MONASH UNIVERSITY

THE IMMIGRATION OF IRISH LAWYERS TO AUSTRALIA IN THE NINETEENTH CENTURY: CAUSES AND CONSEQUENCES

by

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THIS THESIS

is

Dedicated to the Memory of my Parents

MICHAEL JAMES McLAUGHLIN (1893-1970)

and

LINDA VICTORIA McLAUGHLIN née MAGEE (1898-1992)

ABSTRACT

When the Australian Colonies were being established, Ireland was, and for at least a century had been, a country divided --- divided by class and divided by religion. For almost a century from 1690 Catholics officially were precluded from the practice of the learned professions of law and medicine, from entering academia and from holding commissions in the armed services. Even after those prohibitions were removed in 1792, there was a vast over-supply of upper-middle class young men desirous of embarking upon careers in those fields, especially in the Law.

Those young men, mainly Catholics and Protestant younger sons, had to make careers for themselves, and in doing so had to look beyond Ireland. In their departure from their homeland there were concepts of both repulsion and attraction. At first sight Australia might seem an unlikely destination for Irish lawyers. Yet it became their destination of choice, being preferred to far closer North America and to nearby England. Although most of those lawyers intended to practise their profession and to make their permanent home in Australia, some were encouraged by a sense of adventure, intending to remain for only a short time; others, following the concept of chain migration, were encouraged to join kinsfolk already settled in Australia; yet others, from the middle of the century, were enticed by the lure of gold. When the first Irish practitioners began to arrive in the Australia, from the late 1820s, there was already a well established Colonial legal profession, consisting essentially of lawyers who had qualified in England. The newcomers from Ireland had to compete with those English lawyers. In doing so there came to be a considerable degree of mutual help among Irish compatriots, irrespective of their religion.

Opportunities in Australia for Irish lawyers were far greater than those available had they stayed in Ireland. Often they achieved success, both in their profession and in other spheres, especially politics, with appointments to the Colonial Judiciary, and, after Responsible Government, as Ministers in the Colonial Governments. They brought with them many of the practices and attitudes of the Irish legal profession towards the administration of justice and legal procedure. There were similarities and contrasts between the Irish lawyers

and those who had qualified in England or, as the century advanced, in the Colonies themselves. Characteristics which Irishmen brought from their homeland included compassion, generosity, hot-bloodedness, short temper, aggressiveness (often in the conduct of litigation), oratorical eloquence, and a propensity for duelling.

In Australia the Irish practitioners encountered the indigenous population. They were usually well disposed and compassionate towards those original inhabitants, since many of the Irishmen had themselves been regarded as underdogs and second-class citizens in their own country and they often had an empathy for the Aborigines, who were so badly treated by many of the white settlers.

The attitudes and experiences of Irish lawyers in Australia did not remain constant throughout the nineteenth century, and at times differed from Colony to Colony. For example, South Australia was an exception, there being few Irish settlers and few lawyers there, and very few Irish lawyers. Many of the Irish lawyers in Colonial Australia followed careers outside the Law, either concurrently with their legal practices or, independently of the Law, as commercial entrepreneurs, as newspaper proprietors and journalists, as proprietors of rural properties, or as academics. Ultimately there was an almost complete coalescence of Irish lawyers with their non-Irish colleagues.

Declaration

This thesis contains no material which has been accepted for the award of any other degree or diploma at any university or equivalent institution and that, to the best of my knowledge and belief, this thesis contains no material previously published or written by another person, except where due reference is made in the text of the thesis.

Signature

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Royal Australian Historical Society, Sydney

Royal Irish Academy, Dublin

Society of Australian Genealogists, Sydney

State Library of New South Wales, and the Mitchell Library therein

State Library of Victoria, and the La Trobe Library therein

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Waverley Municipal Library, Sydney

INTRODUCTION

"[One thing] I am confident I can do very well ... is an introduction to any literary work, stating what it is to contain, and how it should be executed in the most perfect manner."

In this Introduction to my thesis I hope to be guided by the foregoing aim of Dr Samuel Johnson (expressed in a statement recorded by Sir Joshua Reynolds, which is set forth by James Boswell, *Life of Johnson*, 3 ed. (London, 1799), p 292). The thesis considers the reasons why and the circumstances in which Irish lawyers departed their homeland throughout the nineteenth century, why the Australian colonies were their destinations of choice, what they did in Australia, both in the law and in other spheres, and how their presence impacted upon those colonies.

