advise Pakington to accept the draft of a new constitution.⁵⁹ This draft was completed in September 1852 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-third 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 ground 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.⁶⁰

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 publicity, as well as being tabled in the Council.⁶¹

⁵⁸ Ibid., 20, 26 August 1852, reports LC.

⁵⁹ FitzRoy to Pakington, 31 August 1852, CO 201/453, National Library.

⁶⁰ SMH, 11 September, 7 December 1852.

⁶¹ Pakington to FitzRoy, 15 December 1852, CO 202/60, National Library; SMH, 12 May 1853.

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, Macleay, Thurlow, Murray and Douglass.⁶² 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'.⁶³

One of the major sources of conflict within and without the committee was whether the members of the new Upper House were to be granted hereditary titles. This particular matter was much debated at the time in the Council, and in the public press. Since then it has become one of the touchstones by which historians have tended to evaluate the liberalism or otherwise of those who put it forward. In fact it was not a novel idea, it was never promoted with excessive vigour by its authors in New South Wales, and it served, in their eyes, the useful purpose 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 now, 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 a hereditary basis; especially when a few years later Therry was able to remark that one could scarcely walk down George Street without treading on the toes of a knight, though admittedly such knights were incapable of the reproduction of their own kind.⁶⁴

The clauses in the new bill that referred to hereditary titles were modelled to some extent on similar ones in the 1791

⁶² Ibid., 21 May 1853, reports LC.

⁶³ Newcastle to FitzRoy, 18 January 1853, CO 201/453, National Library.

⁶⁴ Therry to James Macarthur, 17 September 1860, Macarthur papers, vol. 34, p. 72, ML.

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 Cuningham 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 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.⁶⁵

In January 1852 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.⁶⁶ 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.⁶⁷ 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

⁶⁵ See C. J. Borthwick, *The Bunyip Aristocracy*, History Honours thesis, ANU, 1969, p. 1.

⁶⁶ SMH, 10 January 1852; *Empire*, 14 January 1852.

⁶⁷ SMH, 13 December 1852, reports LC.

conferring any legislative powers.⁶⁸ 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 the Victoria Theatre on 15 August in the presence of six Legislative Councillors and 2,500 people, Henry 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'.⁶⁹ It was brilliant, entertaining, derisive and decisive, but it missed the mark for although it served to bury forever 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'.⁷⁰ 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 poem 'Australasia' was 'about as execrable a piece of trash as it had even been his

⁶⁸ See Borthwick, *The Bunyip Aristocracy*, pp. 22-6.

⁶⁹ *SMH*, 16 August 1853; *Empire*, 16 August 1853.

⁷⁰ *SMH*, 25 August 1853, reports LC. 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, reports LC.

misfortune to read', and wound up the discourse by calling for three groans for Wentworth, Plunkett, Nichols and Martin, which were readily given.⁷¹ The House adjourned on 11 October until 6 December 1853 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.⁷²

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 for life by the Governor, and twelve elected for nine-year terms by the Lower House. 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 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

⁷¹ Ibid., 6 September 1853. 3,000 people attended this meeting.

⁷² Stephen to Plunkett, 1 December 1853 in *ibid.*, 3 December 1853. The letter ran to about 7,000 words. To what extent Stephen, like Dowling before him, wanted a Speaker's chair is uncertain.

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.⁷³ 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.⁷⁴ 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.

On 23 December 1853 the *Herald* proclaimed 'The Bill is Safe' as the session was closed and it had passed through its final stages.⁷⁵ 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 by a poet who justly asked Australia of the future:

When in the zenith of thy power
Forget not Thomson's name.⁷⁶

On 21 March 1854 Wentworth, true father of the bill and the idealist who championed the cause of the colony, also left with the same intent as Thomson. Their departure deprived the Legislative Council of its two most prominent leaders, although Plunkett, who stands beside Wentworth as drafter of the bill,

⁷³ Ibid., 8, 10 December 1853, reports LC.

⁷⁴ Ibid., 13 December 1852, reports LC.

⁷⁵ 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.*

⁷⁶ SMH, 24, 27 January 1854. Thomson still awaits his much deserved biography.

remained behind. 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. The House met again in May, but was prorogued until June despite the prevalent fear of an imminent Russian siege which was quelled partially when FitzRoy laconically told the House, 'we possess ample means for repelling any predatory attack'.⁷⁷ 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.⁷⁸ 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.

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, matters about which he knew little or nothing. The motion of no confidence was lost 27-10 with none of the government members voting.⁷⁹

Dr Lang was back in the House temporarily before he went

⁷⁷ Ibid., 7 June 1854 and *Freeman's Journal*, 22 April, 6 May 1854.

⁷⁸ *SMH*, 14 September 1854, reports LC.

⁷⁹ Ibid., 23 September 1854, reports LC. The House had recently debated the problem of scab in sheep.

to serve six months' sentence for libel, whilst Parkes had returned after beating Charles Kemp for a Sydney seat despite his promise to the electors, after Thurlow beat him in 1853, that he would never appear before them again as a candidate.⁸⁰ Together with Martin and Cowper, they 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.⁸¹

In the meanwhile there was constant speculation in the colony as to the ultimate fate in the Mother 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 affected; 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.⁸² 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

⁸⁰ *Ibid.*, 5 June, 9 July 1855, 11 March 1853.

⁸¹ *Ibid.*, 21, 23 June, 18 December 1855.

⁸² *Ibid.*, 7 December 1854.

in 1851 when he was beaten and 'dragged in the dirt most ignominiously—as many useful and good men have been before me'.⁸³

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 1855.⁸⁴ Nonetheless the original bill formulated in the colony was in the main 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'.⁸⁵ If this was true of England it was true also 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'.⁸⁶ 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 was as firmly a part of the British Empire as it had ever been and it is therefore appropriate to look back at Plunkett's role as lawyer and citizen between 1832 and 1855, because from 1856 until his death he had to try to adapt himself to a new society in New South Wales.

⁸³ Cowper to Parkes, 23 December 1854, Parkes Correspondence, vol. 6, p. 379, ML.

⁸⁴ See A.C.V. Melbourne, *Early Constitutional Development*, pp. 419-20. Melbourne said also, 'The whole course of legislative history in the Australian colonies bears witness to the unsatisfactory nature of the elective upper house', p. 421.

⁸⁵ SMH, 1, 3 November 1855. See *ibid.*, 17 November 1855 for full text of Act 13 and 14 Vict., cap. 59.

⁸⁶ *Ibid.*, 11, 12 December 1855.

Part 2

The Emancipated Whig

The Price of Freedom

It was Plunkett's 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 the other for their research and inspiration. Yet an argument can be mounted that in Australia—over a period of twenty-five years from the arrival of Richard Bourke and the implementation of the Ripon Regulations in 1831 to the beginnings of responsible government in 1856—an experiment took place that has no equal in the annals of European civilisation. It was long customary to pass quickly over the period in European civilisation 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 civilisation 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 civilisation were civil servants turned clerics. 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 civilised 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 civilised, 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 civilisation 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—Bourke, Gipps, FitzRoy and Denison—must be remembered. Again, those who had the vision—Forbes, Wentworth, Lowe, Nichols and, in his lonely, erratic way, Lang—will not be forgotten.

Nevertheless behind them were the clerks, and the word is used, remembering that in the Dark Ages they were the repositories of civilisation because they alone could read and write, they alone could be the framers and interpreters of the law. For over a quarter of a century Plunkett was a 'clerk' in New South Wales and he toiled unceasingly to impart to the colony the values and traditions he held so dearly. The fact that he had to be so many things—civil servant, lawyer, politician, educator and adviser to the Crown—has aggravated the task of projecting him, but 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 Plunkett tags such as liberal, conservative, democratic and their like. In religion he was a Roman Catholic who knew what it was to be emancipated so that he strove to share his own ideals of tolerance with others

and to extend the limits of religious freedom to all. In politics he was a whig to the extent that he had probed the links between Crown, Parliament and people, believed in the value of an educated element in society and wanted to extend the rights of a free citizen both to the emancipists and to the Aborigines. Both his religious and political convictions had their limitations but in the society he met when he arrived in New South Wales convictions that transcended the barriers of class and creed were necessary if a new society were to be shaped.

The most important question that faced New South Wales in the late 1830s was that of the cessation of transportation. The question arose again, after transportation stopped in 1840, when in the aftermath of the drought and the depression of the early 1840s a move was made in the colony to revive transportation. So much of the social, political and economic welfare of the colony was bound up with the system upon which it was founded that no man in public life could stand aloof from the question of transportation. Society had been split for years into two factions—the exclusivist who wanted to keep the convict and the ex-convict in his place and, as a result, to continue the division in society, and the emancipist who wanted to forget the divisions of the past, claim the rights of free citizens and, hopefully, heal the running sore in society. After a passage of over a hundred years it is readily understandable that the weight of judgment will fall on those who opposed the men, measures or movements 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 those such as 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 others who had been sent to this country to expiate their crimes and to reform their characters. The divisions within society were never more evident than when the attempts were made to apply more fully

the British legal system to New South Wales. As a result, given his position as Solicitor-General and then as Attorney-General, Plunkett was deeply involved in these attempts and his involvement served to deepen his conviction that the observance of the rule of law was the basis of civilisation as he understood it.

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 1830s it was clear that the development of the colony rendered it imperative that the legal system 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 fitted 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. Moreover he possessed the necessary competence to embark on the work of reform.¹

The argument about the possible introduction of trial by jury had gone on for thirty years. As early as 1803 Governor 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

¹ 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*, p. 52.

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 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.²

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 realised 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.³ 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.⁴

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 co-operate outwardly, if not inwardly, jury lists

² For a study of the development of the jury system see A. C. V. Melbourne, *Early Constitutional Development in Australia*, pp. 37-46, 121-4, 192-201; C. H. Currey, *Sir Francis Forbes*, chs. XXXIV and XXXVIII, and the valuable article by J. M. Bennett, 'The Establishment of Jury Trial in New South Wales', in *Sydney Law Review*, vol. 3, pp. 463-85.

³ SH, 30 May 1833.

⁴ 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.

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 be preserved. It is understandable that those elements in society who considered themselves as the basis of its respectability, stability and decency would resent being forced to sit as equals in a jury box with men who had themselves been the past recipients of the verdicts handed down by other juries. By January 1834 Forbes had taken action on the matter when he fined Robert C. Lethbridge, Phillip 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.⁵ But throughout 1834 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'.⁶

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'.⁷ 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

⁵ *Sydney Gazette*, 9 January 1834.

⁶ SH, 13 January, 17 March, 3 April and 8 May 1834.

⁷ *Ibid.*, 19 May, 2 June 1834.

the thanks of the entire community for what he had done in this instance'.⁸

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 names and even wrong surnames; many jurors absented themselves. The result was that the system itself was deemed by some 'a public nuisance'.⁹ Plunkett himself, acting as a magistrate, assisted in drawing up the jury lists for Sydney. In the opinion of James Macarthur his initiative may have been admirable, but it was nonetheless 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.¹⁰ Some jurymen, when 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.¹¹ 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

⁸ *Sydney Gazette*, 3, 5 June 1834.

⁹ SH, 13 February, 3, 20, 24 March, 8 May 1834.

¹⁰ See James Macarthur to Sir George Grey, Parliamentary Under-Secretary of State for the Colonies, London, 9 February 1837. Petitions to the King 1835-37, pp. 95-115, ML. See also James Macarthur, *New South Wales, Its Present State and Future Prospects*, pp. 69-127 and Appendixes 1 & 2, pp. 1-20.

¹¹ SH, 15 May 1834.

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!¹²

Thus the work of the Courts was constantly hampered by inefficiency, 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'. 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!¹³ Amongst the general public 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 copies of the proceedings at a police examination, rather than the originals. 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. Plunkett, however, had apparently decided that the point had been made, as he successfully moved before Forbes that the fines be remitted, observing that the object of showing that the magistrates were required to send the originals had been attained.¹⁴

During 1836 and 1837 the jury question still occupied the minds of both the officials of the government and those who administered the law in the courts. 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 touch stone by which one measured the progress of New South Wales towards a free society. Plunkett did his utmost to enforce the jury laws, warning,

¹² *Ibid.*, 24 February 1834.

¹³ *Sydney Gazette*, 5 April 1834; *SH*, 3 April 1834.

¹⁴ *Sydney Gazette*, 4, 18, 25 February 1834.

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.¹⁵ Together with Kinchela he gave an opinion in favour of the new system. They were emphatic that they could not recollect a single case since its introduction in which the verdict rendered by a jury '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.¹⁶

To others the 'Convict Jury Bill' was the greatest evil yet to befall 'this unhappy country'.¹⁷ When William Watt, convict employee of the *Sydney Gazette*, 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 jury itself was partly 'rabble' and the 'Good People of England' were implored to deliver New South Wales from such verdicts.¹⁸ From his 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.¹⁹ Eventually he became wearied of the attacks of the *Herald* and took the editors, Stephens and Stokes, into court for 'an attempt to obstruct the administration of justice'. They were fined £200, 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'.²⁰

Meanwhile in London James Macarthur, who avowed that 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 granted to emancipists only in so far as they

¹⁵ *Ibid.*, 5 May 1836.

¹⁶ Kinchela and Plunkett to Colonial Secretary, 8 April 1836. Opinions of the Attorney-General, 1836, pp. 202-4, NSW 4/473.

¹⁷ *SH*, 24 August 1835.

¹⁸ *Ibid.*, 3, 24 August 1835. See also Bourke to Glenelg, 28 February 1836, and enclosures, *HRA* (1), XVIII, pp. 306-30.

¹⁹ *SH*, 25 July 1836.

²⁰ *Ibid.*, 3, 27 October 1836 and 23 February 1837.

proved over a period of time that they were fit to possess them. Mirroring the mind of the exclusives he 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'.²¹ These opinions were given weight by Burton who, 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'.²² 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.²³

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.²⁴
- 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

²¹ Macarthur to Grey, 9 February 1837, *Petitions to the King 1835-37*, pp. 95-115, ML.

²² Bourke to Glenelg, 10 June 1836, *HRA* (1), XVIII, pp. 436-8. Bourke called Burton's opinions 'vague aspersions' but was deeply pained by the cloud they cast on his administration.

²³ *Ibid.*, p. 438 and Bourke to Glenelg, 13 April 1836, with enclosed petitions, *ibid.*, pp. 391-403.

²⁴ SH, 11 May 1837.

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 of outrage amongst the exclusives that he had put Donnison and Bean up for trial because he was not considered by them as 'a strictly independent officer of the Crown'.²⁵ In the event Donnison and Bean were found not guilty but by his act Plunkett served notice that he was no respecter of persons when it came to serving the ends of justice and exercising his own responsibility as a Grand Jury.

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 then 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 gone practically unpunished, and it was not unknown for whole herds of cattle to disappear and be sold elsewhere, mixed in with lots from other runs.²⁶ 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.'²⁷

²⁵ Ibid., 2, 6 March 1837.

²⁶ 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. NSW 4/467.4 and 4/477.5 and SH, 9 May 1836.

²⁷ 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. It centred upon John Bingle who was a settler on the Hunter where he had amassed considerable wealth. He was also one of those whom Bourke had struck from the list of magistrates in 1836 because of his alleged 'unfitness'. Together with an accomplice Bingle was sent for trial on a charge of cattle stealing by Plunkett in May 1837. In the case Plunkett personally acted as prosecutor and Bingle, 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.²⁸

This disavowal was to little avail because Plunkett was already considered an 'irresponsible public officer' by some of the exclusive party who, understandably, 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 accused 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 parasite'. Plunkett tried unsuccessfully to prosecute the editor for a libel on the jury, but failed, allegedly through his 'precipitancy and want of know-

²⁸ Bourke to Glenelg, 14 May 1837, HRA (1), XVIII, pp. 750-1 and, for previous impressions of Bingle, see Bourke to Goderich, 24 August 1832 in *ibid.* (1), XVI, pp. 719-23 and SH, 15 May 1837.

ledge'. The paper then ran a letter that deplored the lack of delicacy and justice to others in one 'so sensitive' himself.²⁹

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 intention 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 each and Therry remarked that 'the thanks of the public were due to the Attorney-General for conducting the prosecution'.³⁰

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 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 2,030 prisoners had been received into the Sydney gaol in 1836.³¹ The lack of circuit courts threw the whole respon-

²⁹ 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, p. 751. For the case see SH, 15, 22, 25 May; 5, 6 June 1837.

³⁰ Ibid., 15 May 1837.

³¹ Ibid., 26 May, 17 November 1836, 2 January 1837.

sibility on 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 of persons come to view the constant stream of Crown versus the prisoner, or citizen versus citizen.

The Jury Act was renewed in 1838 in the same form as it had been formulated in 1833. Plunkett moved for its continuation despite the opinion held by some colonists that it was 'a judicial monstrosity which has never yet been paralleled in any other part of the world' and he further incurred the wrath of the exclusives by his opposition to the Bushranging Act.³² He was called a 'liberal theorist' because of his stand but his theory was important to bushrangers because part of the Act ordered the execution of a convicted bushranger within forty-eight hours of sentence—a period leaving little time for an extension of mercy by the Crown. Plunkett stated publicly that such a requirement was '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.³³ He knew that he would not succeed in having it repealed given the prevalence of the crime and the attitude of many 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 fear however not yet arrived, when it can be dispensed with in New South Wales'.³⁴

In December 1838 Chief Justice Dowling suggested that the final step be taken by which the law relating to juries in the colony be brought into complete concurrence with that of Westminster. He proposed that military juries be abolished immedi-

³² *Ibid.*, 14 June 1838.

³³ *Ibid.*, 11 June 1838, reports LC. See also C. H. Currey, *Sir Francis Forbes*, pp. 416-20 for a discussion on the origins of the Act.

³⁴ Gipps to Glenelg, 26 January 1839. HRA (1), XIX, pp. 774-80.

ately, 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'.³⁵ 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,³⁶ but Gipps and Plunkett were determined to proceed with the abolition and the 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. The stalwart old liberal, Sir John 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.³⁷ 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.

Nonetheless, by 1840, a white citizen charged with an offence in New South Wales enjoyed the privilege of appearing before a jury comprised of his civilian peers. However, argument still continued as to whether juries ought to be drawn indiscriminately

³⁵ Dowling to Gipps, 18 December 1838 in Despatches from Governor of New South Wales 1839, pp. 1-10, ML.

³⁶ 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.

³⁷ SH, 7 August, 25 September, 9 October, 4 November 1839.

from those peers. When the Sydney list of jurors was returned in January it was noticed that there were 145 emancipists and 153 publicans amongst the 878 names. The *Herald* suggested that there would still be an ample sufficiency of jurors if both the emancipists and the publicans were summarily dismissed from the list.³⁸ 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 moralised 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.³⁹ 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 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'.⁴⁰ 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?' because, apart from their colour, 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

³⁸ *Ibid.*, 20 January 1840.

³⁹ *Ibid.*, 17 May 1839.

⁴⁰ *Ibid.*, 20 May 1839.

South Wales; effectively it was simply part of a 'liberal' theory that bade fair to wreck colonial society.⁴¹

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 cornerstone of British justice, and in fact there was some commitment to the proposition that English law should not be taken over 'holus bolus' into the colonial legal system.⁴² Juries could be objected to in so far as it was inevitable that in certain circumstances some jurors would not be capable or willing to exercise their duty with responsibility and Plunkett was the first to recognise this. Nevertheless the 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.⁴³ Two days later another incident occurred which, if extended on the principle 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.⁴⁴

Despite the amount of criticism levelled at Plunkett by the exclusives over the jury system he seemed able to establish more amiable relations with the burgeoning Sydney press which in

⁴¹ Ibid., 13, 22 January, 16 March, 24 April 1840.

⁴² Gipps held to this view 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 (I), XXI, pp. 155-7 and SH, 24 April 1840.

⁴³ Ibid., 4 May 1840.

⁴⁴ Ibid., 6 May 1840.

1840 obtained its first daily when the *Herald* began on Wednesday, 30 September, to come out every day except Sunday.⁴⁵ 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'.⁴⁶ 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 N.M. *Herald*, in which he was referred to as a 'mean-souled abortion of humanity'.⁴⁷ Plunkett thought that this was an excessive use of freedom and, although he was advised 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 sins.⁴⁸ 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, promptly and understandably, denied the assertion. Manning even went so far as to say that in his experience the free juror was more likely to convict the free than the emancipist was. 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 hint was taken and the letters were printed without hesitation.⁴⁹ As with most things, so also with the jury system, events and the passage of time softened

⁴⁵ *SH*, 30 September 1840; its circulation at the time was about 2,500, *ibid.*, 24 April 1840.

⁴⁶ *Ibid.*, 19 June 1840, reports L.C.

⁴⁷ *Sydney Gazette*, 14 April 1840.

⁴⁸ *SH*, 20 April, 15 July 1840.

⁴⁹ *Ibid.*, 2, 25 September 1840.

the harshness of opposition. By 1845 Plunkett alone remained of those who had fought for its adoption since the early thirties and he had his reward when the newly-fledged Chief Justice Stephen said at Maitland, 'in no part of the world were the responsible duties which devolved upon jurors more faithfully fulfilled'. The *Herald* stood back and applauded the statement warmly, perhaps by now 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 had guided the realisation of the system.⁵⁰

Alongside this single minded dedication to a purpose there was a 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. He was always 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 over centuries. He was prepared to see it 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. To him the law was an expression of the common will ensuring the peace and stability of society and thus, in its formulation, the aspirations and developments of society itself had to be fathomed and acted upon if law itself was to be just and reasonable. The most notable case in which Plunkett tried to understand the aspirations of society was in regard to the system upon which it had been built in New South Wales—transportation. In his initial commitment to defending New South Wales and transportation itself, and in his final resolution that transportation had to cease and cease forever Plunkett did not allow personal associations, whether to his superiors or his fellow colonists, to deflect him from his course

⁵⁰ SMH, 22 March 1845.

of action. In the long run he saw the cause for which he had fought adopted and accepted without demur and in so doing he made perhaps his most valuable contribution to the development of the colony.