I first acquired an interest in Legal History, especially Australian Legal History, as an undergraduate at the University of Sydney Law School in the late 1950s. There I had the advantage of being introduced to Australian Legal History and Australian Constitutional History by Dr C. H. Currey, a pioneer in those fields. At that time Legal History (both English and Australian) was a compulsory First Year subject at the Sydney Law School. That interest continued after my graduation, and I occasionally contributed articles and book reviews on matters of Australian Legal History to the *Journal of the Royal Australian Historical Society*, *The Australian Law Journal* and the *Sydney Law Review*. In 1973 I was awarded by the University of Sydney the degree of Master of Laws (First Class Honours) for my thesis, "The Magistracy in New South Wales, 1788-1850".

After my retirement as Associate Judge (formerly Master) of the Supreme Court of New South Wales in 2010 it was suggested that I might continue my studies in Australian Legal History as a candidate for the degree of Doctor of Philosophy. I was accepted as a candidate at Monash University in Melbourne. When considering an appropriate topic for a thesis in that field, I looked to my profession, the Law, and to my ancestry, the Irish. My career, both in practice and on the Court had extended over half a century. My ancestry was totally Irish.

All four of my grandparents were Irish. My Catholic father was born in Ireland (in what is now the Republic of Ireland, but what was then part of the United Kingdom of Great Britain and Ireland). My mother's Presbyterian parents were from Ulster. I was the only member of my family to follow a career in the law, having neither ancestors nor kinsfolk in that profession.

I have long been fascinated by the emigration of Irish lawyers to the Australian colonies, but I found that very little had been written on that topic. I wished to learn more about why those lawyers left Ireland (and the circumstances of that country when they departed), why they chose to come to Australia, how they were treated when they arrived, especially by English lawyers already established in the colonies and by compatriots of the opposite religious denomination, their experiences, successes and failures here, and their contributions to Australian law and society. At the outset some specific questions occurred to me. One question was whether the Irish lawyers brought with them the sectarianism prevalent in their homeland. My own family experiences suggested that in Australia sectarianism directed against Catholics usually came from settlers of English or Scottish descent or from those of Presbyterian Irish descent, originating from Ulster, since relatively few Irish immigrants to nineteenth century Australia adhered to the Church of Ireland (the Irish equivalent of the Church of England). Another question was whether Irish lawyers formed a group apart, separate from their non-Irish colleagues, and whether Catholic lawyers (almost all being Irish) also formed a group apart, separate from their non-Catholic Irish colleagues. Another question I asked myself was: How different would the Australian legal profession have been if no Irish lawyers had come here in the nineteenth century?

During my research for the present thesis I encountered a number of surprising things. One was the almost universal reaction by professional acquaintances whenever I mentioned that I was researching Irish lawyers in Australia during the colonial period. They immediately assumed that any Irish lawyers who came to Australia in the nineteenth century arrived as convicts. The impression was widespread that the only Irish immigrants in that period were convicts or destitute peasants escaping from the ravages of the Great Famine of the late 1840s. Indeed, the generality of present day educated Australians seem to be totally unaware

of the arrival of Irish free settlers, often with professional qualifications, or of assisted immigrants from Ireland.

One consequence of the presence of Irish lawyers in the Australian colonies is the way in which they have been treated (or, as has often been the case, overlooked) by later historians and scholars. It is curious that so few of the Irish lawyers in Australia have been the subject of serious biographical study. It is also curious that until now scholarly writing on the Irish in Australia has essentially been in the context of social history. The writings of Professor Patrick O'Farrell are an exception, although in his *The Irish in Australia* only about four pages (of more than 300) are devoted to Irish lawyers and their profession in the nineteenth century. Social historians such as Professor Manning Clark have largely overlooked legal history, apart from passing references to some legal personalities. An otherwise uninformed reader of Clark's monumental *A History of Australia* might be forgiven for thinking that in the colonial era there was little in the way of courts or the legal profession or constitutional development. Perhaps the reason is that few of the scholars interested in the Irish in Australia have been lawyers. But it is strange that few of the writers on Australian legal history (most of whom are lawyers) have given much consideration to the role of Irish lawyers in the colonial period.

There has not until the present thesis been a study of Irish lawyers as a professional group in Australia. A scholar embarking upon this study is confronted by many difficulties, especially because of the want of primary sources. Apart from Thomas Callaghan in his diary, and Sir James Dowling, Sir Frederick Darley, William Sheils and Patrick McMahon Glynn in letters to their respective families and others, few of the Irish lawyers left records of their professional lives in their new homeland. Some, like George Higinbotham, successfully obliterated their records from possible consideration by future generations. In consequence, substantial reliance upon sources such as newspapers and other contemporary printed works, often Irish sources, as exemplified by the writings of Sir Jonah Barrington and columns in contemporary Irish newspapers, has been necessary in the researching and the writing of this thesis.