Since the foundation of New South Wales in 1788 there had been men in the colony who had wondered about the final fruits of a system that threw down the refuse of three peoples upon the shores of a new land and let events themselves decide what the amalgam would produce. Questions were asked about the types of felons, the methods of punishment, the benefits to the economy and even the fame of Botany Bay in the countries that so cursorily gave it its birth marks. Back in England an anxious Anglican prelate with gloomy notions on the perfectibility of man, a brilliant seducer who longed to spend his pent-up emotions on the fathering of a new and finely-formed England on another shore, and a nervous young radical whose ambition was to preen himself as the chairman of a committee, combined to paint Botany Bay in the colours of their own imaginings and to remove from it the source of its slur. The third of them, William Molesworth, formed his committee in 1837, hand picked his witnesses and took evidence as to the state of the mute accused, Botany Bay, and her convict children. It was not hard for Molesworth and his men to arrive at the conclusion that the convict system had corrupted and degraded colonial society and that transportation was an ineffective means of punishing felons. Mudie slandered the land and the system upon which he had fattened, James Macarthur vacillated but contributed his mite, Lang spoke of crime and villainy and Ullathorne, coached by Molesworth, told in hushed tones of vice so vile that gentlemen must surely whisper it, as if only desperate, lonely men on a wind-swept island in the Pacific could commit it.

Yet in New South Wales there were men who had for years toasted the land they lived in and who looked with pride on the society that had struggled to its feet and was now taking its first halting steps towards self-respect, permanent stability and independence. Understandably there was considerable consternation amongst them when William Molesworth's committee told them about the infamy by which their land was infected. The members of the Legislative Council took the matter up and a petition was

presented praying for the appointment of a local committee to inquire into the transportation system and thus counteract, if possible, the views engendered in England.⁵¹ Plunkett was strongly 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, and he mentioned James Macarthur who, he was sure, 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.⁵²

Throughout the debate on the proposed committee Plunkett had some harsh things to say about the men who had attacked the colony in their utterances and writings. He contemptuously 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 that 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 teetotaler, he considered drunkenness rather than transportation 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 British government could only have had punishment and not

⁵¹ Gipps to Glenelg, 18 July 1838, HRA (1), XIX, pp. 504-5. See also Molesworth *Report on Transportation*, 1838, and, for a study of the evidence and witnesses, C. M. H. Clark, *A History of Australia*, vol. II, pp. 315-47.

⁵² SH, 28 June, 6 July 1838, reports LC.

reformation of the convicts in mind, a deduction with which Plunkett agreed.⁵³ Eventually Plunkett managed to get through a motion that a committee be considered premature until the actual text of 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.⁵⁴ 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 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'.⁵⁵

Curiously enough, the London reformers who had protested about the horrors of transportation and the need for the genuine reformation of convicts were given a chance to test their sincerity within a short time of the publication of the Molesworth Report. The same civilisation that had created them had also formed Alexander Maconochie, who dreamt of a society that would give to its felons a vision of their own human value and prepare them to take their place in its ranks once more with dignity and purpose. In 1839 Maconochie was appointed Superintendent of Norfolk Island and he proceeded to implement his ideals of reform amongst men to whom death itself had seemed a happy escape from misery. It was not very long, however, before news reached Sydney and London of the way in which he intended to reform his charges and his system was attacked as a 'tissue of undigested absurdities'.⁵⁶

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, 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

⁵³ SH, 4, 6, 13 July 1838, reports LC. See also W. B. Ullathorne, *The Horrors of Transportation Briefly Unfolded to the People*.

⁵⁴ SH, 18 July 1838, reports LC. See *Australian*, 10 August 1838, for protests against the misrepresentations in London.

⁵⁵ SH, 9 April, 3 May 1838.

⁵⁶ *Ibid.*, 29 April 1840.

for the most part of the deepest dye'. The play bills, when circulated in Sydney, gave 'rise to loud expressions of dissatisfaction', and 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 was in need of 'good'.⁵⁷ Gipps wrote to tell La Trobe that 'Maconochie is playing the Devil at Norfolk Isl.', unmindful perhaps that in the hell hole the Island had become men no longer looked to God and His servants for succour.⁵⁸ In London other matters pressed more urgently when it was known that Maconochie's methods cost money and ultimately, to the cause of mammon, good order and obedience to regulations, Maconochie was sacrificed.

In the Legislative Council Plunkett's was a lonely voice defending Maconochie and his work on the Island.⁵⁹ 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 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'.⁶⁰ Plunkett was not prepared to feign shock when Maconochie dared to write about the crime which the Molesworth Committee had heard tell of with such reverence in London. Four prisoners had been 'indicted Capitally for the Commission of an unnatural offence' on the Island. 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

⁵⁷ Gipps to Russell, 27 June, 17 July 1840, *HRA* (1), XX, pp. 688-90, 712-15; Russell to Gipps, 12 November 1840, *ibid.*, XXI, p. 73.

⁵⁸ Gipps to La Trobe, 4 July 1840, Gipps-La Trobe correspondence, vol. 2, no. 40, La Trobe Library.

⁵⁹ The *Australasian Chronicle*, 2 July 1840, thought Maconochie's system was excellent and asked that it be given a fair trial.

⁶⁰ *SH*, 8, 9 October 1840, reports LC.

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'.⁶¹ Plunkett would not 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. To Maconochie it was of small comfort perhaps that even in his own day some few saw the value of his ideals and even less comfort that after his death he was recognised as one of the great pioneers of penal reform.⁶²

On 20 October 1840 Gipps announced in the Council that transportation to New South Wales had ceased. The initial shock of the colony's being branded with depravity had worn off and most people thought with the *Australasian Chronicle* that the cessation proclaimed 'the dawn of a bright and glorious era for Australia'.⁶³ Plunkett agreed that, with increased prosperity and the development of free migration in the 1830s, it was time to cast off the burden of continuing as a receptacle for felons from the British Isles, but he was not prepared to see the whole system of transportation condemned simply because it contained defects. To the end he would not admit the system was inherently bad or that it necessarily 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 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

⁶¹ Maconochie to Colonial Secretary, 27 November 1843. Enclosure A to Executive Council Minute 1, 1844, pp. 321-2, NSW 4/1448.

⁶² See J. V. Barry, *Alexander Maconochie of Norfolk Island* and 'Alexander Maconochie, 1787-1860' in H. Mannheim (ed.), *Pioneers in Criminology*.

⁶³ *Australasian Chronicle*, 11 October 1839.

in 1840, with the consequent loss to the colony of its hitherto main source of labour, threw the spotlight on immigration as the hope of the future. Immigration began to grow considerably and 6,697 immigrants were brought into the colony in 1840 at the public expense, to the amount of £111,000. Their coming brought rapid changes to the composition of society and shortly 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'.⁶⁴

But there were still some divisions and for the moment they tended to revolve around the question of immigration. 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 had caused some disquiet. They were all thought to be papists and 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'.⁶⁵ By August the argument was an outright attack on 'Roman Catholic 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'.⁶⁶ He was unable to redeem himself when he opposed a motion to admit to the Bar colonial youth who had no English training.

There is no profession which exercises greater influence over the public than the bar . . . The bar will of course direct the juris-

⁶⁴ Gipps to Russell, 14 September 1841, HRA (1), XXI, pp. 508-11.

⁶⁵ SH, 24 February 1840.

⁶⁶ Ibid., 31 August, 6 October 1840.

prudence 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.⁶⁷

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 specify those whose worship and freedom were in jeopardy. James Macarthur agreed with the Bishop but conceded that the Irish were at least better than Asiatics.⁶⁸ 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.⁶⁹ 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 be stopped from coming into the colony.⁷⁰ Hannibal Macarthur contributed his views and did little to pacify feelings when he called the Irish immigrants 'strumpets and vagabonds' at a meeting of the Immigration Committee and the *Herald* was disappointed that more was not done by the Legislative Council to obtain 'Coolie' labour.⁷¹ Throughout the remaining years of the administration of Gipps there were spasmodic appeals for the reintroduction of transportation to solve the labour problem of the pastoral industry which had become acute. The climate of the local opinion was firmly against any such retrogression and the energies of the leaders of society were taken up with the land question to which

⁶⁷ Ibid., 10 October 1840, reports LC.

⁶⁸ Ibid., 26 October 1840, reports LC.

⁶⁹ Ibid., 12 November 1840.

⁷⁰ Ibid., 8 December 1840.

⁷¹ SH, 29 October 1840; *Australasian Chronicle*, 15 December 1840. Early in the year, 25 February, the paper had been vehement in its denunciation of any attempt to introduce 'Coolies' who would 'depreciate the value of labour'.

FitzRoy was told to turn his mind when he arrived in August 1846.⁷²

As things turned out it was to be on a separate but related issue, that of the revival of transportation, that his immediate attention was focused. 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.⁷³ 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 establishments 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 and Norfolk Island 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 receive convicts into the colony. 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

⁷² SMH, 4 August 1846.

⁷³ Gladstone to FitzRoy, 30 April 1846, *HRA* (1), XXV, pp. 34-7.

and carefully regulated introduction of Convict Labourers into New South Wales or into some part of it may, under the present circumstances, be advisable'.⁷⁴ 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. 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.⁷⁵ Plunkett had been injured in a fall from his horse, so he was not present in the House when these arrangements were made and was not nominated to the committee. 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'. 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 summarised its attitude when it stated that the revival of transportation would result in building New South Wales into 'a mighty colony'.⁷⁶ 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 squatting element in the Council, had 'deceived and betrayed' the community. 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 1846.⁷⁷ 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

⁷⁴ Ibid., p. 35.

⁷⁵ Ibid., p. 37; FitzRoy to Gladstone, 6 November 1846, *ibid.*, pp. 249-50; SMH, 10, 14 October 1846, reports LC.

⁷⁶ Ibid., 16 October, 2, 6 November 1846, reports LC. The *Morning Chronicle* (17 October 1846) wasted no time in attacking the 'Self interest' that in its eyes motivated the cry for revival.

⁷⁷ SMH, 28 November, 21 December 1846.

several speakers, amongst them 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'.⁷⁸ The squatters were regarded as 'Convict-Slavery Restorationists' by the *Morning Chronicle* which urged the colonists to unite in opposition.⁷⁹ 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.⁸⁰ The petitioners of Liverpool gave their reasons against revival in words that rang 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.⁸¹

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.⁸²

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 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

⁷⁸ *Ibid.*, 23 October 1846.

⁷⁹ *Morning Chronicle*, 18 November 1846, 20 January 1847.

⁸⁰ See Enclosures 1-5, HRA (1), XXV, pp. 250-4.

⁸¹ *Ibid.*, p. 253.

⁸² *SMH*, 23, 25 December 1846.

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.⁸³

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.⁸⁴ 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 could be so degraded as to ask again to have British crime poured in upon them they would be forever 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—

⁸³ FitzRoy to Gladstone, 6 November 1846, *HRA* (1), XXV, pp. 249-50; FitzRoy to Grey, 1 February 1847, *ibid.*, pp. 348-50; FitzRoy to Grey, 24 February 1847, *ibid.*, pp. 367-8; FitzRoy to Grey, 30 March 1847, *ibid.*, pp. 439-41. The people of Dungog said they were 'strongly opposed to their Country being degraded from a free to a Penal Colony', *ibid.*, p. 368.

⁸⁴ *SMH*, 19 February 1847. Meanwhile 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.

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'.⁸⁵

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 recognised, however, that the Report of 1846 had not been debated by the Council and he left aside precise arrangements until he knew the results of the debate. When Grey was apprised 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.⁸⁶

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.⁸⁷ 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.⁸⁸ The *Herald* reported the

⁸⁵ SMH, 16 September 1847, reports LC; Address to FitzRoy by Members of Legislative Council, HRA (1), XXV, pp. 764-5.

⁸⁶ Grey to FitzRoy, 3 September 1847, *ibid.*, pp. 735-8; Grey to FitzRoy, 7 March 1848, *ibid.*, XXVI, pp. 259-60.

⁸⁷ SMH, 8 April 1848, reports LC.

⁸⁸ See G. C. Mundy, *Our Antipodes*, vol. 3, p. 115.

debate and gave 120 lines to the speech by Wentworth, and 10 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'.⁸⁹ In the event, all bar Plunkett and Allen voted in favour of acceptance of Grey's despatch.⁹⁰ 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.⁹¹ 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.⁹²

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 emigrants. He was led to this decision because he could not obtain funds to pay for free

⁸⁹ SMH, 10 April 1848, reports LC.

⁹⁰ 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.

⁹¹ Address of Members of Legislative Council to FitzRoy, HRA (1), XXVI, p. 368.

⁹² SMH, 12 April 1848.

emigrants 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 immigrants were not fulfilled.⁹³ 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 the plan outlined in his September 1848 despatch, but went ahead by obtaining an Order in Council naming 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*.⁹⁴

The expected arrival of the *Hashemy* caused several 'Great Protest' meetings at which, despite an occasional deluge, the oratory of Lowe and the organisational ability of Henry Parkes served to co-ordinate and inflame the passions of many thousands of Sydney citizens.⁹⁵ 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'.⁹⁶ 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. This was hailed as '*Glorious News*' by the *Herald*, 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.⁹⁷

The day had passed, however, when any possibility of reviving

⁹³ George Grey to FitzRoy, 8 September 1848, HRA (1), XXVI, pp. 587-90. This despatch was signed by Sir George Grey, Secretary of State for the Home Department.

⁹⁴ Grey to FitzRoy, 4 December 1848, *ibid.*, pp. 723-4.

⁹⁵ SMH, 2 June 1849. Ruth Knight, *Illiberal Liberal*, p. 215, explains Lowe's change of heart on transportation.

⁹⁶ FitzRoy to Grey, 1, 26 May; 1, 7, 15, 30 June; 3, 25 August 1849. Governors' Despatches, CO 201/413 and 416, National Library.

⁹⁷ Grey to FitzRoy, 16 November 1849, in SMH, 13 April 1850.

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 against it.⁹⁸ 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 columns of the *Herald* and Plunkett was the only officer of the government who took a part in it.

The governor was neutral: the official members of the house withdrew: but the attorney-general rose from the deserted benches, and claiming to perform a duty as a citizen who had watched transportation in all its stages and results, gave an irresistible testimony on the side of social freedom.⁹⁹

Plunkett 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'.¹

With the great debate the Colonial Legislature and public

⁹⁸ *Ibid.*, 18 September, 4 October 1850.

⁹⁹ John West, *The History of Tasmania*, vol. 1, p. 312.

¹ *SMH*, 1, 2, 3, 4, 7 October 1850, reports LC.

opinion had at last coalesced and the transportation question was finally settled. Plunkett's contribution to that settlement was without parallel, and when the Council made its resolution it was perhaps his finest hour. In the days when transportation was accepted he had 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 his was a lone voice in official circles strenuously opposed to the suggestion, even though 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.

The Law of the White Man

By the time Plunkett arrived in New South Wales the men who had lived on this continent for thirty thousand years had already gone back before the advances of white settlement. In pitiful remnants some few still remained in and about Sydney, but they had become aliens flitting vaguely through the streets with an existence less real than the inhabitants of their own dream time. They remained unconvinced of the benefits that the white man and his deity offered them, and they preferred to accept the trivia of his civilisation while rejecting its structures whether of law, finance, work or communal interaction. Meanwhile they were decimated, and continued to be decimated—in the main by the white man's diseases. But from time to time a black man came before the awful majesty of a system that detached justice from the reality of his own human situation, and then, perforce, he had to struggle to comprehend the abstraction the white man had christened out of other ancient barbarisms and now termed law.

Such a one was Jackey who came up for manslaughter before Forbes in August 1834, with Plunkett acting the role of the prosecutor. Jackey could not have been aware that the new jury laws had elicited the cry in Sydney that only men who were respectable, men with publicly acknowledged moral characters should be allowed to sit on juries.¹ But deep within Jackey there was an anxious striving for justice of his own; an anxiety that the probity of the peers who passed a verdict upon him would rest upon some yardstick of primitive justice and morality that would be intelligible both to them and to Jackey himself. From the Bench Forbes looked down with that gentility and mercy within

¹ *Sydney Gazette*, 8, 15 February 1834.

him possessed in equal measure by few others in the colony. He looked long at Jackey and then asked him what jury he wished to be tried by. Jackey replied 'black-fellows'. This the court was not empowered to grant, the limit of choice being between a military and a civil jury. Jackey was then shown a soldier in uniform and he promptly said 'no soldier', so a civil jury was empanelled. Forbes was pleased when Plunkett recommended mercy for Jackey. The Chief Justice extended mercy and took the occasion to remark that other cases had arisen before him in which Aborigines had been hanged 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'.²

During the next few years several occasions arose in which Plunkett was given the opportunity to ponder upon the words of Forbes. They seemed to have a curious imbalance in that, while the white man could expect some degree of protection and the consequent application of the law when an Aboriginal was apprehended in its infringement, the case rarely seemed to apply in reverse. No case was successful in which a white man was prosecuted for the murder of an Aboriginal but the Aborigines who did not manage to escape pursuit or the summary justice of the bush were frequently dealt with by the law. Their disability went much further than the mere fact of confronting a system that applied its sanctions on levels that sometimes had no application to Aboriginal concepts of justice and their own human social existence. It was also a system woven around a concept of a Creator in Whom the Aboriginal was alleged to have no faith. As a result his evidence was unacceptable in the courts because of his incompetence to swear an oath based upon the sanctions the God of the white man might mete out to its infringement. On one occasion Plunkett managed to plead successfully for mercy on behalf of an Aboriginal known as Neville's Billy, who was condemned to death on the statement of a white witness who had died before he could appear in court.

² Ibid., 12 August 1834.

Despite the fact that they were also present at the alleged murder, the evidence of the companions of Neville's Billy could not be received because of their incompetency as Aborigines to swear an oath, and Plunkett deplored the manifest injustice of a system that was applied with such rigidity.³

In the courts themselves there were occasions on which attempts were made to redress the balance that weighed so heavily against the Aborigines, but there were elements within the community that held firmly to views that did not augur well for the prospects of amicable and fruitful relations between the two races. In May 1836 Dowling summed up in a case in which an Aboriginal, Jack Congo Murrell, and a companion, were tried for the murder of two other Aborigines. Part of the argument of counsel for the Aborigines was that as they received no protection from English law they were thereby not bound by it. The case set a precedent and Dowling was quick to reject the argument. At the same time, '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'.⁴ The other point of view was expressed by the *Herald* after the *Australian* had run an article insinuating that Major Mitchell was an accessory to the slaughter of a party of Aborigines. 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.⁵

The 'maniacs and hypocrites' 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

³ Plunkett's opinion in N.S.W. Attorney-General's Office Correspondence 1831-40, pp. 22-4, ML.

⁴ SH, 16 May 1836 and C. H. Currey, *Sir Francis Forbes*, pp. 470-1. Murrell and his companion were found not guilty.

⁵ SH, 26 December 1836.

dangers that contact with a white civilisation 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 Aborigines 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 conflict between the races took place, and it is only in this context that it can be understood.

The whole question of the protection of the Aborigines had been discussed by a select committee of the House of Commons in 1836. Its purpose was to consider the measures to be adopted in order to secure to the Aborigines, '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 of the efforts of the English humanitarians a system of protectors was set up with G. A. Robinson as Chief Protector together with four assistants.⁶ 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 Aborigines as he would wild 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.⁷ 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 co-operation' in such an important matter.⁸ One response was clear.

Let the sentimental crew at home who

'Sit by the fire, and presume to know

What's done i' the Capitol',

defray the cost of 'Protectors of the Aborigines', if they are really so much enraptured with their sable proteges.

⁶ See HRA (1), XIX, p. 792 and Glenelg to Gipps, 31 January 1838, *ibid.*, pp. 252-5.

⁷ SH, 8 August 1838.

⁸ Glenelg to Gipps, 31 January 1838, HRA (1), XIX, p. 254.

The same editorial tilted at Plunkett by saying that Gipps should allow him to resign if he thought his duties too onerous, because 'Sparta hath many a worthier son than he'.⁹

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 aborigines 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 Aborigines 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 Aborigines, 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, the energetic Congregationalist missionary, 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 Aborigines.¹⁰

Gipps and his Executive Council spent a good deal of time in early 1838 discussing the various outrages perpetrated both on and by the Aborigines. 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 Aborigines, in which some of the latter lost their lives.¹¹ Plunkett had suggested that an inquiry be held into the circumstances surrounding the case; the Council agreed with his suggestion but the inquiry eventually came to nothing as too long a period elapsed after the affair.¹² At the same time the

⁹ SH, 5 September 1838.

¹⁰ Ibid., 19 September, 24 October 1838; *Australian*, 18, 23 October 1838. There was some public response when Alexander Macleay chaired a well attended public meeting set up to form a Branch Society of the British and Foreign Aborigines' Protection Society.

¹¹ Gipps to Glenelg, 25, 27 April 1838, HRA (1), XIX, pp. 396-400.

¹² Attorney-General to Colonial Secretary, 6 June 1839, Dixon Library Archival Estray List 15, Document 3; and Gipps to Glenelg, 22 July 1839, HRA (1), XX, pp. 243-59.

Council considered the matter of deaths by violence amongst the Aborigines 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.¹³

As a result it was decided to issue regulations in the form of a government notice requiring that there be an inquiry 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 colony when the death of a white man occurred through violence or suddenly.¹⁴ This decision took place on 6 April 1838, but before the promulgation of the notice 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 Faithfull 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.¹⁵

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 Aborigines 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

¹³ Executive Council Appendix No. 8, Enclosures to Minute 24, 6 April 1838, pp. 362-4, NSW 4/1445.

¹⁴ *Ibid.*, Minutes 23 and 24, 27 March, 6 April 1838, NSW 4/1520.

¹⁵ Gipps to Glenelg, 27 April 1838, HRA (1), XIX, pp. 397-8, and Minute 25 of Executive Council, 2 May 1838, NSW 4/1520.

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.¹⁶

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

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.¹⁷ 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'.¹⁸ 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'.¹⁹ The men were tried before Dowling and a civil jury

¹⁶ Gipps to Glenelg, 21 July 1838, *HRA* (1), XIX, pp. 508-11.

¹⁷ Alexander Harris, *Settlers and Convicts*, p. 388.

¹⁸ Gipps to Glenelg, 21 July 1838, *HRA* (1), XIX, pp. 508-11, and Minute 33 of Executive Council, 7 July 1838, *NSWA* 4/1520.

¹⁹ Gipps to Glenelg, 19 December 1838, *HRA* (1), XIX, pp. 700-4.

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'.²⁰ 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'.²¹

The actual crime, as outlined by Plunkett, was naked in its simplicity. About fifty Aborigines—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 9 June 1838, a Saturday, they were surrounded, to the number of about thirty, roped, led away and shot. For reasons requiring no elaboration 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.²² Harris described it as 'a formal execution' for the outrages committed by the blacks.²³ No evidence was submitted that the Aborigines 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 and they did not plead any extenuating circumstances. 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, landholder and magistrate. He arranged for William Foster, à 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

²⁰ J. Dowling, Proceedings of the Supreme Court of N.S.W. 1838, vol. 156, p. 87, NSW A 2/3341.

²¹ SH, 14 September 1838.

²² 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, Dixon Library.

²³ Harris, *Settlers and Convicts*, p. 388.

could not be convicted'. 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. 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'.²⁴

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 . . .'.²⁵ Dowling summed up and made it clear that the whole argument rested upon identity—namely that the jury 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'.²⁶ The all white, male jury retired for fifteen minutes and then returned a verdict of not guilty.²⁷ Dowling did not record his reaction so there is no way of knowing whether he was as 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.²⁸ 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

²⁴ Gipps to Glenelg, 20 December 1838, HRA (1), XIX, pp. 704-6; Normanby to Gipps, 17 July 1839, *ibid.*, XX, pp. 242-3. The Marquis of Normanby succeeded as Secretary of State for the Colonies when Glenelg resigned in 1839.

²⁵ J. Dowling, Proceedings of the Supreme Court of N.S.W. 1838, vol. 156, in note pinned to p. 140, NSW A 2/3341.

²⁶ *Ibid.*

²⁷ *Australian*, 17 November 1838.

²⁸ *SH*, 9 November 1838.

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 Aborigines are restrained.²⁹

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.³⁰ Burton was on the Bench and he prepared well for the trial as proved by his extensive notes on murder, malice, and aiding and abetting, all amounting to six pages in his own hand, drawn from various authors.³¹ The trial began on 26 November but was adjourned to the 27th on the plea of *à 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.³² 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, empanelled to try it, rejected it.³³ 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.³⁴ The seven men were brought before

²⁹ Ibid., 19, 26 November 1838.

³⁰ Gipps to Glenelg, 19 December 1838, HRA (1), XIX, p. 702.

³¹ Notes on Criminal Cases in the Supreme Court New South Wales tried before W. W. Burton from 12 November 1838 to 10 December 1838, vol. 39, NSW 2/2439.

³² Ibid., p. 28.

³³ Ibid., pp. 28-46.

³⁴ Ibid., pp. 47-107.

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.³⁵ Two days later the Executive Council met and 'The Right Reverend the Lord Bishop [Broughton] having retired' Gipps, Thomson and Riddell confirmed the sentence of death, after hearing the opinions of Dowling and Burton.³⁶

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.³⁷

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 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

³⁵ SH, 7 December 1838.

³⁶ Executive Council Minute 49, 7 December 1838, NSWA 4/1520.

³⁷ SH, 5, 7, 10, 14 December 1838.

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 being furnished of their guilt'. It contrasted them with the Aboriginal murderers who 'have not been brought to justice' and pleaded for their lives.³⁸ The Executive Council met on 14 December and, having considered the pleas, rejected them as they offered 'no reasons for altering the decision'.³⁹ 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.⁴⁰ 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'.⁴¹ 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'.⁴² 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 any longer. He thought that the men were 'hanged for what they had been taught was perfectly lawful by their masters; and some

³⁸ Enclosures A 1, 2, 3 to Minute 51 of Executive Council, 14 December 1838, pp. 694-703, NSW 4/1445.

³⁹ Executive Council Minute 51, 14 December 1838, NSW 4/1520.

⁴⁰ Gipps to Glenelg, 19 December 1838, HRA (1), XIX, pp. 700-4. An examination of the signatures to the petition in NSW 4/1520 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.

⁴¹ SH, 19 December 1838.

⁴² Glenelg to Gipps, 21 December 1838, HRA (1), XIX, pp. 706-7.

of these masters [were] magistrates of the territory'; that it was a case of 'The sacrifice of these seven men's lives to the protection theory', and that after a period of ferocity 'the original and customary course of things was permitted to return'.⁴³ 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 Aborigines, 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'.⁴⁴ 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'.⁴⁵ 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'.⁴⁶

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 civilisations, 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. As an event in colonial history Myall Creek passed into the

⁴³ Harris, *Settlers and Convicts*, pp. 381-99.

⁴⁴ SH, 17, 26 December 1838 and 7 January 1839.

⁴⁵ Ibid., 15 February 1839.

⁴⁶ Ibid., 2 August 1839. Unsigned letter dated 4 July 1839.

pages of officialdom, criminology and folklore.⁴⁷ 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 civilisation to the Aborigines 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, in so far as the sacredness of human life was concerned. For that one thing, at least in its application in the colony, 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 Aborigines 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 alike.⁴⁸ 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'.⁴⁹

It is small wonder that two days after the execution of the Myall Creek murderers Plunkett should have applied for leave of absence to return to Ireland. Many men with stronger mental and physical constitutions would have found it difficult to stand

⁴⁷ See: *Despatches relative to Myall Creek* — ordered to be printed 12 August 1839, *House of Commons Papers* 526; *Extracts from the Papers and Proceedings of the Aborigines Protection Society*, No. 1, May 1839, pp. 41-52; Camden Pelham, *The Chronicle of Crime*, pp. 472-4; *Australia*, 'A Full and Particular Report of the Trial of Eleven Men for the . . . Murder . . . of Twenty Eight Individuals', copied from *Sydney Gazette*, 15 November 1838; C. H. Chomley, *Tales of Old Times*, pp. 35-54.

⁴⁸ See Bill Wannon, *Very Strange Tales: The Turbulent Times of Samuel Marsden*, pp. 191-2; S. K. Barker, 'The Governorship of Sir George Gipps', *RAHSJ*, vol. 16, p. 255; S. H. Roberts, *The Squatting Age in Australia 1835-1847*, pp. 405-6.

⁴⁹ Mrs Campbell Praed, *My Australian Girlhood*, pp. 16-17.

up to the pressures brought to bear on him, especially in 1838. It was precisely in his capacity as a public servant that he had been viciously attacked so frequently throughout the year, 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 expected that Downing Street would contemplate experimenting with an office, in a colony, that was not proving completely satisfactory at home.⁵⁰ The *Australian* was opposed to a Grand Jury here on the grounds that its members might 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.⁵¹

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—that same element was not prepared to recognise the integrity of the men who were the very essence of the society, financially and socially.⁵² The fact that Plunkett was regarded as the prime instigator in the Myall Creek case, in which men of 'integrity' had done their utmost to deflect the application of the law, did not endear him to those who saw themselves as the very bulwark of colonial society.

Given the attitude adopted in London it is understandable that Gipps remained 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

⁵⁰ *Australian*, 9 February 1838.

⁵¹ *Ibid.*

⁵² *SH*, 24 December 1838.

solicitude into reality.⁵³ 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 Aborigines 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 recognisable as the 'over paid Whiggling', the 'Whiggish pluralist' who inspired the prohibition.⁵⁴ As Attorney-General, however, he was more concerned with the legal difficulty into which he constantly ran of convicting Aborigines for crime upon the whites, or vice versa, because he could not bring Aborigines into court as witnesses. In May 1839 he reported that he had five of them in gaol awaiting trial for murder and stealing but, because of the lack of an interpreter and the inadmissibility of Aborigines' evidence, he 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.⁵⁵

In May 1839 the Reverend William Watson was examined before the Executive Council. He had had a great deal of experience with the Aborigines 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'.⁵⁶ 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

⁵³ Russell to Gipps, 21 December 1839, HRA (1), XX, pp. 439-41.

⁵⁴ SH, 31 May 1839.

⁵⁵ Ibid., and 19 August 1839. See also Barry Bridges, 'The Aborigines and the Law: New South Wales 1788-1855', *Teaching History*, vol. 4, pt 3, pp. 40-71.

⁵⁶ Evidence of Rev. William Watson, 28 May 1839. Enclosure 3 to Executive Council Minute 18, 1839, pp. 115-19, NSWA 4/1446.

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.⁵⁷

The grounds upon which the Aborigines, whose very tribal and social existence revolved around their concept of an ancestral dream time, were excluded was the alleged lack on their part of a belief in an after-life. Thus they were deemed unable to take an oath binding them to tell the truth. On 20 September Plunkett took the plunge and brought in a bill to allow Aborigines 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 imperative for the sake of both Aborigines and whites that their evidence be taken.⁵⁸ The Legislative Council was competent to take action in the matter because Normanby had left to it the whole question of evidence by Aborigines, although he thought that 'the ultimate remedy must at the same time be unceasingly sought in an improved system of moral and religious instruction'.⁵⁹ In this he was following the opinion transmitted to London by Burton who was prepared to admit statements by Aborigines 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'.⁶⁰

Plunkett managed to steer his 'preposterous' 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'.⁶¹ With these animadversions Gipps transmitted the Act, 3 Vict., No. 16, to London. It is scarcely surprising that it was never seen by the

⁵⁷ Tredgold to Normanby, 30 July 1839, *HRA* (1), XX, pp. 303-4.

⁵⁸ *SH*, 23 September 1839, reports LC.

⁵⁹ Normanby to Gipps, 17 July 1839, *HRA* (1), XX, pp. 242-3; Normanby to Gipps, 31 August 1839, *ibid.*, pp. 302-3.

⁶⁰ Burton to Labouchere, 17 August 1839, *ibid.*, pp. 304-5.

⁶¹ Gipps to Normanby, 14 October 1839, *ibid.*, p. 368.

Queen. Russell, constant champion of the cause of the Aboriginal, and ever forthright to impress upon Gipps his duty to improve their 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 Aborigines 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'—a lack of precision understandable amongst even the most astute of lawmakers.⁶²

In his attempt to alleviate the plight of the Aborigines 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 Aborigines, 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'.⁶³ While Plunkett was engaged in these legal transactions other segments of the community were turning their minds to the steps that ought to be 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

⁶² Russell to Gipps, 11 August 1840, *ibid.*, pp. 754-6; Campbell and Wilde to Russell, 27 July 1840, *ibid.*, p. 756.

⁶³ SH, 20 November 1840, report of Supreme Court Proceedings of 9 November 1840.

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.⁶⁴

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 Aborigines were 'dirty black savages'.⁶⁵

However, the question of Aborigines' evidence arose again in 1844. Stanley had communicated to Gipps an Act of Parliament authorising 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'.⁶⁶ This Act was clearly the result of Plunkett's submissions on the matter whilst he was in London on leave, and he accordingly attempted to steer another 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 Aborigines only as corroborative evidence to sworn testimony.⁶⁷ Plunkett himself was convinced of both the necessity of the measure and the capacity of the Aborigines 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 Aborigines were found guilty of the murder of a white man and he had made a point in his plea that they understood the serious nature of their crime, although he must have been taken aback when

⁶⁴ R. Windeyer, 'On the Rights of the Aborigines of Australia', p. 44, ML.

⁶⁵ 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 Aborigines proved fruitless.

⁶⁶ Stanley to Gipps, 6 July 1843, HRA (1), XXIII, p. 9.

⁶⁷ SMH, 21 June 1844, reports LC.

one, Therramitchie, shook his head after hearing the sentence and said to the court at large, 'bail me'.⁶⁸

The first to speak against the bill was Robert Lowe whom Gipps had appointed to the Council after the insolvency of Richard Jones had necessitated his retirement in October 1843.⁶⁹ 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 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 and W. A. Duncan was one member of the community who saw fit to deplore the sentiments expressed by some of the speakers and to regard the loss of the bill as 'another of the many injustices which the colonists of New South Wales have to account for in [the Aborigines'] regard'.⁷⁰

Further impetus to Plunkett's determination was given in March 1849 when 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 Aborigines. The only surviving witness to the event of Kennedy's own death was an Aboriginal named Jacky Jacky, who

⁶⁸ Ibid., 18 September 1843.

⁶⁹ Gipps to Stanley, 10 November 1843, HRA (1), XXIII, p. 216. The Governor was at least correct in estimating Lowe as 'a man of first rate abilities and a forcible speaker', *ibid.*

⁷⁰ SMH, 21 June 1844, reports LC; *Weekly Register*, 22 June 1844.

had shown a high degree of courage and loyalty and recounted the story on his return to Sydney.⁷¹ 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 had 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'.⁷²

During the following 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.⁷³ His legislation had a smooth passage until 27 June 1849 when his 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 Aborigines 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.⁷⁴

In his speech Plunkett allowed his concepts of justice and humanity to override his political judgment. He argued forcibly that the bill was necessary for the sake of the Aborigines rather

⁷¹ SMH, 6 March 1849.

⁷² Plunkett's opinion, 22 March 1849, Archival Estrays, List 15, Dixon Library.

⁷³ SMH, 8 June 1849, reports LC.

⁷⁴ Ibid., 28 June 1849, reports LC.

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 thought he discerned the influence of the humanitarians of Exeter Hall, the focal point of English evangelical movements, in such a measure. Foster said that the Aborigines 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 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 in the case of 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 Myall Creek, 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.⁷⁵

Alexander Berry, who avowed that he had great confidence in the Aborigines, and Deas Thomson and George Allen who were

⁷⁵ Ibid., 29 June 1849, reports LC.

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 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'.⁷⁶

At the next meeting of the Council, on 29 June 1849, Foster moved for a select committee to investigate the state of the Aborigines, 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 suggested that a ballot be taken, with which Plunkett agreed, saying that after all he had heard from Hamilton on the

⁷⁶ Ibid., 29, 30 June 1849, 'The blacks being degraded, the law was to be degraded too. As they could not rise it was to stoop.' Aboriginal evidence was finally admitted in the New South Wales courts in 1876.

matter he did not judge him as a fit person to sit on such a committee.⁷⁷ 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.⁷⁸ Hamilton replied with the bald assertion that he personally lacked no feeling for the Aborigines, 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 for the white man. 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.⁷⁹ 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 Aborigines 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 alleged that the verdict given in the Myall Creek case was, in the estimation of 'the country at large', a just one, and that Plunkett both deserved and obtained their thanks for his actions in that instance. But the opposition to the Protectorate in the Council was strong, ranging from Lowe who wanted 'these benighted tribes . . . taught how immeasurably inferior they were in every respect to civilised men' to Thomson who had come to the same conclusion as George Gipps that it was proving too costly and inefficacious to retain.⁸⁰ The Protectorate was abolished in the following year. Many more years passed before Aboriginal

⁷⁷ SMH, 2 July 1849, reports LC.

⁷⁸ Ibid. The book to which Plunkett referred, and from which he quoted verbatim at some length has an account of Myall Creek which is both flamboyant and absurd.

⁷⁹ SMH, 2 July 1849, reports LC.

⁸⁰ Ibid. The most recent, valuable study of these matters is C. D. Rowley, *The Destruction of Aboriginal Society*.

evidence was accepted in the courts of the white man, and the stand taken by Plunkett over those early years remained no more than a token of what might have been had he been given the support to establish at least a legal basis for Aboriginal equality.

If the attitude of Plunkett towards the Aborigines was unequivocal the stand he adopted on coloured immigration to Australia was equally so, but given his stated principles regarding the dignity of the human person it shows a curious imbalance. In May 1847, when the squatting districts were alarmingly short of labour, there was a debate in the Council in which the question of coloured immigration arose. It was not the first time the question had arisen and as early as 1843 the English authorities had been opposed to coloured immigration with James Stephen expressing the most forthright views on the matter:

it is in my mind, the evident duty of the British government to oppose the application of any part of the revenue of New South Wales to the introduction of coolies. They would debase by their intermixture the nobler European race. They would introduce caste with all its evils. They would bring with them the idolatry and debasing habits of their country. They would beat down the wages of the poor labouring Europeans . . . [and] cut off the resource, for many of our own distressed people.⁸¹

With this attitude Plunkett agreed, although in the debate in 1847 he tried to make a distinction between Indians and Polynesians. 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'.⁸² 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

⁸¹ Quoted in A. C. V. Melbourne, *Early Constitutional Development in Australia*, pp. 358-9. In 1841 Gipps was rejoicing that 'here we are all whites', SH, 7 July 1841.

⁸² SMH, 19 May 1847, reports LC.

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 with which the magistrate at Moreton Bay was unprovided'.⁸³ 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 discontented, 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'.⁸⁴ 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.⁸⁵ A few months later Lowe initiated a debate about the possibility of a slave trade developing and referred to 'Boyd's Savages' as 'outrageous violators of the decencies of civilized life'.⁸⁶ 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'. Despite his protestations he was clearly concerned about the possibility of slave labour and he quickly acted upon a rumour then circulating in Sydney that the South

⁸³ 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.

⁸⁴ See letter signed A. P. Friell, *ibid.*, 21 May 1847.

⁸⁵ Ibid., 24 May 1847.

⁸⁶ Ibid., 2 October 1847, reports LC. It seems that some of Boyd's islanders appeared in the Sydney streets minus a lower garment, *Atlas*, 18 September 1847; *Bell's Life in Sydney* (20 November 1847) complained that 'These fiendish looking cannibals have become a complete nuisance in the city'.

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.⁸⁷

Some years later the question arose again with the arrival of Chinese into the colony after the discovery of gold. The matter came up in the Council where Henry Douglass moved, fruitlessly, 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'. He said that he would prefer 2,000 convicts to arrive than 500 Chinese, probably on his usual legislative grounds that long experience had taught British administrators how to handle convicts whereas Chinese were an unknown and alien element.⁸⁸

In this whole 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 of years before regarding the introduction of 'poor South Sea Islanders' had fallen down. As regards the Chinese his views were, if possible, hardening. He taunted the House with its refusal to allow Aborigines 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

⁸⁷ FitzRoy to Grey, 24 December 1847, HRA (1), XXVI, p. 119. FitzRoy's despatch does not seem to reproduce correctly the opinion given by Plunkett on the matter, in Plunkett to Colonial Secretary, 25 September 1847. Letters from Attorney-General to Colonial Secretary, pp. 32-3, NSW 7/2678.

⁸⁸ SMH, 24 November 1851.

signed after arrival he conceded that they then had to be treated as the native born and here again he revealed his tenacity to legal structures. Parkes's motion, as Plunkett's previous ones, was thrown out by 19 votes to 7, with Murray summing up the feelings of the squatting 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.⁸⁹

If there is any explanation for Plunkett's stand on Aboriginal equality and his rejection of coloured immigration it must rest on his dedication to the building of a civilisation in Australia based as closely as possible on the British model. The Aboriginal as an inhabitant of the land, indeed its original possessor, had to be granted the equality due to him as a human person and thus be allowed to work out his own destiny. Other peoples who did not measure up to Plunkett's concept of civilisation he thought ought to be excluded. His attitude here was not based simply on economic arguments, nor indeed did they stem solely from an ethnic prejudice. Plunkett took the view that such peoples could not contribute to the concept of British civilisation as he understood it. It is probable that in the mid-nineteenth century such an attitude was not wide of the mark.

⁸⁹ Ibid., 8 July 1854, reports LC.

Bulwark of a Civilisation

IN the years before the 1830s the colony of New South Wales was ruled by a legal system little removed from a penal code. Australia's first judge, Jeffrey Hart Bent, said in 1815 that the basic legal principle was *Quod Gubernatori placet, legis habet vigorem* and, until the governorship of Brisbane, who arrived in 1821, it was a fact that the will of the governor was the backbone of the law. Under Brisbane and Darling there was some development due to the pressures towards freedom exerted by men who were beginning to think of New South Wales as a society based on civilisation rather than servitude. By the time of Bourke's arrival in 1831 it was still necessary to tread a delicate balance between a penal and a free society, but the scales were gradually weighted towards the latter. For the next two decades Plunkett had to blend the process of law making with the still discordant elements of the old and the new society, thus softening the harsher tones of the past and laying the basis for a society freed ultimately of its penal overtones.

In Sydney itself the administration of the law was closely watched by Forbes who was a humane and liberal judge, working in harmony with Richard Bourke whose ideals he shared. Beyond the limits of Sydney and its closer settlements the law was left largely in the hands of the local magistrates, most of whom were unlearned in the law, many were biased as land holders employing convict labour and some were cruel and vindictive. As governor, Bourke took it upon himself to restrict the powers of the magistrates and under his direction Forbes drew up an Act—3 William IV, No. 3—that became law in August 1832. The Act was a humane and enlightened step that substantially reduced the powers of magistrates to inflict punishment, but it brought odium upon Bourke and his associates from that section of the

community that believed in the necessity of strictly repressive measures against the convicts. Bourke, however, remained uneasy about the excessive power still held by the magistrates, especially that outlined in section 16 of the Act, which gave any two or more justices the power to take cognisance in a summary way, that is without a jury or any technical forms of procedure, of a variety of misdemeanours including 'disorderly or dishonest conduct'. He told Lord Stanley that 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'.¹ In 1833 he instituted an inquiry into corporal punishment and its effects, the reading of which must have made even the hardened squirm, although one witness, E. A. Slade, saw nothing incongruous in requesting a more plentiful supply of scourgers on the grounds that it was impossible for any single scourger 'to duly administer more than 150 lashes in the course of one day'.²

It was one thing to limit the power of the magistrates; it was another to extend their knowledge of the law—so, 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.³ 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 Burn's Justice, published in the year 1825'.⁴ 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

¹ Bourke to Stanley, 15 January 1834, HRA (1), XVII, pp. 313-30 and enclosures pp. 331-41. This despatch from Bourke forms the most important summary of his judgment on the system of transportation, convict discipline and the powers of the magistrates.

² Corporal Punishment Enquiry, Col. Sec. Bundle 4.2189.1, NSWA.

³ 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 Landlord and Tenant*. Plunkett was encouraged by Bourke to undertake the work and 50 copies, costing £112 10s., were bought by the government to send to the Courts of Petty Sessions throughout the colony. See NSW 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, NSWA 4/473.

⁴ Plunkett, *An Australian Magistrate*, in unpaginated preface.

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'.⁵ 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.⁶ Plunkett therefore spent the time he could spare from his official duties, in the event mostly after midnight, writing his *An Australian Magistrate*. The English and Irish authorities he used were extensive, but in the main Burn was his major source. A comparison between Burn and Plunkett under the title 'Murder' bears this out.⁷ 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'.⁸

An Australian Magistrate was never re-edited by Plunkett because of 'his numerous avocations'.⁹ Although Alexander Berry suggested in 1839 that Kinchela ought to edit the work and thus do 'a sort of Coke upon Littleton' the idea was not taken seriously, but 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

⁵ Ibid.

⁶ 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.

⁷ See Plunkett, *An Australian Magistrate*, pp. 231-9, and Burn, *Justice of the Peace and Parish Officer*, vol. 2, pp. 1312-41.

⁸ Plunkett, *An Australian Magistrate*, p. 234.

⁹ Edwin C. Suttor (ed.), *Plunkett's Australian Magistrate*, p. vi.

known Australian Law Book "Plunkett's Magistrate"; and noted that Plunkett was consulted whilst the work was in progress, and approved of it.¹⁰ 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 had 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 had grown to 1,182 pages, and a supplement of 382 pages was added in 1911. The Aborigines 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.¹¹ This was included perhaps unthinkingly 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 Aborigines.¹²

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*'.¹³ 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 hitherto issued from the colonial press which will prove more generally beneficial'.¹⁴ 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

¹⁰ William H. Wilkinson, *Plunkett's Australian Magistrate*, p. v.

¹¹ W. H. Wilkinson and F. B. Wilkinson, *The Australian Magistrate*, p. 811.

¹² Francis Forbes's manuscript, p. 369, New South Wales Parliamentary Library.

¹³ *Sydney Gazette*, 8 April 1834.

¹⁴ *Ibid.*, 23 August 1834.

essence it was so long in use, indicated that his attention to his office, perhaps beyond the call of duty, was of great benefit to the young colony.

For an Irishman, whose initial concept of a territorial jurisdiction was the Connaught Circuit, the colonial jurisdiction that extended from Moreton Bay to Port Phillip and from Sydney beyond the reaches of the Darling must have seemed enormous. By 1837 Plunkett told Bourke that he considered Port Phillip 'almost without the pale of the law' and he thought it perfectly absurd that in the case of the stealing of an old bag of no value it cost the Crown £40 to bring witnesses from Melbourne.¹⁵ Action was taken in 1839 that provided for trial by jury at the Court of Quarter Session held in Melbourne, but it was not until 1841 that a resident judge was appointed there and only then after serious rifts had developed on the Sydney Bench between Chief Justice Dowling and Judge Willis. After a good deal of personal recrimination had been exchanged between the two judges, Plunkett and Dowling met in Macquarie Street where, incidentally, a good deal of the higher affairs of the colony seems to have been conducted, and it was agreed that Willis would go to Melbourne, a township which he 'kept in a state of continued excitement'.¹⁶ Plunkett, however, was pleased, as indeed was Downing Street from whence Russell wrote one of his rare letters of mild congratulation to Gipps, although all parties ought to have known that they would hear more from the 'legal oddity' they had so happily despatched to the south.¹⁷

With Port Phillip taken care of, 1841 also saw the fulfilment of another development long advocated by Plunkett. Circuit Courts were set up at Bathurst, Berrima and Maitland, thus relieving the necessity of a constant resort to Sydney for legal activity of a higher level than the simple magistrates courts. It was quickly observed that the District 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

¹⁵ See Plunkett to Colonial Secretary, 13 June 1837. Col. Sec. Letters, p. 1812, ML; SH, 31 August 1838, reports LC.

¹⁶ Dowling to Plunkett, 2 December 1840, Dowling's Letter Book, vol. V, NSWLA 2/3474; Gipps to Stanley, 13 October 1842, HRA (1), XXIII, pp. 320-4.

¹⁷ Russell to Gipps, 22 June 1841, HRA (1), XXI, p. 406.

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'.¹⁸ 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, forty lashes for 'telling a wilful falsehood' and thirty-six lashes for 'disobedience of orders'. He also received a year in a chain gang 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.¹⁹ 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.

The setting up of the Circuit Courts gave Plunkett an opportunity to observe at first hand the working of the magistracy and he went on circuit at least twice a year to the sittings of the Court 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 by 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. Wearied though he may have been by his constant activity it perhaps improved his oratory, as 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!²⁰ If he took his own duties so seriously he must have been given pause to wonder at times whether justice itself showed a severity that knew little of the gentle hand of mercy. He was present at Maitland at the sitting of the Court as prosecutor when Mary Thornton and

¹⁸ SH, 1 May 1841.

¹⁹ Gipps to Russell, 17 November 1841, HRA (1), XXI, pp. 582-4.

²⁰ *Morning Chronicle*, 17 July 1844.

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'.²¹

As the Attorney-General of a penal colony which carried over into its later developments some of the barbarisms of its past Plunkett had to face the question of the retention and application of the death penalty. In 1845 he did not hesitate to introduce a bill to abolish the death penalty for forgery and for embezzlement, but he was in favour of its retention for rape, although it had been abolished under English law in such cases.²² 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, and Therry, with Plunkett as prosecutor, was the first judge to pass again the death penalty for the crime in question.²³ 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; Gipps agreed with this opinion.²⁴ A few years later Plunkett had developed in his

²¹ Dowling's report to Executive Council, Minute 8, 1844, pp. 412-16, NSW 4/1448.

²² SMH, 6 August, 2 October 1845, reports LC. The *Morning Chronicle* (3 September 1845) adopted a forthright view for a Catholic organ. It professed itself an advocate 'for the total abolition of punishment by death'.

²³ SMH, 2 October 1845, reports LC; *ibid.*, 17 April 1846. Lowe attacked Plunkett over the death penalty and called him 'a barbarous Attorney-General' whose ideas were 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*, 7 October 1848.

²⁴ Gipps to Stanley, 23 November 1845, HRA (1), XXIV, pp. 635-41. 'I am sorry to say the crime of Rape is still frequent in the Colony', *ibid.*, p. 638.

thinking on the matter. He refused to take part in discussions at the Executive Council when matters dealing with persons condemned to death took place, and in the Legislative Council he spoke in favour of private executions because 'public executions were extremely demoralizing' although he did not specify to whom. Finally he said that he would be prepared to give 'his best consideration' to a bill to abolish the death penalty.²⁵ He had replied with shock to a proposal of Wentworth which he thought would be a step back into barbarism. With his customary impetuosity and probable lack of conviction, in this instance at any rate, Wentworth had 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.²⁶ Plunkett recoiled in horror at the idea and it is not surprising that by the end of his life he had become a vigorous opponent of the death penalty.

For one who made the curious claim that to act as an attorney 'entirely prevents the undisturbed reflection, study and constant reference to Books necessary to a barrister' Plunkett found that books became the companions of the night hours only while the day was occupied with a varied though burdensome course of court activity by virtue of his office as Crown Prosecutor.²⁷ The separation of the legal profession into barristers and attorneys in 1834 had met with his wholehearted approval but it did nothing to relieve him of his onerous responsibilities.²⁸ 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.²⁹ Obviously he required considerable skill and a wide knowledge of the law. He committed all his resources, physical and mental, to this

²⁵ SMH, 21 July 1853, 12 January, 15 August, 20 October 1855. Private executions came into force in 1855.

²⁶ Ibid., 23 October 1851, reports LC. Perhaps Wentworth was thinking of Major Mitchell and the future premier Donaldson as being in the hardened criminal category. They had fought a duel in Sydney a few weeks before!

²⁷ Plunkett to Macleay, 6 April 1833, HRA (1), XVII, pp. 287-92.

²⁸ 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, 60-3.

²⁹ SMH, 16 January 1844.

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.³⁰ 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 a Grand Jury of the English type which, the newspaper argued, was questionable and unnecessary; in any case, in its opinion, Plunkett himself did the work eminently well.³¹

Attorney-General Plunkett's activity was so taken up with the work of the Crown that his appearance in private practice became a rarity. The major case in which he took the part of the Crown took place in 1839 and concerned the claim of Sir Maurice O'Connell, on behalf of the heirs of Governor Bligh, to a large portion of the town of Parramatta. The claim rested upon a grant made by Governor 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 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.³² 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.³³

Plunkett was granted an injunction to restrain O'Connell from

³⁰ *Ibid.*, 18 October 1843, reports LC.

³¹ *Ibid.*, 1 November 1844.

³² Gipps to Normanby, 7 August 1839, HRA (1), XX, pp. 277-9.

³³ *Ibid.*, p. 279.

ejecting the occupiers of the land when the case went to the Supreme Court in October.³⁴ He argued a forthright but simple 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.³⁵

He set out to prove his assertion in a number of charges which can be summarised intelligibly once the legal formulae have been interpreted. Bligh arrived on or about 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 unauthorised, 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.³⁶

In his case Plunkett included another grant of land made to

³⁴ 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. Plunkett's plea is given in HRA (1), XX, pp. 558-71, and there is a report of the matter in SH, 14 October 1839.

³⁵ See Plunkett's Information, HRA (1), XX, p. 559.

³⁶ Ibid., pp. 558-71.

Bligh by King of 240 acres at Petersham. He joined both grants in 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.³⁷ They then sold the Petersham property for £26,000.³⁸ 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 realised.³⁹

Some years later Plunkett accepted a brief in a case of a similar kind although it did not involve the Crown. He was retained on behalf of the plaintiffs, Edward and John Devine, in their claim to 210 acres of land at Newtown. The case attracted widespread interest and went on over eight days in the court. Plunkett summed up in an address lasting six hours during which 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.⁴⁰ The case itself, as indeed did the Bligh one, illustrated the difficulty of clearing up the doubts that arose regarding legal titles for land held in New South Wales on the basis of free grants made before 1831. The introduction of the Ripon regulations in that year, by which land could be alienated only at a fixed minimum price, settled

³⁷ For the deed and other papers see Colonial Secretary's Papers re Claims of Bligh's heirs, 1839, NSW 4/7013.

³⁸ Gipps to Russell, 21 April 1841, HRA (1) XXI, p. 338.

³⁹ Stanley to Gipps, 15 November 1841, *ibid.*, p. 582.

⁴⁰ SMH, 6 April 1852.

the question of grants but left George Gipps with the enormous problem of dealing with the squatters who had their own ideas on the occupation of Crown lands.

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 Aborigines 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 licences to occupy temporarily Crown lands in the 'wildlands' at £10 each would bring in another £5,000 to £6,000 annually.⁴¹

To Gipps's surprise Plunkett was 'opposed in principle to the taxation clause' of the bill. He thought that if it was to be introduced at all then it ought not to be confined to squatters, who, in his opinion, had brought a great deal of benefit to the colony. He said that if he were a squatter he would 'oppose it to the utmost'. He also thought the licence fee was unjust. Why should a squatter with 500 sheep be required to pay £10 when William Lawson with 70-80,000 sheep paid only 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.⁴² In 1844 the squatters unanimously adopted a resolution against Gipps's squatting regulations, partly based on their opinion that the regulations rendered 'the right of imposing taxes by the representatives of the people almost nugatory'.⁴³ Gipps

⁴¹ SH, 15 February 1839, reports LC. Gipps to Glenelg, 20 February 1839, HRA (1), XX, p. 6; Gipps to Glenelg, 6 April 1839, *ibid.*, pp. 90-2.

⁴² SH, 18 March, 1 April 1839.

⁴³ Appendix to Report of Select Committee on Crown Land Grievances, VPLC, 1844, vol. 11.

dismissed the resolution as 'a great *Hubbub*' but he was ineffective in exposing the 'larcenous intention' of the big squatters so that his efforts to thwart them were finally brought to ruin when the home government 'appropriated about 180,000,000 of acres of land to about 1,800 persons'.⁴⁴ It is not unlikely that had Gipps taken greater notice of Plunkett's rejection of anything that smacked of direct taxation and had he more deeply concerned himself with the plight of the smaller squatters he would have defeated those whose name he called 'Legion'.⁴⁵

This same tendency to idealism, especially in regard to matters of a constitutional nature or when the liberty of the human person seemed to be infringed, caused Plunkett to take stands that proved unpopular either to his superior, Gipps, or to the powerful interests within the Legislative Council. Gipps referred ironically to his 'amiable Council' and told La Trobe that 'there never were men I think who did more in six months to prove their want of wisdom'.⁴⁶ He was referring specifically to the want of harmony resulting from his land regulations but the uneasy relations between the Governor and the Council 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 landholder 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, Deas Thomson. Broughton, O'Connell and Riddell were never in

⁴⁴ Gipps to La Trobe, 13 April 1844, Gipps-La Trobe correspondence, vol. 4, no. 272, La Trobe Library. Report of Select Committee on Minimum Upset Price of Land, VPLC, 1847, vol. 11.

⁴⁵ Gipps to La Trobe, 13 April 1844. Gipps-La Trobe correspondence, vol. 4, no. 272, La Trobe Library.

⁴⁶ Gipps to La Trobe, 8 January 1845, *ibid.*, vol. 5, no. 324, La Trobe Library.

anything like real harmony with the 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 Phillip Parker King became Resident Commissioner of the Australian Agricultural Company just a few months after Gipps had appointed him, unwillingly, to the Legislative Council.⁴⁷ 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.⁴⁸

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 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

⁴⁷ Gipps to Glenelg, 5 March 1839, HRA (1), XX, pp. 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.*

⁴⁸ Gipps to Glenelg, 3 April 1839, *ibid.*, pp. 81-2; Russell to Gipps, 24 October 1839, *ibid.*, p. 372. Russell ignored Wentworth as a candidate despite Gipps's assurance that he was now 'moderate in his politics', Gipps to Glenelg, 3 April 1839, *ibid.*, p. 82.

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.⁴⁹ 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. At the same time there were occasions when Gipps was irritated and confused because Plunkett refused to support his measures with that degree of acquiescence he expected in his civil servants.

In the Legislative Council in 1840 Gipps introduced a series of bills, all of which moved Plunkett to display facets of his idealism and to take a stand on the rights of the individual. The first bill was one to continue again the old Bushranging Act to which Plunkett had always objected in the past. When it came before the Council Plunkett was 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'.⁵⁰ 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.⁵¹ 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

⁴⁹ See SH, January to April 1839.

⁵⁰ SH, 29 May 1840, reports LC. See also *Australian*, 2 June 1840.

⁵¹ SH, 15, 27, 29 January, 16 March 1840.

Bathurst district in a period of a few months.⁵² 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 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.⁵³

Two other 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.⁵⁴ 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'.⁵⁵ 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 an 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 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. The petition was signed by 485 people

⁵² Ibid., 29 May 1840.

⁵³ Ibid., 25 February 1841 and *Australasian Chronicle*, 18 March 1841.

⁵⁴ In the four years to 1840 Sydney cost the government £111,418 to maintain. See Gipps to Russell, 26 August 1840, *HRA* (1), XX, p. 777.

⁵⁵ SH, 10 August 1840, reports LC.

with prominent names like Terence Aubrey Murray, Henry O'Brien, Robert Campbell and Charles Throsby, five clergymen and fifty-five magistrates on it. 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. 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.⁵⁶

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 in that way. Plunkett replied that he acted only in justice, but that if he had thought that his vote 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. 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'. 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

⁵⁶ *Ibid.*, 10, 17, 19 August 1840, reports LC; Gipps to Russell, 26 August 1840, HRA (1), XX, pp. 777-82.

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'.⁵⁷

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 disgrace parties'.⁵⁸ The bill was amended, by which the householder could still 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.⁵⁹ 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.⁶⁰ In this form as 4 Vict., No. 26, the Act was confirmed by the Queen.⁶¹

For an Irish Catholic who liked to relax at the Australian Club with its well stocked cellar and attend the races with their concomitant pleasures Plunkett had an aversion to drunkenness and gambling that can only be explained on the basis of his exposure to the results of both in his capacity as Crown

⁵⁷ SH, 21, 28 August 1840, reports LC.

⁵⁸ Ibid., 21 October 1840, reports LC.

⁵⁹ Dowling Letter Book, 27 October 1840, vol. V, NSW 2/3474; SH, 4 November 1840; Gipps to Russell, 1 January 1841, HRA (1), XXI, pp. 154-5.

⁶⁰ 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.

⁶¹ Russell to Gipps, 26 August 1841, HRA (1), XXI, pp. 484-6.

Prosecutor.⁶² His concern at the high rate of crime, which he considered was too frequently a result of over-consumption of spirits, led him to take steps to restrict the granting of licences to public houses, and to regulate the sale and consumption of 'fermented and spirituous liquors' in the colony.⁶³ He drew up a 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 licence be at a lower rate than the spirit licence, which was itself raised to £30. The proposed hours of the public houses 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 suggested that the old law ought to be changed that closed the public houses on a Sunday. He thought that closing them was 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 estimation as to what period of time their indulgence ought to be given rein, proposing that one hour would suffice for the purpose!⁶⁴ Seven years later he was still alarmed at the quantity of spirits being consumed and he spoke against a bill, introduced by the Colonial Secretary and favoured by Gipps, to reduce by half the duty on spirits. The bill was designed to help defeat illicit stilling in the colony but Plunkett would not vote for it as he thought it necessary to retain the higher duty as well as punish illicit stillers more heavily.⁶⁵ A year later Plunkett thought that some improvement was noticeable in the colony in the matter. He went to a meeting of the Temperance Societies held in honour of Gipps, at which Father McEncroe, perhaps mindful of his own failings in the past,

⁶² The Australian 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. Its records also bear testimony to its cellar.

⁶³ See 2 Vict., No. 18, Gipps to Glenelg, 26 January 1839, HRA (1), XIX, p. 778.

⁶⁴ SH, 14 September 1838, reports LC.

⁶⁵ SMH, 9 October 1845, reports LC. The bill was in fact passed.

praised the example given to the community by their 'temperate Governor'. Plunkett spoke and said that it was to intemperance rather than to convictism that the crimes and horrors unfolded with such lurid detail before the Molesworth Committee were mainly attributable. To illustrate his point he gave figures showing that in the year 1836 there were 196 deaths in the colony caused by intemperance, whilst ten years later, between June 1845 and 1846, with a trebled population, there were only 43 deaths.⁶⁶

In regard to gambling and speculation in money matters Plunkett was equally adamant. He took up a position on two occasions which, had he been successful in the latter, could have rendered great harm to the colony in the years when it was struggling to recover from the depression of the early 1840s. 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, which had failed during the depression, 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'.⁶⁷ 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.⁶⁸ When the bill went to a vote only Lang and Robinson voted with him so it was passed by seventeen votes to three.⁶⁹ This did not deter him from advising Gipps to withhold his assent to the Act. Gipps accepted his advice with reluctance because he agreed

⁶⁶ Ibid., 29 June 1846.

⁶⁷ William Elyard to Plunkett, 24 December 1844, copies of letters to the Judicial Establishments 1844, NSW 4/3751; Plunkett and Manning to Colonial Secretary, 28 December 1844, in SMH, 1 January 1845.

⁶⁸ Ibid., 24 December 1844, reports LC. Plunkett thought 'the precedent would be a most dangerous one'. See also *ibid.*, 20 November 1844.

⁶⁹ John Dunmore Lang's religious convictions are well known. Joseph Phelps Robinson was a Quaker who earned the title 'Humanity Robinson', see *Australian Dictionary of Biography*, vol. 2, p. 387. With Plunkett they formed an interesting trio.

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'.⁷⁰

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'.⁷¹ 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 legalising a practice with 'an immoral tendency' and thus making a precedent that would certainly be used in the future.

The other, more basic Act to which Plunkett was opposed was the Lien on Wool Act and in the end he had the good sense to acknowledge that his opposition to it on legal grounds, if successful, would have resulted in 'great injury' to the colony. The Act, 7 Vict., No. 3, permitted owners to 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'.⁷² 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.

⁷⁰ Gipps to Stanley, 1 January 1845, HRA (1), XXIV, pp. 164-72.

⁷¹ Stanley to Gipps, 17 May 1845, *ibid.*, pp. 350-1.

⁷² SMH, 8 August 1845, reports LC.

Plunkett freely recognised that the Act had been a beneficial one, 'although it was a deviation from the English law'.⁷³ 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'.⁷⁴ 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 in so far as the removal of the objectionable sections were concerned.⁷⁵ Plunkett sat on this committee with Wentworth 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, an industry which was summed up succinctly in 1849 with the words, 'what the potato is to Ireland [wool is to Australia]. It is our LIFE'.⁷⁶

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.⁷⁷ 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.⁷⁸ 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

⁷³ Ibid.

⁷⁴ Stanley to Gipps, 28 October 1844, *HRA* (1), XXIV, pp. 57-9.

⁷⁵ Gipps to Stanley, 23 November 1845, *ibid.*, pp. 621-3.

⁷⁶ *SMH*, 1 January 1849.

⁷⁷ *SMH*, 11 January 1845.

⁷⁸ 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'; but he could also write of Plunkett's 'supercilious and spiteful pride', *Atlas*, 7 June 1845, 26 September 1846.

and sheep liable to be appropriated for servants' wages.⁷⁹ He opposed a bill introduced by Edward Brewster intended to bring about a return to amalgamation of the Bar by admitting both barristers and attorneys.⁸⁰ He was able to point out that the possibility of such a move had already caused the Bar to be reduced, because English barristers would not come to the colony while the possibility of amalgamation existed.⁸¹ As a result he carried 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.⁸²

Although he often complained about his work load 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 wait perhaps for months in gaol until they could be released 'by proclamation at a Court of Gaol delivery'. 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.⁸³ In much the same way Plunkett was a prime mover for the 26th Clause of the

⁷⁹ SMH, 5 July 1844, 4 October 1845, reports LC. See Gipps to Stanley, 5 January 1845, HRA (1), XXIV, pp. 174-81.

⁸⁰ *Bell's Life in Sydney*, 28 August 1847, called Brewster's bill 'a bantling'.

⁸¹ SMH, 1 May 1848, reports LC.

⁸² *Ibid.*, 26 April 1848, reports LC; *ibid.*, 30 September 1848. Hallam's *Constitutional History* was a required text.

⁸³ *Ibid.*, 18, 19, 26 October 1844, reports LC.

Insolvency Act passed by the Legislative Council in 1843. 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 a Colonial Legislature ought scarcely to take the lead of Parliament'.⁸⁴ 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 were based on a genuine need and could be framed in suitable legislation.

This constant almost obsessive preoccupation with the law and its forms and his determination to uphold it at all costs involved him in matters that caused widespread animosity, but he never seemed to heed the possible consequences of his actions. 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'.⁸⁵ Three years later 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, naturally viewed the case as a socio-legal one. Plunkett prosecuted seventeen compositors of the *Empire* who were charged with conspiring 'to raise wages'. He 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

⁸⁴ Gipps to Stanley, 1 January 1844, HRA (1), XXIII, pp. 279-93.

⁸⁵ Plunkett to Parkes, 13 March 1851, Parkes Correspondence, vol. 29, pp. 281-2, ML.

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 twenty-four hours to six weeks.⁸⁶

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'.⁸⁷ 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'.⁸⁸ At the same time he was prepared to see that concept of liberty widened with the changes in society. He spoke in favour of changing any laws that smacked of the penal past 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'.⁸⁹ 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

⁸⁶ 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.

⁸⁷ Ibid., 14 February 1852, 8 March 1854, 14 July 1855.

⁸⁸ Ibid., 21 July 1853, reports LC.

⁸⁹ Ibid., 2 July 1853, 14 October, 8 November 1854, reports LC.

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'.⁹⁰

The old idealism remained firm with the years and it carried him to heights of legislative fantasy which the more realistic members of the ruling class simply could not comprehend. In April 1851 the Council debated the Electoral Bill for Victoria at length and 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 candidates who engaged in bribery would gladly make a declaration that they had not done so.⁹¹ In 1853 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'.⁹² 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

⁹⁰ Ibid., 14 May 1855.

⁹¹ Ibid., 24 April 1851, reports LC.

⁹² Ibid., 18 June 1853, reports LC.

accepted.⁹³ John West 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'. He 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.⁹⁴

During all the years in which Plunkett was the one permanent figure amongst governors, judges and Crown law officers concerned with the dispensation of justice there were frequent complaints about its financial side, and in the early years especially, some infrequent ones about its impartiality and administration.⁹⁵ None of them were serious enough to warrant any investigation or action until 1848 when the first Royal Commission of Inquiry instituted by the government of New South Wales was set up. Its purpose was 'that a diligent and full enquiry should forthwith be made into the Constitution, Practice, and proceedings of Our said Supreme Court', and also of the lesser courts of the colony, in order to effect any alterations and improvements.⁹⁶ 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 Commission. When Riddell, the Colonial Treasurer, seconded the motion, Plunkett immediately spoke against it.⁹⁷

⁹³ Ibid., 12 July 1855, reports LC. As early as 1848 the *Sydney Chronicle* (28 March) had warned that it would be in everyone's best interest if the railways were a government concern.

⁹⁴ SMH, 12 July 1855.

⁹⁵ SH, 28 September 1838. The editorial stated that £28,513 6s 8d 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, pp. 613-14.

⁹⁶ FitzRoy to Grey, 14 October 1848, *ibid.*, XXVI, pp. 638-42.

⁹⁷ SMH, 13 July 1849, reports LC.

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.⁹⁸

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 placemen'. A fourth judge would be a useless addition to the Court because 'the three they possessed had now almost nothing to do'.⁹⁹ 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 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 the Chief Justice 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

⁹⁸ *Ibid.*, See Report in VPLC 1849, vol. 1, pp. 655-62.

⁹⁹ SMH, 13 July 1849.

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.

By the time that Plunkett was ready to hand over the reins of his office to an elected representative of the people in 1856 he had worked for twenty-five years as a framer and administrator of the law in New South Wales. Those years saw no fundamental departure from the English model upon which he based his practice. They did see fundamental changes in the society in which that system worked and it says a great deal for Plunkett's convictions and integrity that the law fitted smoothly to that transition, indeed in some genuine sense helped to shape and guide it. Some idealists today, perhaps even a handful in Plunkett's day, would have wanted a different transition to have taken place. Yet it must be remembered that the greater part of society in those days desired a society based on English tradition, ideals and institutions to arise here. As a man of the law, working within and through the law Plunkett helped to ensure that the wish of society was fulfilled. In so doing he laid down the cornerstone of a civilisation for later ages to build on—one which, for good or for ill, has endured the test of time.

¹ Ibid.

² Ibid., 14 July 1849.

³ Ibid., 24 August 1849, reports LC.

Another Shade of Green

THE young Roman Catholic of an age that has witnessed the recognition granted to basic human freedom by his church since Vatican II is scarcely capable of conceiving the mental outlook of most Roman Catholics of the mid-nineteenth century. The Catholic of that period was brought up on the concepts of the Council of Trent of the sixteenth century. Many of those concepts were Roman and centralised, they were defensive, reactionary and exclusivist. They rejected much of the valuable insight on the sanctity of the human conscience developed partially by the Protestant reformers. Without much discrimination they applied the formula of Lateran IV of 1215 denying the possibility of salvation to those less fortunate souls outside the Church.¹ By the nineteenth century all this had produced a simple, secure and unbending faith, firmly based on an inflexible creed and fed by a rigid sacramental system. It knew nothing of ecumenism and, given the homogeneous nature of most Catholic communities, it understood little of life in a pluralist society. Finally the whole Church had begun to react against the developments of European liberalism, which it deemed increasingly pagan, and it proceeded to see the world through the eyes of a beleaguered Chief Pastor, Pio Nono, who excoriated the tendencies of his age at every possible opportunity.

Yet there were some things that a Roman Catholic of that age had not made part of his outlook. Before 1870 he could still ponder upon the wisdom or even credibility of papal injunctions without much upset to his conscience. He could look upon a maid of another faith than his own, and even marry her in

¹ 'Una vero est fidelium universalis ecclesia, extra quam nullus omnino salvatur' in J. D. Mansi, *Sacrorum Conciliorum Nova et Amplissima Collectio*, vol. 22, p. 982.

another sect, without fear that his union would be termed invalid and his children illegitimate.² He could send his children to a non-Catholic school for their education without incurring the wrath of his pastors and the possibility of his being denied the sacraments. Finally, because he was less likely to be as well instructed in the minutiae of his religion as were those of a later age, and because those minutiae were not formulated in a massive Codex until 1917, he could go through life unencumbered with such trivia, secure in the hope that his faith was indeed that of the New Testament and the Nicene Creed.

If a Catholic of the nineteenth century was born in Ireland then he normally added another dimension to his faith. British rule in Ireland in the eighteenth century was an unhappy experiment in oppression that saw its climax in the Rebellion of 1798. As a result the faith of an Irish Catholic frequently blended with overtones of nationalism, and sometimes there were harsher tones of hatred, bitterness and resentment. Ireland had become a land haunted not only by its little people, but haunted also by the ghosts of its misery, and some Irishmen carried within them the memory of that misery even beyond the seas. Few indeed of them possessed the education necessary to analyse historical causes and their effects, and they frequently proved incapable of distinguishing the wrongs done by a nation from the lack of involvement of most individuals of a nation in its wrongs.

Many of the Irish who came to Australia in the first sixty years of white settlement came as prisoners of the Crown. A high proportion of them came because they were criminals, but many also came because it had been judged an act of criminality to fight for the freedom of one's own nation, and that nation was, in the main, Catholic. It was easy for them, and almost a natural thing, to blur the tones of their religion with their own pent-up nationalism and to see the rule of the British Crown as equally oppressive to both the Irish and the Catholic components of their background. There has been much argument about the manner in which Irish Catholics were treated in the penal colony of New South Wales and it is understandable that to many, in retrospect, it appeared as a catacomb era in which the faith was persecuted. The myth frequently takes on greater validity than

²The *Ne temere* decree, forbidding Catholics to marry outside the Church under pain of invalidity, did not come into effect until 1907.

the reality, so that whole generations of Australian Catholics were reared with the idea that in its origins in this country their church was patterned on that ancient and glorious one under the Caesars, or on the more recent one that suffered under British suppression in Ireland.

Plunkett, perforce, was a product of Catholic Ireland, the Council of Trent and even that of the Lateran. But he was a product also of an institution he professed to cherish, Trinity College, Dublin, which was called by a Catholic writer in 1941 'that hotbed of bigoted hate'.³ There can be no doubt that throughout his life Plunkett blended his love for Ireland, his adherence to his faith, his loyalty to the British Crown, his gradually developing sense of Australian nationalism and his firm adhesion to civilisation based upon law into a unique amalgam that makes it impossible to fit him into the simple category of an Irish Catholic. The testimony to that unique compound is borne by Cardinal Moran who recognised that Plunkett's appointment to the position of Solicitor-General was of importance, but found nothing to say of his contribution to Australian Catholicism except that he brought McEncroe with him to New South Wales.⁴ That Plunkett was an enigma to Moran is understandable because it was Moran the historian who created an imaginary quaternity in Australian Catholic history with its division into ages of 'open persecution', 'partial toleration', 'nominal religious equality' and 'comparative peace'.⁵ These were divisions with which Plunkett would have found it hard to agree. He was mindful of the fact that New South Wales had been established as a penal colony by a Protestant power, and that complete legal and religious rights could scarcely be expected to exist until the colony had lost its initial character. As a result his first endeavours were to remove the barriers to equality, and his work with Bourke on the Church Act of 1836, coupled with its ready acceptance amongst the larger portion of the colonists, indicates that genuine progress towards equality was possible.

Nevertheless there were other members of the Catholic community in New South Wales who felt that, although the period

³ N. McNally, 'The Men of '98' in *Journal of the Australian Catholic Historical Society*, vol. 3, pt 1, p. 37.

⁴ P. F. Moran, *History of the Catholic Church in Australasia*, p. 131.

⁵ *Ibid.*, p. iv.

of 'open persecution' was concluded by the mid-1830s, the ensuing period of 'partial toleration' left something to be desired. It seems that one did not have to be an Irish Catholic to hold to that view because the gentle and large-hearted English Benedictine, John Bede Polding, spoke in harsh terms of the state of the Catholic minority in Australia when he visited London in 1841. Polding was apparently unmindful of the fate of the church in 'Catholic' Spain, France and part of Italy in the previous fifty years and of the fact that no white man had ever suffered death for his religious convictions on the Australian continent. On 13 May 1841, 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.⁶

When Bishop Polding's words were reported in Sydney the *Herald* replied,

This, surely, is not the way to 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 kindest feelings and the most open-handed generosity.

It went on in following issues to refute the charges made by Polding with a mass of documentary evidence that the Catholic *Australasian Chronicle* was quick to reject for its part, because it

⁶ SH, 27 September, 21 October 1841; Moran, *History of the Catholic Church in Australasia*, pp. 220-1. 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.

knew of 'nothing we owe to the *Herald* and its friends but forgiveness for oppression, calumny, hatred and all uncharitableness'.⁷

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, and he was entertained by Lord Stanley 'in a splendid manner' before his departure for Sydney in 1842.⁸ 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 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.⁹

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'.¹⁰ Stanley and his assistants had spent a good deal of time in the

⁷ SH, 21 October, 3, 11, 15 November 1841; *Australasian Chronicle*, 23 October 1841.

⁸ See Original Correspondence, Secretary of State, New South Wales, 1841-2 *passim*, CO 201/329, National Library; Moran, *History of the Catholic Church in Australasia*, p. 226.

⁹ Gipps to Stanley, 28 March 1843, HRA (1), XXII, p. 598; see also SH, 27 March 1843.

¹⁰ Stanley to Gipps, 12 September 1843, HRA (1), XXIII, p. 125.

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 exploited 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, a characteristic he would surely not have denied to Polding and Broughton also.¹¹

It was this very facet of Plunkett's nature that frequently marked him off from other members of the community as well as those of his own religious denomination. Without affirming that there was actual religious persecution or even genuine discrimination against Catholics in the colony, it is undeniable 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.¹² The social question was thus bound to arise as to the extent to which a member of the Roman Catholic church would be permitted to hold an influential position, and when that position entailed responsibility for the administration of justice it is understandable that the subject became at times agitated, given the penal nature of the colony.

Plunkett strove constantly to steer clear of religious controversy but there were occasions in which he was forced to take up an attitude and he found it difficult to avoid charges of discrimination even when the argument centred upon matters unconnected with his own church. Even the Church Act, generally acceptable as it was, had its opponents and the difficulty of its application was revealed in 1838 when 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

¹¹ Stanley to Gipps, 2 June 1843, *ibid.*, XXII, pp. 766-7.

¹² SH, 12 September 1836, asserted that 'the religion of the state is the Protestant religion', and still claimed in 1838 that there was an established church here, *ibid.*, 11 January 1838.

church in the colony as a result of which payment had been withheld from ministers of the Lang section of the church.¹³ Plunkett's opinion was that the ministers in question 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 had made a Presbyterian of him. He said that 'he advocated the measure . . . on the ground of liberty of conscience' and because he thought that it would tend to restore peace amongst the Presbyterians.¹⁴ The bill was passed 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'.¹⁵ 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.¹⁶

This particular matter had arisen when relations between the leaders of the Anglican and Catholic communities had been strained beyond their normal state of uneasy tension. Judge Willis was the principal speaker at a meeting of an Anglican Committee held on 19 July 1838 with Bishop Broughton in the chair. If his judgments from the Bench were at times inflammatory, the one Willis passed on the 'Church of Rome' on this occasion was explosive indeed. Amongst other things he charged the said church with 'idolatrous worship'. The Catholic leaders were outraged and a public meeting, presided over by Polding, recorded its grief 'at the unfounded and illiberal charge'.¹⁷

¹³ See Snodgrass to Glenelg, 17 February 1838, *HRA* (1), XIX, pp. 274-5.

¹⁴ *SH*, 19 September 1838, reports LC.

¹⁵ Gipps to Glenelg, 14 January 1839, *HRA* (1), XIX, pp. 755-6.

¹⁶ *SH*, 19, 21 September 1838, reports LC; *SH*, 26 October 1838.

¹⁷ *Australian*, 31 July 1838.

Polding pointed out that the absence from the meeting of Plunkett and Therry was unavoidable given their connection with Willis in his legal capacity, but that they were 'equally pained and aggrieved'. The Bishop endeavoured to dispel the fears that had so agitated Willis by pronouncing a solemn anathema upon any of his flock 'who commits idolatry, who prays to images, or worships them as gods . . . who believes the Blessed Virgin to be more than a creature'.¹⁸

Gipps, who had other reasons to be disquieted at Willis's erratic behaviour, admitted privately to Plunkett that the judge had surpassed himself on this occasion, and Polding thanked Providence for 'a most excellent Attorney-General', without whose help he did not know what would become of the Catholic community.¹⁹ It was fortuitous that Willis's judicial behaviour in general, his relations with Chief Justice Dowling, to whom he no longer spoke, and the necessity of sending a judge to Port Phillip made it comparatively easy to remove him.²⁰ But if Plunkett thought that he was going to escape lightly from his involvement in the affair, remote as it was, he was mistaken. The *Herald* requested the Protestant emigrant colonists to come forward and put a motion of no confidence in 'Popish law officers and other appurtenances of what ought to be exclusively a Protestant government'. This was followed by a demand that Plunkett prosecute Polding and his priests 'for something very like a libel on a Protestant judge' which possibly caused Plunkett to wonder who had committed libel, as Willis never denied his statement.²¹

A year later a certain Miss Byrne arrived in the colony. She claimed a vast knowledge of Roman Catholicism and was given every opportunity to share it with an incredulous community who listened intently to her revelations of priestly morality, life in a convent and sundry choice topics. Ullathorne, in a sermon, used some injudicious language regarding Miss Byrne, and some saw his words as a case of cause and effect when she was attacked

¹⁸ Ibid.

¹⁹ Polding to Heptonstall, 17 August 1838, in H. N. Birt, *Benedictine Pioneers*, vol. 1, pp. 335-6.

²⁰ Willis to Dowling, 12 February 1840, Dowling's Letter Book, vol. V, NSW 2/3474. Willis wrote that no further communication could take place between them 'save those of official courtesy'.

²¹ SH, 3 August, 3 October 1838.

by three men at Parramatta. Ullathorne was accused of causing bloodshed and sectarian passions were again aroused. 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 caused by drunkenness, and by implication in nowise connected with Miss Byrne's religious convictions or Ullathorne's reaction to them.²²

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'.²³ James Macarthur and Phillip Parker 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'.²⁴ 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.²⁵

If, however, Dowling was able to escape with impunity Plunkett was not. The *Herald* again 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 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 should a Protestant community be governed in criminal jurisdiction by 'Roman Catholic Functionaries' who could not be trusted when religious matters, such as

²² SH, 8, 15 November 1839.

²³ The *Australasian Chronicle*, 12 November 1839, naturally defended Dowling while the *Herald* attacked him. SH, 13 November 1839.

²⁴ SH, 15, 18 November 1839, reports LC.

²⁵ Gipps to Normanby, 26 November 1839, HRA (1), XX, pp. 403-4; Russell to Gipps, 6 June 1840, *ibid.*, p. 649.

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'.²⁶ It was also thought that he should have charged Ullathorne in the case as 'an accessory before the fact'.²⁷ The heat of controversy proved too much for Ullathorne and he soon left the colony, later to become Archbishop of Birmingham in which position he encouraged Newman to engage in a saner and more enduring polemic through the pages of the *Apologia*.

One gentleman, who called himself Nemo, was so moved by all the sound and fury that he kept up a constant supply of letters to the newspapers, of which the Sydney people enjoyed the choice of fifteen in 1839. 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.²⁸

If anything, Nemo proved by the lack of any widespread support that sectarian bitterness was an affair reserved for the leaders of the respective Christian communities and a few unhinged supporters. The great mass of the people went about the business of earning a living and mixing in harmony with each other. Plunkett himself made no public response to the attacks made upon him, and even his relations with Judge Burton, whom Polding regarded as 'ten times worse [than Willis] but infinitely more cunning', remained normal.²⁹ In fact, in the midst of

²⁶ SH, 30 October, 27 November 1839.

²⁷ Ibid.

²⁸ Ibid., 16 October 1839.

²⁹ Polding to Heptonstall, 17 August 1838, in Birt, *Benedictine Pioneers*, vol. 1, p. 335.

hurling fulminations against each other on issues ranging from weighty matters of dogma to complaints about the wearing apparel they affected at official functions, the leaders of the two main denominations were able to unite in common cause when the necessity arose, as it did during the drought of 1839.

The drought had begun in 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.³⁰ Many did—Catholic and Protestant—and Polding gave it his wholehearted support. This meeting took place shortly after 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'.³¹ Gipps sent the protest to London and Russell replied, telling Gipps to 'take no further notice of so frivolous a complaint'.³² 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'.³³ The character of Broughton was such that it did not allow him to depart from his principles which, however perverse they may have seemed, nonetheless impelled the respect of his more large minded contemporaries including the leaders of the Roman Catholic body.

There can be little doubt that Plunkett was regarded at large, and regarded himself, as a prominent member of his own church. He acted as a trustee of St Mary's, he represented the laity at

³⁰ SH, 5 August 1839.

³¹ Bishop of Australia to Gipps, 25 May 1839, HRA (1), XIX, pp. 265-6.

³² Gipps to Normanby, 29 July 1839, *ibid.*, p. 265; Russell to Gipps, 17 December 1839, *ibid.*, p. 435.

³³ Bishop of Australia to Gipps, 25 May 1839, *ibid.*, p. 266.

farewells and welcomes to Polding on his frequent journeys to and from London and Rome and he was constant in his attendance at the religious services of his church. Yet, unlike Therry, he retained a degree of independence that irritated his clergy and perplexed those of other denominations. In 1838 Ullathorne was pained when Plunkett, his 'dear old friend', attacked him over his evidence to the Molesworth Committee.³⁴ He little realised how lightly he escaped as, had Plunkett known that Molesworth and Ullathorne met before the formal session, and that Molesworth had attempted to drill him as to how to give his evidence, it is certain that Plunkett's attack upon him would have been much more vigorous.³⁵ In 1843 Windeyer argued that the Governor's salary of £5,000 was too large and compared it with that of Polding who received £500 but who 'possessed the greatest share of dignity and commanded the greatest respect and influence in the colony'. Windeyer was astounded and Polding probably more so when Plunkett replied that as he was a Benedictine with a vow of poverty the Archbishop's salary was perfectly adequate.³⁶ His general attitude was that, together with other citizens, Roman Catholics had to learn the lesson of 'loyalty and submission' and by frequent appeals for redress they would manage to obtain their rights in the long run. 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 did not find easy to teach to his fellow countrymen and co-religionists, at least 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'.³⁷ 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. It was precisely on the question of education that Plunkett proved so notably at variance with the leaders of his church and

³⁴ Birt, *Benedictine Pioneers*, vol. 1, p. 398.

³⁵ *Ibid.*, p. 194.

³⁶ *SMH*, 2 October 1843.

³⁷ *Ibid.*, 4 September 1844.

his, and their, involvement in the matter has borne fruit lasting into the present time.

The attempts to introduce a general system of education into New South Wales coincided with a wave of interest in the idea that the state had a responsibility for the education of its citizens. This concept had gained a widespread footing in England by the eighteenth century although, curiously enough, it was first implemented in Ireland in 1831. In New South Wales, before the arrival of Bourke, it was generally accepted that education was the province of the church, although the inability of the various denominations to cope adequately with the problem had caused some unrest. Bourke was convinced that the state had a duty to take a hand in the field of education and Plunkett shared that conviction.³⁸ Bishop Polding gave his uneasy consent to Bourke's ideas on the understanding that they were based on the Irish National System which combined secular education with a degree of general religious instruction from scripture and the provision of a day each week for denominational instruction. Bishop Broughton was convinced that to compromise with secular education was to sell the pass. He rallied his forces, he opposed the plan and he won. The fact that the word 'Irish' appeared in the name did little to appease those who thought, with Lang, that the colony was becoming a province of popery.

The matter arose again in 1839 when Gipps tried to bring in a system along the lines of the British and Foreign School Society system. 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'.³⁹ Accordingly Gipps gave lengthy thought to the matter and brought into the Council a proposal which he deemed ought to satisfy both the Protestants and the Catholics in that it entailed the use of the Bible in the state-controlled schools and the continuation of support for denominational schools. 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

³⁸ Bourke to Stanley, 30 September 1833, *HRA* (1), XVII, p. 231.

³⁹ *SH*, 8 February, 15 July 1839.

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, received only £5,370. Gipps withdrew his Minute.⁴⁰

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 asperities'.⁴¹ 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. Deas Thomson and John Gibbes, 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.⁴²

Plunkett must have been astonished to find that for once 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'; some kind of compulsory system along the lines of that in Prussia was what the colony needed; a

⁴⁰ Ibid., 2 September 1839, reports LC; Gipps to Normanby, 9 December 1839, *HRA* (1), XX, pp. 426-30.

⁴¹ *SH*, 2 September 1839, reports LC. At this time Plunkett was still the only Catholic in the Legislative Council.

⁴² Gipps to Normanby, 9 December 1839, *HRA* (1), XX, pp. 426-30.

'more moral, happy, contented people does not exist' than that in Prussia, it thought.⁴³

After the granting of representative government in 1842 it was possible for the Legislative Council to initiate more positive steps towards a solution of a problem which by 1844 had become acute. By this time over half of the children in the colony were receiving no education at all. Robert Lowe headed a select committee, of which Plunkett was a member, and it found that education in the colony was 'extremely deficient', that the essence of the denominational system was 'to leave the majority uneducated in order to imbue the minority with peculiar tenets' and that a national system was required.⁴⁴ Although a day each week, apart from Sunday, was to be set aside for religious instruction, the opposition from the Anglicans and Catholics was again forthright and unequivocal. The Anglicans denounced the proposed system as 'irreligious' while the Catholics pronounced the denominational system as the only one acceptable to them.⁴⁵ Polding chaired a meeting of Catholics to express opposition to general education while McEncroe whipped up the support of his volatile Irish followers on the grounds that the Church knew best how to educate its children.⁴⁶

Plunkett was both pained and 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 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.⁴⁷ To him it was incomprehensible that his church's leaders took a stand more rigid than the Irish and more Roman than Rome itself. He was, however, unable to move them in their opposition and the Anglicans likewise remained adamant. Gipps again had to admit defeat as he realised that any prospect of success was jeopardised

⁴³ SH, 8 February, 11 October 1839.

⁴⁴ See Report of Committee in *General Education Vindicated*, p. 3.

⁴⁵ Moran, *History of the Catholic Church in Australasia*, p. 867.

⁴⁶ *Morning Chronicle*, 11 September 1844; SMH, 4 September 1844. W. A. Duncan, another Catholic layman who thought like Plunkett, supported a general system in his *Weekly Register*, 20, 27 July, 7 September, 5 October 1844.

⁴⁷ SMH, 11 October 1844, reports LC.

by the lack of support from the ministers of religion. The fact that the colony was still in the grip of an economic depression probably helped him arrive at his decision as he was reluctant to allow any further expenditure of public funds. The Legislative Council continued to press for the implementation of its report but it was ineffective without the support of Gipps, and any further action had to await a change in the economy and the arrival of FitzRoy in 1846.

FitzRoy took advice from all quarters in the first year of his rule and the visits he made to the interior impressed him with the necessity of pressing on with a state-supported system. Opposition had not abated and it was left to Plunkett to suggest a compromise that would prove acceptable, if not completely satisfactory to all. He recommended that two boards should be established to control national education and denominational education, with the government financing the first and making substantial grants to the latter.⁴⁸ Plunkett was personally convinced of the need for a single system for all children but, with FitzRoy, he felt it necessary to compromise in order to ensure that the thousands of children still without education be given the means to obtain it.

When the two boards were set up in 1848 Plunkett was appointed the first chairman of the National Education Board. It was a difficult situation as the Board initially possessed little more than enthusiasm. G. W. Rusden was sent out to advertise the fact that a national system was in operation, books were ordered from Ireland and William Wilkins became the head of the Model School for training teachers in 1851. The opposition of the churches remained as a firm undercurrent and Rusden was told by a minister at Portland that he 'would sooner bring up his own children amongst the blacks as heathens than send them to the National Schools'.⁴⁹ Progress, however, was made and by 1851 there were thirty-five national schools in New South Wales while seven had been handed over to the new colony of Victoria. The public was increasingly in favour of the system and in that same year forty-seven applications were made to the Board for the setting up of new schools.⁵⁰

⁴⁸ R. Fogarty, *Catholic Education in Australia 1806-1950*, vol. 1, p. 47.

⁴⁹ A. G. Austin, *Australian Education 1788-1900*, p. 51.

⁵⁰ *Ibid.*, p. 54.

Plunkett continued to hope that the two systems would be able to work together in harmony. He subscribed to the principle enunciated in the regulations of the National Education Board that 'Our Saviour did not intend His religion to be forced on men by violent means' but some of the clergy, especially the Anglicans and the Catholics, had their own ideas on how to lead men to religion. As a result they 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 here would not give genuine support to the national schools. At the same time he defended the schools against Charles 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.⁵¹ By 1853 it was evident that the support of the clergy could not be counted on and what puzzled Plunkett the most was the alignment of Rome and Canterbury on this issue. In the House he attacked the alliance between the Catholic *Freeman's Journal* and the clergy of the Church of England as 'unnatural, unholy and hypocritical' whilst saying that their 'charge of godlessness [against the national schools] was untrue, was libellous and 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.⁵²

⁵¹ SMH, 29 November 1851, reports LC. 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, pp. 5-6. 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.

⁵² SMH, 8 July 1853.

If Plunkett hoped that such affirmations would induce his contemporary co-religionists to abate their opposition he was mistaken. His chairmanship of the National School Board was regarded as an embarrassment then, and later, when Cardinal Moran wrote a full chapter on the history of education in Australia, he did not mention the fact.⁵³ Another historian of the Catholic church, T. L. Suttor, condemned both the national system, 'a nurse of practical naturalism and indifferentism, determining by its omissions the bias of the next generation towards secularism', and Plunkett's chairmanship of the Board 'disarming Catholic resistance'.⁵⁴ Plunkett did not see his 'labour of love' in that light, nor did it deflect him from his allegiance to the church he continued to revere.

His firm commitment to religious toleration and equality for all led Plunkett to take stands in the Legislative Council that appear consistent only when seen in the context of his convictions. He was opposed to the opening of Council sessions with prayers and in August 1845 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.'⁵⁵ He narrowly won the debate, but it was a strange argument for a Roman Catholic to use in the 1840s 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.⁵⁶

⁵³ Moran, *History of the Catholic Church in Australasia*, ch. XVIII.

⁵⁴ T. L. Suttor, *The Catholic Church in the Australian Colonies 1840-1865*, Ph.D., pp. 316, 324.

⁵⁵ *SMH*, 6 August 1845, reports LC.

⁵⁶ *Ibid.*, 14 August, 1 November 1845, reports LC.

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 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'.⁵⁷ 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.⁵⁸ 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.⁵⁹

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, which regulated state aid to religion, the sum of £1,000 to the Jews of Sydney for the debt they had incurred on building a synagogue and to build a house for the rabbi.⁶⁰ Thomson spoke

⁵⁷ Ibid., 14 August 1845, reports LC.

⁵⁸ Ibid., 6 August 1847, reports LC. The bill finally went through in 1847. To the end Broughton was opposed to it. See FitzRoy to Grey, 16 December 1847, *HRA* (1), XXVI, pp. 89-101.

⁵⁹ Ibid., 16 July 1847, reports LC. The *Sydney Gazette*, 12 October 1837, recommended 'such of our readers as are lovers of the ludicrous to resort to the Sydney Burial Ground in search of amusement'.

⁶⁰ *SMH*, 25 October 1845, reports LC. See also Israel Getzler, *Neither Toleration nor Favour*.

against the motion on the grounds that the Governor could not touch Schedule C. Plunkett 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 voluntarist 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.⁶¹ Gipps of course replied that he had no authority to endorse such payments from Schedule C.⁶² 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.⁶³ FitzRoy acceded to the request for the £1,000, but refused to grant a salary on the grounds that, as it would be a permanent charge on the Crown, the permission of the Queen must be sought.⁶⁴ 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.⁶⁵ It was not until 1856 that the Jews were finally granted aid in the form of a stipend for their rabbi, and the grant was made in

⁶¹ *SMH*, 25 October 1845, reports LC. W. A. Duncan hoped that the Jews would learn that Plunkett, not Wentworth, was their true champion, *Weekly Register*, 18 October 1845.

⁶² Gipps to Stanley, 13 November 1845, *HRA* (1), XXIV, p. 612.

⁶³ *SMH*, 16 September 1846, reports LC.

⁶⁴ *Ibid.*, 26 September 1846, reports LC.

⁶⁵ FitzRoy to Gladstone, 1 October 1846, *HRA* (1), XXV, p. 202; Grey to FitzRoy, 13 April 1847, *ibid.*, pp. 484-6. Earl Grey took over the Colonial Office from Gladstone in 1846.

the context of a continuing argument about the applicability, indeed justice, of the Church Act of 1836.⁶⁶

The conditions that had applied to New South Wales in the thirties were vastly changed by the fifties with the economic and social developments brought about by the cessation of transportation, free immigration, the effects of the gold rushes and the stabilisation of the pastoral economy. Many thousands of people with varying or no religious convictions were the audience to whom the opponents of the Church Act played when they attacked its outmoded provisions by which only four churches were aided and, at that, only nominally. There were cries on the one hand for an extension and widening of aid and on the other for its abolition. In 1852 the Council debated a motion on raising the stipends of the clergy and Plunkett asserted that the Act was intended 'to support the building of churches and the extension of religion, but not to supersede the necessity of private support'. He went on in characteristic vein to pronounce an encomium of the Act and his own involvement in it.

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.⁶⁷

By 1855 he was prepared to recognise 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 a Bill for the Temporary Relief of Ministers, but showed that he was moving towards voluntarism by insisting on the duty of Christians to support their pastors.⁶⁸

In the electoral field the question of religious affiliations did not come to the fore until 1851 when a Catholic candidate was put

⁶⁶ Naomi Turner, *Sinews of Sectarian Warfare*, p. 132.

⁶⁷ SMH, 30 September 1852, reports LC.

⁶⁸ Ibid., 12 October 1855, reports LC; *Empire*, 31 October 1855.

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 unfairly 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'.⁶⁹ Plunkett perhaps added to suspicions when he reluctantly went to court to prosecute the respected Scottish Presbyterian minister James Fullerton for the illegal solemnisation of a marriage in which a girl of fourteen was married without her father's consent. Fullerton, who had been misled about the girl's age, 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.⁷⁰

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.⁷¹ 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. Plunkett and Therry watched the elections with interest. Therry 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'.⁷² Macarthur was returned, to the delight of Plunkett and Therry, who thought also that 'a few defeats that have taken place are

⁶⁹ SMH, 21 May, 28 July 1851; *Empire*, 7 August 1851, also attacked Longmore.

⁷⁰ SMH, 10 July 1851 and Plunkett and Manning to Colonial Secretary, 22 August 1853. Col. Sec. Bundle 4/714.4, NSW.

⁷¹ SMH, 15 August 1851.

⁷² Therry to James Macarthur, 15 September 1851, Macarthur papers, vol. 34, pp. 1-4, ML.

likely to weaken the pernicious influences of Socialism and its unprincipled votaries'.⁷³ Representatives of the old interests of property, law and order were already 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.

The final contribution made by Plunkett to the social harmony of the colony before the introduction of responsible government was in the field of legislation and in its way it was one of his major administrative achievements. He drew up two bills directed at the promulgation of one Act regulating marriage and another to ensure the registration of births, deaths and marriages. As early as 1851 he had his first draft of the Marriage Bill ready and presented it to the Legislative Council. Its object was twofold in that it firstly wanted 'to remove all doubts as to each branch of the Christian Church equally partaking of the provisions thereof' and secondly to allow civil marriages for those who wanted them.⁷⁴ When he introduced the bill 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 inquire 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.⁷⁵

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 its provisions' and to allow the House to get on with the business of the new constitution.⁷⁶ A year later

⁷³ Therry to James Macarthur, 26 September 1851, *ibid.*

⁷⁴ SMH, 5 December 1851, reports LC.

⁷⁵ *Ibid.*, 25 August 1853.

⁷⁶ *Ibid.*, 7 October, 14 December 1853.

he brought in the Registration Bill, to which even Lang, who was always testy when matters touching religion were involved, was prepared to give his 'cordial approval'.⁷⁷

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 in the framing of the bill 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'.⁷⁸ 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'.⁷⁹ The bill passed its second reading by twenty-seven votes to ten. Martin, who was of the opinion that matters of such moment ought to be left in the hands of an elected assembly, 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.⁸⁰ The new Council neither abolished the Act nor varied its formulae and

⁷⁷ Ibid., 27 October 1854, reports LC.

⁷⁸ Ibid., 2 August 1855, reports LC. 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.'

⁷⁹ SMH, 16 August 1855, reports LC. 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.

⁸⁰ SMH, 19 October 1855, reports LC.

the details required on the registration forms for births, deaths and marriages made the New South Wales records among the most full and useful in the world and a model for other countries.

Plunkett must have been well pleased with his final contribution to the laws of New South Wales under the old form of government and 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.⁸¹

Plunkett's head was perhaps turned by this kind of nectar because, a few days later 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', and he then became so expansive that he extended his patronage to organ grinders. Donaldson wanted to ban the gentlemen from the streets as he found their rendition of 'Pop goes the weasel' bad enough but 'Vilikins and his Dinah' infinitely worse. Plunkett quoted in reply 'Music hath charms to soothe the savage breast' and opposed the prevention of 'music of whatever kind from the streets' with the further observation that 'wandering minstrels were an acquisition to the city'.⁸²

Besides the benefits accruing to him from his background and temperament Plunkett had the inestimable advantage of living as a Catholic in New South Wales in a period when religious

⁸¹ *Ibid.*, 22 September, 6 October 1855.

⁸² *Ibid.*, 11, 21 October 1855, reports LC.

animosities were muted. They were muted by economic necessity, the common struggle towards a free and civilised society, the striving towards equality for all citizens and the urbanity of many of the leaders of the community. Broughton, Polding, Lang, Burton and Willis engaged in their skirmishes but underneath there was the common dedication to the cause of building a society based on the British model. In the last years of his life Plunkett saw the beginnings of change and with them he changed a little himself. The struggle over education was exacerbated when it became clear that it was no longer simply a question of what kind of Christian creed was to underpin it but whether a Christian creed was to be involved at all. From the 1860s the Catholic community increasingly saw itself as embattled and the harsh tones of controversy were a reflection of the insecurity bred by the conflict. No one spoke any longer of Plunkett's dream of harmony resulting from a common formation through education, and with the passing of that dream the memory of Plunkett's principled stand passed also. For almost one hundred years after his death in 1869 Catholics lived in a world divided on a basis of denominational adherence that gave rise to religious animosities. The source of the affiliations was the system of Catholic education that arose after the rejection of Plunkett's dream. Perhaps the Catholics of this age will see that vision anew, and while not rejecting their past, will build on it to help construct a society in which freedom, toleration, equality and respect for the human person—themselves the touchstone of a genuine Christianity—will form the basis of the future.

Part 3

A Free Citizen

The New Politics

By 1855 his years of service in the colony had left their mark on Plunkett, both physically and mentally. He had passed his prime and the incessant labour demanded by his office had impaired his health. Those same years had faded the bloom in Maria Charlotte and the hope of so many seasons had been replaced by the certainty that their union would remain fruitless. Wealth and preferment had also escaped him. So many others had won riches from the new lands the colony offered, but Plunkett did not share them, indifferent as he was to business matters, like so many of his race. Others had been rewarded in men's eyes by the titles bestowed by royalty, but here again Plunkett was not interested. This very lack of interest in the things that drove on his contemporaries puzzled Maria Charlotte, who became querulous and angered in turn, while Plunkett withdrew to the solace and the tranquil companionship he found in work, books and music. At the same time those years had bred in him a sense of confidence and it was with renewed hope and interest that he looked forward to the implementation of the new constitution. For the first time he was to be his own man, owing favour neither to a governor nor to the demands of an official position. As a free citizen rather than as a servant he could now face his fellows, and assist in the development of the colony in its final stages from servitude to freedom. Perhaps Plunkett forgot that those years of transition had made him part of an era that was now past. At all events they held him still when the new age of responsible government opened, and it was as one stamped with that long struggle towards freedom that he took his place on the hustings in 1856.

The new constitution was received in a colony in which 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 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 the implementation of the constitution. John West, now editor of the most powerful organ in the colony, deemed Plunkett an eminently suitable candidate for a seat in the new legislature.³ West still saw in Plunkett qualities that transcended barriers of creed and which coalesced 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 1855.⁴ West's aspirations were matched by Plunkett's own intentions as he had

¹ SMH, 2 June 1855.

² Cowper to Parkes, 5 December 1854, Parkes Correspondence, vol. 6, pp. 325-9, ML.

³ 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.

⁴ *Ibid.*, 13 September 1855.

already made up his mind to stand for election.⁵ Although canvassed for the speakership, he had rejected it; his main problem was selecting a constituency for which to offer himself, but he quickly refused nomination for Northumberland because he would not run against his friend, George Nichols. 'Plunkett has invitations from two or three constituencies but I believe he intends to accept one from the City', Therry told James Macarthur.⁶ 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.⁷

By December 1855 Sir William Denison was already experiencing some difficulty in the implementation of the new constitution, and he turned to the Attorney-General to help him sort it out.⁸ As a result Plunkett had to bend his mind to legal matters while others, who looked upon themselves as fit and proper persons to run the new government, were able to give their time to the enhancement of their electoral possibilities. Together with Manning he prepared 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. He did manage to attend the closure of the old Council on 19 December when, amidst cheers and claps, Nicholson 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'.⁹ The Governor, however, had the problem of initiating that 'parliamentary history', and his task was 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

⁵ *Freeman's Journal*, 17 November 1855.

⁶ Therry to James Macarthur, 1 November 1855, Macarthur papers, vol. 34, p. 25, ML.

⁷ SMH, 20 November 1855.

⁸ See the letters to the Colonial Secretary under the bundle title '1855 Constitution Bill', NSW 4/714.3, and the Colonial Secretary's letters to the Judicial Establishments, vol. 26, NSW 4/3761.

⁹ SMH, 20 December 1855, reports LC.

Colonial Secretary, to think about forming a ministry. When Thomson refused, Denison turned to Donaldson who offered to try, but the Governor's difficulties on the level of personalities were revealed by his letter to Plunkett on the day the old Council closed. 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.¹⁰

It was thus still as a trusted servant of the Crown and in rein with a new governor, with whom he had little more than formal relations, that Plunkett entered the new era of politics in New South Wales. Even so he did not seem to realise that his very involvement as an adviser to the Governor would jeopardise his position as a candidate in the eyes of those who looked to new and democratic elements as the leaders and members of a government responsible to the people.

By early January 1856 the campaign for the elections had begun. Plunkett was still, of necessity, Attorney-General but he had allowed himself to be put forward for Sydney. The most remarkable feature of his candidature was the cross-section of the Sydney 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 to promote his chosen candidate. He began with an editorial on 3 January 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

¹⁰ Denison to Plunkett, 19 December 1855, Plunkett papers, ML; Denison to Grey, 19 February, 14 May 1856, and Thomson to Denison, 20 April 1856, CO 201/493, National Library.

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 broadminded as were those of both West and Plunkett themselves. West overlooked the 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'.¹¹

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 list.¹² To the appeal Plunkett replied that he had wanted 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. Lang added to the discordance later when he called Plunkett a 'Tipperary Boy'—which failed to amuse the Irish aristocrat with his Trinity College background.¹³

Plunkett's campaign opened at a large public meeting held in the Royal Hotel on 11 January. Robert Ross was chairman and Ryan Brennan proposed Plunkett formally as a candidate. John West seconded Brennan, repeating his editorial points and concluding by proclaiming that Plunkett was an honest man and

¹¹ SMH, 3 January 1856.

¹² Ibid., 7 January 1856.

¹³ Ibid., 7, 8 January 1856; *Freeman's Journal*, 9 February 1856.

'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 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', thereby earning the gratitude of the *Freeman's Journal* which spoke of his 'tender and affectionate allusions to his native land'.¹⁴ On a more practical level he asserted his conviction that the two-thirds clause in the Act, which restricted the power of constitutional amendment, had to be repealed as soon as possible. But probably the most revealing statement at the meeting came from Ryan Brennan 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 thus being projected as a conservative in a radical electorate.¹⁵

A committee was promptly elected to run the 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 of what he considered a misuse of democracy had weighed most heavily on his mind when he had voted for a

¹⁴ SMH, 12 January 1856; *Freeman's Journal*, 19 January 1856.

¹⁵ SMH, 12 January 1856.

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 justice for the convicts.¹⁶

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'.¹⁷ 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 had written 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. 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'.¹⁸

As a result, by the middle of January the lines began to clear

¹⁶ *Ibid.*, 12 January 1856.

¹⁷ *Southern Cross*, 17 March 1860.

¹⁸ Cowper to Parkes, 12 January 1856, Parkes correspondence, vol. 6, p. 489, ML.

with the public announcement of Parkes, Cowper, Wilshire and Campbell as 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 was 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 votes 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. Unwisely he dismissed the sectarian argument by lightly proclaiming lines which he claimed his father had taught him.

For modes of faith let graceless zealots fight
He can't be wrong whose life is in the right.¹⁹

At the same time he 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'.²⁰

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

¹⁹ SMH, 15, 17, 22 January, 2 February 1856.

²⁰ Ibid., 22 January 1856.

the bunch, was asked to talk about himself and his friends rather than Plunkett. Parkes replied 'With regard to Mr. Plunkett, I owe that gentleman a larger debt of personal kindness than, perhaps, I do to anyone else', although he quickly forgot the debt when he accused Plunkett of nepotism. 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.²¹ 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'.²² 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 was about to arrive in the colony.²³ Perhaps he shared Therry's view of 'those illustrious exiles' but he at least had the good sense not to communicate it to the public. Therry wrote to Donaldson his description of O'Brien and his companions:

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.²⁴

If at this time Plunkett had realised the power of the ethnic and sectarian arguments ranged against him he would have served his purpose better by aligning himself with a sectional interest more clearly and using the conventional rhetoric to impress his stand before the electorate. Yet as in the past, so now on the hustings, it was almost precisely because he kept free of involvement with personalities and tried to remain on a lonely level of principles that he engendered resentment and confusion in the electorate.

²¹ Ibid., 6 February 1856; *Empire*, 1, 11 March 1856.

²² SMH, 26 January 1856.

²³ Ibid., 2 February 1856.

²⁴ Therry to Donaldson, 16 July 1856, Donaldson Ministry letters, ML.

When John West realised 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.²⁵

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', but Plunkett did not help his cause by taking charge of a welcome home to Polding who returned from Europe in early February.²⁶ 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.²⁷ Undaunted, the *Voice*, a new publication under the aegis of Lang, alleged that 'If the electors return him, they will in reality 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 his people to act on the basis that 'we are Australians'. The Archbishop said in his Lenten Pastoral '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'.²⁸ James Cameron, Moderator of the Synod of Eastern Australia, repudiated the *Voice*, but it or other rumours must have affected the Reverend 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

²⁵ SMH, 15 January 1856.

²⁶ Ibid., 25 January 1856; *Freeman's Journal*, 2 February 1856.

²⁷ SMH, 22 February 1856.

²⁸ *Freeman's Journal*, 16 February 1856; SMH, 26 February, 1 March 1856.

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'.²⁹

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 scurrilous charges that young James Martin was bringing against him on the grounds that they were beneath his notice.³⁰

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 on the hustings 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. James Martin proved more worthy of the responsibility accorded him of attacking Plunkett as he considered it afforded him an opportunity of 'unmasking this imposter'.³¹ Martin's main accusation against Plunkett was made in the heat of an election and he proffered no proof of his statement. He averred that in 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

²⁹ Ibid., 8, 13 March 1856.

³⁰ Ibid., 7, 18 February 1856; *Freeman's Journal*, 23 February 1856; *Empire*, 21 March 1856. Martin later became Premier and he is remembered in Sydney by Martin Place.

³¹ SMH, 13, 16 February 1856.

the Attorney-General had used unusual energy to prosecute him, had been found guilty. This indictment of Plunkett was refuted by others, but not at the time by Plunkett or West who scorned to notice such 'gross and wicked charges'. The facts were that Plunkett and his wife had called at Lakeman's Inn where Mrs Plunkett became ill after her meal. Plunkett took umbrage at the treatment she received but it was not directed at Lakeman who was not present on the day in question. The rape case took place some time later.³² 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 charges he had made, but it would have been better politics to have forced him to retract them then and there.³³

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; given 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'.³⁴ 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

³² See letter of J. Sullivan to SMH, 22 February 1856 and editorial of that day.

³³ *Ibid.*, 24 September 1856.

³⁴ *Ibid.*, 22 February 1856.

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 in honour of the Irish patriot, 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 absence from Sydney on that day but his real reason, which he made clear to Duffy, was that as an official of the Crown he could not attend a banquet at which it had been decided to omit a toast to the Governor, Denison, who had governed Van Diemen's Land in the days when the Irish prisoners were there. To the Irish he was known as the 'Gaoler-General' which occasioned the refusal to toast him at the banquet. Parkes saw Duffy's visit and the banquet as an opportunity to help dispel any fears that he and the bunch were either anti-Catholic or anti-Irish and satisfaction was widespread amongst them and their supporters that circumstances forced Plunkett's absence.³⁵ In the event Duffy proved something of a disappointment as he gave a moderate speech which tended to dispel the fears of those who thought with Therry that Duffy would become an instrument pushing on the 'tide of democracy' in Victoria and 'those here [who are] ready and willing to be inoculated with his spirit'.³⁶ In his speech Duffy referred to the new constitution which 'with all its faults [is] one of the safest, wisest, and most liberal constitutions in the world', although he disagreed with the nominated Upper House and referred to 'Queen Merivale' now ruling the colonies instead of 'King Stephen'. 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

³⁵ Ibid., 12 March 1856. Even Father McEncroe could not express his Irish patriotism as he, too, was absent because the banquet was held in Passion Week!

³⁶ Therry to James Macarthur, 1 March 1856, Macarthur papers, vol. 34, p. 39, ML.

place of Daniel Deniehy whose absence was unexplained, was equally tentative.³⁷

The next day was wet, but a good crowd gathered for the nomination of the bunch first, and then Plunkett whose nominator 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 piece of legislation 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, in London in 1842, against restrictions to the franchise in the first colonial legislature when the Secretary of State had 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 land 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'.³⁸ 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.

³⁷ *Empire*, 12 March 1856; *SMH*, 12 March 1856; *Freeman's Journal*, 8 March 1856.

³⁸ *SMH*, 13 March 1856.

When the final numbers went up Plunkett ran fifth with 2,800 votes. Cowper led with 3,073, followed by Parkes with 3,057, Campbell with 3,041 and Wilshire with 2,901. Dr Duigan ran last in the poll with 89 votes.³⁹ The bunch won a narrow victory and proved the effectiveness of their organisation, and the greater appeal of their policies. Danny Deniehy, who had been praying to God for the success of the bunch and the 'discomfiture of the Plunkettry', 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 Noddledom, sore and savage at the defeat of that archetype of immaculate inanity and respectable humbug—'Misther 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.⁴⁰

Probably both Wilshire, who benefited by the tactics, and Plunkett, who lost the election, knew a little more about the effectiveness of the bunch 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*'.⁴¹ Perhaps he realised that Plunkett would contribute very little henceforward to the shaping of that history, but his unwearied appeals to the hoped for 'impartial hands' cast their own shadow over his campaign and Parkes was not wide of the mark when he called them 'silly extravagancies' which caricatured Plunkett and obscured his real worth to the community.⁴²

Within a few hours Plunkett was wondering about the nature

³⁹ Ibid., 21 March 1856.

⁴⁰ Deniehy to Parkes, 9 March, 28 November 1856, Autograph letters, vol. 71, pp. 51-61, ML.

⁴¹ SMH, 14 March 1856.

⁴² *Empire*, 15 April 1856.

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. At the declaration of the poll a week later the bunch wisely left without speaking. Plunkett said that he had proof of his allegations regarding the poll which 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 Father McEncroe of favouring Cowper on the education question 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.⁴³

There was general astonishment in the country districts that Plunkett had not been returned for the city and some enthusiasts still thought that, now that Wentworth had left the colony, Plunkett was the man to lead it. Wentworth himself would have had as little hope as Plunkett of leading the colony at the time as popular opinion in Sydney was still unfavourable to them both over the new constitution, the faults of which they were blamed for, while its benefits, for which they were equally responsible, were overlooked. Undaunted, the *Freeman's Journal* called for Plunkett as premier but its standing even within the Catholic community was suspect as it was edited by the former monk, J. Sheridan Moore and Polding had repudiated it.⁴⁴ In the event Plunkett was nominated against Bligh in Bathurst and won the 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. Plunkett also stood for and won the seat of Argyle against Chisholm who was supported by Charles Cowper Jnr, which must have given his father pause for

⁴³ SMH, 15, 21 March 1856; Therry to Macarthur, 31 March 1856, Macarthur papers, vol. 34, pp. 43-50, ML. McEncroe falsely denied that he had helped to defeat Plunkett. See *Freeman's Journal*, 22 March 1856.

⁴⁴ *Freeman's Journal*, 26 April, 27 September 1856; *Empire*, 22 April 1856.

thought because he had written to Parkes, 'J. D. Chisholm will go in for Argyle. A lamentable result.'⁴⁵

West was pleased to see that his candidate was welcome in other electorates and wrote, possibly indicating to Plunkett that even in politics there could be enough of a good thing, 'Mr. Plunkett . . . will have as many constituencies open to him as there were towns claiming to be the birth-place of *Homer*'. 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*, which was trumpeting 'Down with Plunkett, Polding and Popery'.⁴⁶ West felt that 'No Popery' beat Plunkett in Sydney but that he had been vindicated by his two wins, and thus 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 1856.⁴⁷ 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. It is also clear that, whatever else, sectarianism had little effect on the Sydney electorate. Plunkett's vote there was based on social and political rather than religious factors and that vote, given the efficacy of the campaign mounted by the bunch, was insufficient.⁴⁸

With the elections over the business of forming a ministry was undertaken by Donaldson who thus became, albeit briefly, the first premier of New South Wales, although he still used the current term of Colonial Secretary. Like Thomson, when he was seeking members for his proposed ministry, Donaldson also offered the post of Attorney-General to Plunkett. Plunkett had

⁴⁵ SMH, 1, 2 April 1856; Cowper to Parkes, 12 January 1856, Parkes correspondence, vol. 6, p. 489, ML.

⁴⁶ SMH, 3, 12 April 1856; *Empire*, 5, 10 April 1856.

⁴⁷ SMH, 12 April 1856.

⁴⁸ See Peter Loveday, 'The Development of Parliamentary Government in New South Wales, 1856-1870', pp. 463-5 for a useful analysis of the voting trend in Sydney at the election of 1856.

refused to go in with Thomson because he thought that a ministry ought to be led by an elective member of the Assembly rather than 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 further grounds that he thought the old officers of the government ought not to continue in office.⁴⁹ Manning, however, felt able to accept Donaldson's invitation to be Attorney-General, although Plunkett continued in the office until early June. The first ministry consisting of Donaldson, Manning, Darvall and Nichols was sworn in as an Executive Council, and responsible government began in New South Wales.⁵⁰

The Legislative Council, however, still had to be nominated, and again Plunkett was turned to for his opinion on the membership, almost as if his old status as a confidant and adviser to the Crown was not over.⁵¹ Whether his advice was accepted is not known but given his attitude to the involvement of the clerical and legal professions in politics it is unlikely. The four heads of the major churches were initially invited to be members, 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'.⁵² 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, Thomson and Merewether. After Thomson refused the position Stephen was appointed as Speaker of the Council on the understanding that no salary was attached to the office, and when Denison wrote to the Colonial Office to explain that the composition of the Council catered for all classes, creeds and interests, the Secretary, Labouchere, noted on the letter that he thought it unwise to appoint judges 'in a colony where party is sure to run high'.⁵³ Another important appointment that Denison undertook, with the advice of his Executive Council but 'under the

⁴⁹ Thomson to Denison, 20 April 1856; Denison to Grey, 14 May 1856, CO 201/493, National Library; *SMH*, 21 April, 5 May 1856.

⁵⁰ *Ibid.*, 30 April 1856.

⁵¹ Manning to Plunkett, 5 May 1856, Manning papers, uncat. MSS., ML.

⁵² *SMH*, 3, 14 May 1856.

⁵³ Denison to Grey, 22, 24 August 1856, CO 201/494, National Library.

recommendation' of the Anglican bishop, Barker, was that of Cowper to be Chairman of the Board for Denominational Schools. West, unaware of the implications of the appointment for Plunkett's future, pointed out that it was a step that ought to have been taken by the Governor and the Executive Council acting together, and 'upon their own responsibility'.⁵⁴ Plunkett also had his appointment—as Queen's Counsel—and Denison was graceful when he wrote unofficially his expression of 'best wishes for your happiness on your release from office'.⁵⁵

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.⁵⁶ 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 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, despite the fact that Judge Dickinson was recorded as having voted for the bunch although he was absent in Goulburn on polling day, but to show his stand on the matter he proceeded to claim 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 and he then spoke in favour of Henry Parker for the office because he thought his opponent, Daniel Cooper, lacked the experience needed in the position. Ironically 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'.⁵⁷ With a touch of asperity and a hint that he would stick to his

⁵⁴ SMH, 10 May 1856.

⁵⁵ Denison to Plunkett, 7 June 1856, Plunkett papers, ML.

⁵⁶ SMH, 13 May 1856. In 1836 there were 12,111 males to 7,618 females, in 1856 there were 26,220 males to 26,898 females.

⁵⁷ Ibid., 20, 23 May 1856.

old principles Plunkett indirectly attacked both the composition of the new Legislative Council and its manner of nomination when he deplored the fact that it had not been nominated by 'the representatives of the people'. He said that he had all along understood that such a method of nomination would have ensured the operation of democratic influences upon the Council, but that those influences were now manifestly lacking.⁵⁸

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'. In the ensuing debate on the composition of the ministry 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, and Parkes was sufficiently impressed with his attitude to call him the only genuine cross-bencher in the House who judged every case on its merits.⁵⁹ 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'.⁶⁰

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

⁵⁸ Ibid., 30 May 1856, reports LA.

⁵⁹ Ibid.; *Empire*, 6 September 1856.

⁶⁰ See P. Loveday and A. W. Martin, *Parliament, Factions and Parties*, p. 6.

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.⁶¹

The Supreme Court of New South Wales paid tribute to Plunkett on 24 June 1856. Each judge spoke of his career, Stephen 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.⁶²

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

⁶¹ SMH, 8, 9, 13 June 1856.

⁶² Ibid., 26 June 1856. Therry, secure on his Bench and full of patronage, said 'We took leave of Plunkett quite affectionately in Court yesterday'. Therry to James Macarthur, 25 June 1856, Macarthur papers, vol. 34, p. 51, ML.

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'.⁶³ 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.

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.⁶⁴ 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.⁶⁵ It was a formidable group that sat across from Donaldson and voted against him, including as it did Parkes, Cowper, John Robertson,

⁶³ SMH, 26 June 1856.

⁶⁴ Denison to Grey, 11 August 1856, CO 201/495, National Library.

⁶⁵ SMH, 13 August 1856, reports LA.

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 to exclude the judges. Plunkett replied at length to the leader of the House 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.⁶⁶ 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 in earnest, 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 the opposition', to form a ministry.⁶⁷ Plunkett then seized his opportunity to berate by implication those whom he considered had repressed the very freedoms he had fought for in the past and who seemed to threaten them still. He did it with another remarkable speech—this time in favour of Edward Smith Hall. Hall, as editor of the *Monitor*, had fought so long and valiantly for the freedom of the press against Darling, but he was now an old and broken man seeking a position in government employ. Parkes and Cowper knew whom Plunkett

⁶⁶ Ibid., 15 August 1856, reports LA.

⁶⁷ Denison to Labouchere, 13 September 1856, CO 201/495, National Library. Denison aptly 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.

meant when he said that 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'.⁶⁸

After this outburst 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. 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.'⁶⁹ 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.⁷⁰ 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 been admitted to the Bar, so that he was 'an Attorney-General that cannot practise', joined with Campbell, 'a Treasurer who cannot count'.⁷¹

Denison was also apprehensive at the appointment of Martin. He told Labouchere about it, but explained that he had asked the opinion of the Chief Justice, who saw no legal grounds for opposing it, and that in any case Martin would soon be admitted to the Bar.⁷² The reference 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 appoint-

⁶⁸ SMH, 21 August 1856.

⁶⁹ Ibid., 25 August 1856; 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.

⁷⁰ SMH, 26 August 1856.

⁷¹ Ibid., 28, 30 August, 6 September 1856.

⁷² Denison to Labouchere, 13 September 1856, CO 201/495, National Library.

ment, the Bar, led by Plunkett, thought that it was imprudent, 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.⁷³

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 by persuading its members to refuse to accept the position of Attorney-General he would join Cowper to put it down. Cowper also said that Martin had gone as far as to offer not to take another position in the ministry knowing that Plunkett would not sit with him. He made this offer in order to ensure that Cowper obtained Plunkett's services as Attorney-General and won West's begrudging praise for that. Hay told Cowper and the House that at the moment Cowper realised 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'. 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 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'.⁷⁴ Donaldson was perhaps unmindful of the fact that those same opinions may have caused some alarm to Denison and others 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

⁷³ SMH, 9 September 1856.

⁷⁴ Ibid., 17, 18, 24 September 1856, reports LA.

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'.⁷⁵ 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.⁷⁶

Denison turned to Henry Watson Parker to attempt again to stabilise the ministry. When Parker came into the House with his new ministry, consisting of 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 to Plunkett, 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'. By the same token he was beginning to loosen up himself and showed some capacity to learn the language of political invective. He called Martin 'a

⁷⁵ Ibid., 19 September 1856, reports LA. See *Freeman's Journal*, 6 September 1856, for comment on Martin.

⁷⁶ *SMH*, 25, 26, 27 September 1856, reports LA; Denison to Labouchere, 28 October 1856, CO 201/495, National Library.

foul and malicious slanderer' after Martin wrote a derogatory article on Parker in the *Empire*.⁷⁷

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 £1,000 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 state fostering a system of 'compulsory voluntarism' 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 regretted 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 and his later career indicates that the old liberal of pre-1856 understood both the needs of the future and the men who would change it.⁷⁸

Despite the three rapid changes in ministries the transition to responsible government in New South Wales was effected with dignity, efficiency and order although Deniehy was complaining from Goulburn that the country was still in the hands of 'the

⁷⁷ SMH, 29 October, 1, 8 November 1856, reports LA.

⁷⁸ Ibid., 21, 26 November, 12, 29, 30, 31 December 1856, reports LA. For the career of Dalley see the article by Bede Nairn and Martha Rutledge in *Australian Dictionary of Biography*, vol. 4, pp. 6-9.

faction who look upon it as their preserve'.⁷⁹ 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 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.

⁷⁹ Deniehy to Parkes, 28 November 1856, Autograph letters, ML.

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 Deas 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':¹ 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'.² 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'.³ 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. West 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 the previous twenty-five years.

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'.⁴ Others saw in his nomination ominous signs of rising Popish power. The *Australian Banner* had rejoiced in early January when Fairfax, allegedly Plunkett's candidate, was beaten by Dalley, whom the *Banner* preferred, despite the fact that he too was a Roman Catholic. It was alleged that during FitzRoy's administration the Governor had 'handed over the reins of Government . . . to the guidance and determination' of Plunkett, and it was feared that in his new position Plunkett might begin to exercise the same kind of power.⁵ 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.⁶ Understandably Plunkett was regarded as an old man by the rising generation, despite the fact that he was only fifty-five, but he had come a long way since he arrived in

² Plunkett to Denison, 22 January 1857, Plunkett papers, ML.

³ Therry to James Macarthur, 24 June 1856, Macarthur papers, vol. 34, ML.

⁴ *SMH*, 23 January 1857.

⁵ *Australian Banner*, 3, 24 January, 25 April 1857. The *Banner* was strongly anti-Catholic in its bias.

⁶ *SMH*, 29, 30 January, reports LC.

Sydney in 1832 and 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 1857.

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 had frequently sat for fifteen minutes or less.⁷ Plunkett was unable to make use of the break by resuming 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*'.⁸ In the meantime, perhaps because he was idle, 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 before the ceremony. Dr John Woolley, first principal of the University, 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,

⁷ *Ibid.*, 13, 14 February 1857, reports LC.

⁸ 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.

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'.⁹ 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 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 his career Plunkett was aggressively Catholic to the extent that he was prepared to cause public embarrassment in order to express a claim to equality. He neither could nor would have argued that equality was lacking on all points of importance, which makes it even more strange that he should have so behaved over a matter of minor protocol. It is possible that as Plunkett began to realise 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 had remained 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 a prominent speaker 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 the Catholics of the colony ought to take their opportunity and erect their own college.¹⁰ It was a peculiar

* SMH, 21 April 1857; *Church of England Chronicle*, 1 May 1857; *Australian Banner*, 25 April 1857.

¹⁰ SMH, 4 August 1857.

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 6s was subscribed with Plunkett himself giving £100.¹¹ 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.¹² There was some semblance of truth in its statement that Plunkett and Therry had 'relit the torch of discord throughout the land'.¹³ Their behaviour is even more surprising when it is realised 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. Although committed under the strongest possible provocation his actions cast odium upon both the Governor and the Colonial Secretary. They almost brought down the government and caused sectarian, social and political conflicts to arise that in the past Plunkett would have been the first to deplore. Obliquely he proved that the old order of colonial society had passed forever in that ultimate decisions were no longer taken in the offices of

¹¹ *Ibid.*, 17 August 1857.

¹² It is indicative of Moran's ambivalent attitude to Plunkett that he devoted seven pages of his *History* to Therry's speech and did not mention Plunkett's at all. See P. F. Moran, *History of the Catholic Church in Australasia*, pp. 453-9.

¹³ *Australian Banner*, 22 August 1857.

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 indefatigable in his role as Chairman of the National School Board.¹⁴ Opposition to the national system had not abated and, from the side of the churches, including the Catholic church, it varied only in its intensity. The National Board, however, continued its work and the system it promoted was, by 1857, showing considerable expansion. In its day-to-day operations the Board acted as an autonomous body although it depended completely upon the government for its funds. Even as early as 1849 Plunkett was applying for funds in terms which must 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 £3,000 for schools in the settled districts, £1,500 for the squatting districts and £1,500 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'.¹⁵

As the years went on the national system continued to grow as to students enrolled and consequently as to the sum outlaid for the erection and maintenance of schools and the payment of teachers. By 1858 there were 7,814 pupils in the national schools and the outlay was £22,193 18s 8d. 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 to 1858 had cost £114,974 6s 6d, whilst in the same period 145,067 had enrolled in the denominational system costing the government only £149,689 7s 3d.¹⁶ 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

¹⁴ See the valuable thesis of Joseph R. Burke, *The Contribution of John Hubert Plunkett to Education in the State of New South Wales: 1832-1869*.

¹⁵ Plunkett to Colonial Secretary, 18 June 1849, National School Board Miscellaneous Matters 1849-54, NSWA 4/7176.

¹⁶ Comparative Statement of the Expenditure on account of the National and Denominational Schools from 1848 to 1858, NSWA 4/7177.

Board from 1856 onwards asking for a detailed budget for the ensuing year, 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 ever gave any satisfaction to the various ministries in this matter and when the Board asked for £25,000 in June 1857 the government, understandably, became anxious.¹⁷

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'.¹⁸ 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.¹⁹ 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 in regard to educational matters, 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

¹⁷ See letters from Colonial Secretary to Secretary of National Board, 10 March, 4 July, 12, 22 December 1856, 14 January, 8 April, 27 June 1857, in Copies of Letters to the National School Board, 4 January 1848-27 December 1866, NSW 4/3702.

¹⁸ SMH, 13 November 1857.

¹⁹ See James Macarthur to Donaldson, 2 July 1856, Donaldson Ministry letters, pp. 73-84, ML.

the matter.²⁰ During 1857 the Executive Council 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 1857.²¹ 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.²²

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.²³ 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.²⁴ If Plunkett had been able to read the signs at all he would have realised 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 although it must also be recognised that Cowper, especially, was ready to seize any opportunity to curb Plunkett in regard to the national schools.

²⁰ James Macarthur to Donaldson, 3 July 1856, *ibid.*, pp. 85-8. 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.

²¹ Executive Council Minutes, 3, 20 August 1857, in National School Board Miscellaneous Matters, NSW 4/7177.

²² Denison's note on letter from National School Board, 3 June 1858, *ibid.*

²³ *SMH*, 13, 18 May 1857 through to letter no. 7, 20 July 1857.

²⁴ *Ibid.*, 16 December 1857, reports LC.

Acting on a suggestion made by William Wilkins the National 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.²⁵ 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, and 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 realised 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'.²⁶ Denison was also prompted to his decision by his personal interest in education and his desire to have a hand in any formulation of policy on it.

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.²⁷ 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*

²⁵ This and the ensuing correspondence was printed in New South Wales VPLA, vol. 2, 1858, pp. 435-43.

²⁶ Denison to Cowper, 9 January 1858, in Removal from Office of the Chairman of the National Board, NSW 4/7176.1.

²⁷ Plunkett to Cowper, 4 January 1858, VPLA, vol. 2.

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.²⁸ 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.²⁹ 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.³⁰

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 towards national education. At the same time he expressed the Board's readiness to abide by any decision Parliament might 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 present Government'. He added further fuel to the flames when he pushed the matter on to the stage of public opinion by having the rules and all the correspondence published in the *Herald*.³¹

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

²⁸ W. Elyard to Plunkett, 4 January 1858, *ibid*.

²⁹ Plunkett to Cowper, 5 January 1858, *ibid*.

³⁰ Elyard to Plunkett, 5, 7 January 1858, *ibid*.

³¹ Plunkett to Elyard, 8 January 1858, *ibid*.; *SMH*, 8, 11 January 1858.

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'. He was thus prepared to do what he deemed his 'right' even if the Board resigned *in toto*.³² 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'.³³ 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.³⁴ 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 further illustrated how far the whole affair had affected his own poise when he said he was resigning all public office under a government by which 'the reign of terror has commenced'.³⁵ 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*'.³⁶ 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.³⁷ 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

³² Cowper to Martin, 13 January 1858, in Removal from Office, NSW 4/7176.1.

³³ Executive Council Meeting Minutes, 27 January 1858, *ibid.*; 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.*

³⁴ Plunkett to Denison, 11 February 1858, Plunkett papers, ML.

³⁵ Plunkett to Cowper, 6 February 1858, in Removal from Office, NSW 4/7176.1.

³⁶ *SMH*, 10 February 1858.

³⁷ See *ibid.*, 13 February 1858.

teaching which he believes will tend to their well-being.³⁸ Public meetings were held at several places, the one in Sydney attracting three to four thousand 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'.³⁹ A later writer summed up the furore by stating that it was a dispute that aroused the colonists more 'than any other personal quarrel since the days of Bligh and Darling'.⁴⁰

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 extending over a period of some months.⁴¹ He organised 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'.⁴² The petition from the people of 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 might pose some problem in the event of an appeal.⁴³

Macarthur was in constant contact with West regarding his

³⁸ Ibid., 16 February 1858.

³⁹ Ibid., 6 March 1858.

⁴⁰ R. Flanagan, *The History of New South Wales*, vol. 2, p. 425.

⁴¹ See National Education and the Dismissal of J. H. Plunkett, Macarthur papers, vol. 87, ML. This volume lacks pagination.

⁴² For the petitions see VPLA, vol. 2, 1858, pp. 443-57; and Removal from Office, NSW 4/7176.1.

⁴³ Denison's notes on W. C. Wiles to Cowper, 16 February 1858, and on Plunkett to Cowper, 6 February 1858, *ibid.*

activity on Plunkett's behalf and he led the opposition to the government in the ensuing Legislative Assembly debate.⁴⁴ 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.⁴⁵ This was as much as Macarthur, Plunkett and West could hope for but, given Plunkett's long service, it was no 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 West wanted Macarthur to pull Cowper down on the matter.⁴⁶ 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.⁴⁷ Plunkett would not apologise 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'.⁴⁸ For years Plunkett had been justly considered by many as 'the great patron of education' and

⁴⁴ See Macarthur papers, vol. 87, *passim*, and debates of Legislative Assembly in SMH, 23, 27, 28, 29 April 1858.

⁴⁵ *Ibid.*, 29 April 1858, reports LA.

⁴⁶ *Ibid.*, 10 August 1858.

⁴⁷ 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, NSW 4/7176.1.

⁴⁸ Macarthur to Cowper, 16 July 1858, *ibid.*

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'⁴⁹ for the simple reason that, as a system, its days were numbered by 1858. In so far as Plunkett himself was concerned his dismissal was a personal tragedy in that it removed him from a field to which he had given so much and in which he hoped to yet give more. Beyond that, however, 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'. 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'. 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 realise that 'old Hubert' had almost spent his course in the service of New South Wales.⁵⁰

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'. 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

⁴⁹ See C. C. Linz, *The Establishment of a National System of Education in New South Wales*, p. 49.

⁵⁰ SMH, 13 February, 12 March, 23 April 1858.

could not leave because 'the very fibres of his heart had taken root' in it.⁵¹ 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.⁵² 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.⁵³

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 prior to 1856 he had been the leading Catholic layman of Sydney, although he had been careful to act always as a responsible citizen in the public arena, and to keep the principles and practice of his 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. Sydney, 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. Matters 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,

⁵¹ Ibid., 14 September 1858.

⁵² Ibid., 1, 6, 11 October 1858. See also manuscript book of music in Plunkett's hand in Plunkett papers, ML.

⁵³ SMH, 9 November 1858.

which it likened to 'foxes who destroy the vineyard of the Lord', or even 'roaring lions' stirring up dissent.⁵⁴ Plunkett was not amongst those such as William Duncan, Jabez 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.⁵⁵ 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 1858.⁵⁶

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.⁵⁷ At the same time Daniel Deniehy, with whom Plunkett was now in transient political collusion, found himself threatened with excommunication over a somewhat petty protest meeting held in the Victoria Theatre.⁵⁸ 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.⁵⁹

Since their arrival in Australia in 1838 the Sisters of Charity had always been favoured with Plunkett's especial benevolence and care and 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

⁵⁴ *Freeman's Journal*, 30 June 1858; *SMH*, 2 July 1858.

⁵⁵ *Ibid.*, 2 August 1858.

⁵⁶ *Ibid.*, 30 October, 3 November 1858, reports LA.

⁵⁷ *Ibid.*, 3 March 1859. 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.

⁵⁸ *Ibid.*, 2 March 1859.

⁵⁹ It has been described, with differing emphasis, by T. L. Suttor, *Hierarchy and Democracy*, pp. 188-92, Mary Shanahan, *Out of 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.

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'.⁶⁰ 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 1859 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.⁶¹ 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.⁶²

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'. 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'.⁶³ 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

⁶⁰ *Freeman's Journal*, 1 June 1859.

⁶¹ *Ibid.*, *SMH*, 7 June 1859.

⁶² *Ibid.*, 2 June 1859. The *Herald* likened de Lacy to Nightingale, *ibid.*, 6 June 1859.

⁶³ Polding to an unnamed bishop, 20 June 1859, SAA.

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.⁶⁴

It is difficult, if not impossible, to speculate fairly where truth lay in the matter. Undoubtedly Polding and his Vicar-General, Abbot Henry Gregory, had an unhappy history of relationships with religious orders other than Benedictines, although it seems probable 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 his general distemper, dating to some extent from the elections of 1856 when he failed to win a Sydney seat, 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. Yet 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 anathema to Plunkett. Polding was unjust when he included Plunkett in the 'cabale hypocrite' which he said was responsible for the public clamour.⁶⁵ 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

⁶⁴ See *Freeman's Journal*, 1 June 1859 for report. In fact the Bibles were restored and the hospital continues to this day.

⁶⁵ Rough draft of a letter, in French, by Polding to the Cardinal Prefect of Propaganda, n.d., but probably early 1860, SAA.

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.⁶⁶

Plunkett was successful in winning a seat for West Sydney at the elections in mid-June although Deniehy, still under his threat of excommunication, lost and the indefatigable Dr Duigan again brought up the field of seven candidates.⁶⁷ 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'.⁶⁸ 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. 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 in 1860 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

⁶⁶ Polding to Geoghegan, 9 July 1859, SAA.

⁶⁷ SMH, 16 June 1859. Duigan seconded his own nomination, see *Southern Cross*, 12 November 1859.

⁶⁸ SMH, 14 June 1859 and 2 September 1859, reports LA.

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.⁶⁹

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. 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. 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.⁷⁰

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 make the two boards more responsible to Parliament. Plunkett feared that the measure would result simply 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'.⁷¹ Forster, a man who

⁶⁹ 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, ML.

⁷⁰ SMH, 13 July, 2, 5, 6 September 1859, reports LA.

⁷¹ Ibid., 23 September, 6, 20, 21 October 1859, reports LA.

thought that '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.⁷² 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.⁷³ The new government offered Plunkett his old post on the National School Board, 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.⁷⁴

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'.⁷⁵ 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 furthermore would weaken the churches by pensioning the clergy.⁷⁶ 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.

⁷² W. Forster to Parkes, 4 October 1857, vol. 52, pp. 20-6, Parkes correspondence, ML.

⁷³ 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.

⁷⁴ Ibid., 10 December 1859; SMH, 10, 11 November 1859.

⁷⁵ *Southern Cross*, 10 March 1860, reports LA. Plunkett said this after John Robertson replaced Forster in March 1860.

⁷⁶ SMH, 22 February 1860, reports LA.

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, who took a democratic stand on the question, was nevertheless 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. In Plunkett's opinion the agitation regarding land was little more than complicated political manoeuvring and, although this judgment had some validity, it indicated further how he had lost touch with the times.⁷⁷ 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'.⁷⁸ It was to no avail because Plunkett was regarded on the land question as an instrument of the large pastoral 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.⁷⁹ Plunkett was beaten and McEncroe consoled William Macarthur with the pious thought that they had to be resigned to the ways of Providence which 'Knows how to bring good out of evil'.⁸⁰

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 held up fairly well 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 govern-

⁷⁷ Ibid., 24 December 1859, reports LA.

⁷⁸ McEncroe to Macarthur, 14 December 1860, Macarthur papers, vol. 41, pp. 149-51, ML.

⁷⁹ *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.

⁸⁰ McEncroe to William Macarthur, 28 December 1860, Macarthur papers, vol. 41, pp. 171-3, ML.

ment 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.'⁸¹ 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.⁸² 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 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 Burton, now President of the Council, led a walk-out but, as the five

⁸¹ 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 rarefied 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.

⁸² Nicholson to James Macarthur, 1 January 1861, Macarthur papers, vol. 28, ML.

years' appointment of existing councillors expired soon afterwards, it was possible for Young and Cowper to reconstitute the Upper House on more liberal lines.⁸³

Plunkett at this time had made plans 'for the future' which probably included a visit to Ireland.⁸⁴ He was still drawing his pension of £1,200 and his legal practice augmented this sum slightly so that with his moderate requirements 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 mind Cowper approached Polding and asked him to persuade Plunkett to accept a seat in the Council. 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.⁸⁵ 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

⁸³ P. Loveday, *The Development of Parliamentary Government in New South Wales, 1856-1870*, pp. 338-64, has a clear and interesting account of these proceedings. See also C. H. Currey, 'The First Proposed Swamping of the Legislative Council of New South Wales', *RAHSJ*, vol. 15, pt 5, pp. 282-91.

⁸⁴ Plunkett to Young, 13 June 1861, Plunkett papers, ML.

⁸⁵ Cowper to Polding, 28 May 1861, Cowper correspondence, vol. 1, ML; F. Turville, Private Secretary to Plunkett, 12 June 1861 and Plunkett to Young, 13 June 1861, Plunkett papers, ML.

—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 Church' due to the numerous endowments of the Anglican church.⁸⁶ 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 1863.⁸⁷

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.⁸⁸

⁸⁶ SMH, 17 September 1862, reports LC, and *Report of Two Speeches of the Honourable J. H. Plunkett on the Bill to Abolish State Aid to Religion*.

⁸⁷ Young to Newcastle, 21 January 1863, CO 201/526, National Library. See also Naomi Turner, *Sinews of Sectarian Warfare*.

⁸⁸ See E. J. Braggett, 'The Public Schools Act of 1866 and its Aftermath', RAHSJ, vol. 53, pt 3, pp. 180-211.

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.

Throughout the previous years 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.⁸⁹ 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.⁹⁰ He 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 protégés, James Murray and others in New South Wales.

In the case of Polding it was perfectly clear by 1859 that he totally 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'.⁹¹ 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 now in

⁸⁹ *Freeman's Journal*, 13 November 1851.

⁹⁰ See Braggett, 'The Public Schools Act of 1866 and its Aftermath', *passim*.

⁹¹ See Text of Bishops' Pastoral in Moran, *History of the Catholic Church in Australasia*, pp. 770-3.

perfect agreement as it was no longer his desire to have one all-embracing system of education, although he remained convinced of the necessity of a national system for those who wanted it and he did not reject it in the manner of the leaders of his religious community. He feared that a new system of public education would deprive Catholics of assistance in setting up schools of their own choice, so he turned back on his steps. He was firmly 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 realise 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's 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's 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 to be allowed to interfere' he noted in the margin 'A proper subject for Enquiry'.⁹² 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.⁹³

⁹² *Public Education Speeches of the Hon. Henry Parkes*. The pamphlet has Plunkett's personal notes throughout, Plunkett papers, ML.

⁹³ *Freeman's Journal*, 20 October 1866.

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'.⁹⁴ 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.

Although he was gradually leaving public life, Plunkett accepted three other appointments 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'.⁹⁵ 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 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.'⁹⁶ In the event his term in the

⁹⁴ See dedication to Plunkett of G. W. Rusden, *National Education*.

⁹⁵ See Loveday, *The Development of Parliamentary Government in New South Wales, 1856-1870*, p. 394.

⁹⁶ Therry to James Macarthur, 12 January 1864, Macarthur papers, vol. 34, pp. 291-7, ML.

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 charged with murder 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.⁹⁷ 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 'of the Judges to appropriate any sum to particular individuals on Circuit'.⁹⁸ 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

⁹⁷ Judgment Book of Maitland Circuit Court 1865, NSW 4/5763.

⁹⁸ Cowper to Stephen, 16 October 1865, Letters from Colonial Secretary to Judicial Departments, vol. 29, NSW 4/3764.

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'.⁹⁹

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.¹ Young asked Plunkett what could be done to obtain an Attorney-General and Plunkett suggested Manning as 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-à-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'.²

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

⁹⁹ Young to Cardwell, 21 September 1865, CO 201/535, National Library.

¹ 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 Plunketts' 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.'

² 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, CO 201/535, National Library. The press generally approved of the manoeuvre, see SMH, 29 August 1865, *Empire*, 26 August 1865.

the country' but he found it a hopeless task.³ 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. 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 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.⁴

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.'⁵

One bond still held Plunkett and the passage of the years had made it part of his character. The love he bore his wife had stood the test of disappointment, clash in temperaments and

³ Plunkett to James Macarthur, 22 January 1866, Macarthur papers, vol. 30, pp. 226-9, ML.

⁴ Ibid., p. 227.

⁵ Ibid., p. 228.

interests, perhaps even the doubts that come to most couples when they ask those ultimate questions regarding the finality of a marriage union. In their last years together the Plunketts lived in that lighter but more precious relationship arising from the lessening of demands on the physical and material level and the consequent enhancement of the spiritual and emotional union. Maria Charlotte continued to suffer from the unspecified maladies born of ennui and frustration, and her restlessness was assuaged only by constant changes in climate. She went frequently from Sydney to Hobart and to Melbourne and Plunkett, true to his word, followed her in sickness although they spent months at a time apart. He grieved when she worsened and rejoiced on the odd occasions when he could tell a friend that she was 'in renovated health'.⁶ Maria Charlotte could not look down that endless vista of almost thirty years when they would be parted by death, with herself becoming a frail and querulous figure haunting convent parlours and talking of what might have been. In the end 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.

From Melbourne, where he took up a semi-permanent residence in 1865, Plunkett returned constantly to Sydney to sit in the Legislative Council. As painstaking as ever he deplored the 'discreditable' behaviour of the Council when no quorum could be gained to discuss important matters and especially when he wanted a debate on a bill of his own on the abolition of capital punishment.⁷ He no longer possessed either the vigour or the official backing to push matters ahead of their time and his initiative in this field remained only an ideal for a distant future.

⁶ 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. 34, pp. 260-3, ML. In 1865 she returned to live with Plunkett after five months in Van Diemen's Land and three months in Melbourne. Plunkett to James Macarthur, 2 September 1865, *ibid.*, vol. 30, pp. 151-3, ML.

⁷ Plunkett to Parkes, 8 November 1867, Autograph letters to Parkes, pp. 42-4 and pp. 106-7, ML.

By this time he had become a unique reminder of the past, recalling to others the society from which New South Wales had evolved. It was to his credit that he could still point the way to the future.

In 1865 he was delighted at his appointment as vice-chancellor of Sydney University and he did his best to take an active part in its administration over the next few years despite his failing health.⁸ Melbourne University gave him an *ad eundem* degree and Gavan Duffy named a section of the Western District of Victoria after him and those two honours he recognised by filing the parchments away with the degree from Trinity of the distant past. Ireland in its mists was only a memory now but the Western District with its Koroit and its Killarney was an attempt of the Irish beyond the seas to remake their humble society in another land, and Plunkett loved to visit it. In those last years his movements were more and more restricted by economic necessity as his last bank book mutely testifies. The balance at the end was £87 14s 2d but the Hebrew School, St Vincent's Hospital and the Good Shepherd Convent—an institute for destitute girls—are named as amongst his last charities and help to explain why he died with so little.⁹

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 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, as he had requested, his remains were brought back to rest with McEncroe in Sydney. Eight centuries earlier, when Gregory VII lay dying in exile, he said, echoing the psalmist, 'I have loved justice and hated iniquity'. One wonders

⁸ See the speech given at the University by Deas Thomson, 18 June 1869, Thomson papers, vol. 4, p. 829, ML.

⁹ See Bank Book 1869, Plunkett papers, ML.

whether John West had those words in mind, or was it mere coincidence, when in penning his final tribute to Plunkett he wrote, 'If one characteristic more than another was marked in his administration it was an intense hatred of oppression and love of justice'.¹⁰ It was a fitting epitaph to one who, in the annals of this country, must assuredly be numbered amongst the architects of its freedom.

In the introduction I stated that this book would ask the question whether Plunkett deserved any recognition, whether in fact his life and work were such as to merit the reward of acknowledgment by his contemporaries or by posterity. The evolution of the historical process has surely answered this question. Plunkett began his work with a set of assumptions springing from his background, his education and his personal character. Summed up they amounted to the simple proposition that his task was to assist in the development in this continent of a civilisation based on the British model. That such a civilisation was built is manifest; that Plunkett assisted in its construction is equally so. It has become fashionable to decry that model and see in it only the grey undertones that any work of imperfect man must possess. While admitting that Plunkett was not a visionary fired by an ideal of a civilisation that would place mankind in another, more human form of social existence, one can scarcely fail to recognise that the civilisation he helped to build had its own validity. That the Crown he served did not recognise his contribution has no import, nor does it matter that his work is forgotten and he lies in a nameless grave. To Plunkett it would have mattered that many men in this civilisation can still walk in dignity and freedom with the security of a legal system to protect them. It would have mattered even more that other men in this same civilisation cannot so walk, and that his work, like so much else that is precious to man, remains unfinished.

¹⁰ SMH, 15 May 1869.

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I A NOTE ON NEWSPAPERS

The first newspaper in New South Wales was the *Sydney Gazette*, 1803-42. It was edited originally by the convict George Howe and later by the ticket-of-leave holder William Watt. It was a semi-official publication until Bourke established the *Government Gazette* in 1832, thus removing its privileged position. From its inception until 1836 it took a strong government line, but changed in its last few years to one of criticism. The *Australian* (1824-48) was started by William Wentworth and Robert Wardell and became the organ of the free colonists and the native-born. Its policies were generally in favour of Bourke and Gipps with their 'Whig' bent. In 1826 Edward Smith Hall began the *Monitor* (later *Sydney Monitor*). It was pro-emancipist, anti-Darling and thus generally supported Bourke and Gipps until its demise in 1842. The most significant paper of the period was the *Sydney Herald*, 1831, which became a daily in 1840 and changed its title to *Sydney Morning Herald* in 1842. The original proprietors were William McGarvie, Frederick Stokes and Ward Stephens with William's brother, Reverend John McGarvie, a Presbyterian minister, as the first unofficial editor. Its early years belied its motto 'Sworn to no master, of no sect am I' as it was Protestant, strongly for the Crown and anti-Whig. Charles Kemp and John Fairfax took over the paper in 1841, but the main influence in its editorial policy was exercised by the former Methodist missionary Ralph Mansfield under whom it remained conservative, Protestant and anti-Gipps. In 1854 the Reverend John West became the first official editor of the paper, marking his period by a blend of liberal-conservative attitudes, moral stances and firm adhesion to principles. Reverend

John Dunmore Lang began the *Colonist* in 1835 and it survived until 1840. In it he portrayed his own fiery convictions against immorality, intemperance and popery whilst promoting the cause of free immigration. The Catholic church was without a voice in the press until Father John McEncroe and the Scots convert William Augustine Duncan began the *Australasian Chronicle* in 1839. Duncan, as editor, supported the rights of other minority groups as well as his own and was firmly behind Gipps in his struggle with the squatters. He was relieved of his post in 1843 after an English-Irish conflict within the church in Sydney and began his own short-lived (1843-5) liberal and literary *Weekly Register*. Meanwhile the *Chronicle* was taken over by Father McEncroe, who changed its name to *Morning Chronicle* in 1843. In 1846 it became the *Sydney Chronicle*, which name it retained until its demise in 1848. McEncroe then began the *Freeman's Journal* in 1850 and it continued to expound the views of the Irish element within the Australian Catholic church. The dominant influence behind the *Atlas* (1844-8) was Robert Lowe and its anti-Gipps policies reflected the paranoia of Lowe himself. The *Atlas* was competent, hard-hitting and bitter and it served the pro-squatter cause well. *Bell's Life in Sydney* (1845-72) had various sub-titles, including *Sporting Reviewer*, that suggested its main interests, sports and court cases; but it also carried useful, if sometimes libellous, comments on prominent people and public affairs, often aimed at removing some men from their high places and purifying politics. Its proprietors in the 1840s were G. F. Pickering and G. R. Nichols; in the 1860s T. Garrett, a leading politician, joined Pickering and continued the lusty tone of the paper. Henry Parkes dedicated the *Empire* (1850-8) to the 'social and political elevation of the working classes'. It was democratic, anti-establishment and effective until Parkes relinquished it in 1858. Daniel Deniehy strove for much the same purposes in the *Southern Cross* (1859-60), although its literary style and contents must have muted the message. The *Australian Banner*, 1857, *Church of England Chronicle*, 1856-65, and the *Tasmanian Catholic Standard*, 1867-72, were denominational newspapers of the period.

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