It should be recognised that in approaching a subject so wide as the present, a degree of selectivity must be exercised, especially regarding the impact of Irish lawyers upon the legal profession in Australia and upon the advance of the Australian colonies towards nationhood. In exercising that selectivity, I have chosen a number of topics to be considered and discussed in the various chapters of the thesis.

The substance of the thesis consists of nine chapters, which are followed by three appendices. I will now briefly outline the content and purpose of each of those Chapters and appendices.

Chapter 1 ("Hanoverian Ireland --- Rich and Poor: Church and State") sets the scene. It describes the constitutional and legal arrangements regarding the governance of Ireland in the eighteenth and early nineteenth centuries; the demographics of that country; the religions which divided its inhabitants, and the relaxation of the Penal Laws against Catholics. The requirements for admission into the legal profession are set forth, and the constraints and difficulties encountered by upper-middle class young men who had to make their way in the world by entering a profession, especially the law. This chapter also describes the professional and social world of which those young men became part when their formal education was complete.

Chapter 2 ("Leaving Home") sets forth various reasons why Irish lawyers of the Hanoverian and Victorian eras left their homeland to practise their profession overseas. Those reasons included the political turmoil associated with and consequent upon the uprisings of 1798 and 1848. The system of patronage and the way in which it impacted upon official appointments, especially to legal and judicial offices, throughout the expanding British Empire, with particular reference to the Australian colonies, are considered. In Ireland an over-supply of lawyers (especially young men without influential family or connections) was one important reason why many sought professional careers in the colonies. The practical consequences of the Incumbered Estates legislation of the 1840s and 1850s significantly reduced the volume of legal work available to an already overcrowded profession. This chapter concludes with a consideration of an interesting Parliamentary return revealing

official and judicial offices occupied by Irish lawyers in the Australian (and other) colonies of the British Empire in the mid-nineteenth century.

Chapter 3 ("Choice of Destinations") offers reasons why Irish lawyers, having decided to emigrate, chose the far distant Australian colonies, in preference to nearby England or relatively close North America, or even India or other parts of the British Empire. As to the Thirteen Colonies, which were to become the United States of America, Irishmen (most of whom were Catholic) were unpopular on account of their race and ethnicity, as well as their religion. Lawyers were unpopular. Irish lawyers, of whom there were very few, were particularly unpopular. Despite the financial benefits available to lawyers in the Subcontinent, India was not a popular destination for Irish practitioners. Although members of the civil administration, which included many Irishmen, enjoyed a high reputation for competence and integrity, a similar reputation was not held by the legal profession in British India.

Chapter 4 ("A New Home in the Antipodes"). The legal profession, and especially its Irish members, in the Australian colonies, are the subject of this chapter. Various Irishmen who held official and judicial office are considered, as well as professional and personal relationships among the Irish practitioners. Comparisons and contrasts, together with differences and similarities, between the Irish lawyers and their non-Irish colleagues are discussed. Such matters as accents and idioms and Court attire, as well as the celebration of St Patrick's Day, as a national and public, rather than as a religious, festival, and how that celebration impacted upon the legal profession and the administration of justice, are also dealt with in this chapter.

Chapter 5 ("Irish Lawyers and the Indigenous Population"). The contact of Irish lawyers with the Indigenous population was essentially in a professional capacity. Both as Judges and as practitioners those Irishmen sought to administer justice with impartiality and fairness and to recognise the right of Aborigines to be treated no differently from the white population. There were practical distinctions, however, arising from language difficulties and problems about the giving of unsworn evidence. Humane attitudes on the part of individual Irish lawyers, such as Attorney-General John Hubert Plunkett in prosecuting the perpetrators of the Myall Creek massacre, were not unknown. With the introduction of

universal male suffrage in 1856 Aboriginal men received the right to vote in parliamentary elections.

Chapter 6 ("South Australia: An Exception"). South Australia was an exception in that its small population contained few Irish settlers and, further, that in its small legal profession there were very few Irish lawyers. This chapter considers and compares three legally qualified Irishmen who were of considerable significance in colonial South Australia: a Governor, Sir Richard Graves MacDonnell; a Judge, George John Crawford; and a practising lawyer, politician and Father of Federation, Patrick McMahon Glynn.

Chapter 7 ("Careers Outside the Law"). Irish lawyers in the Australian colonies often followed, either concurrently with the practice of their profession or separately, various other activities and callings. Many were politicians, commercial entrepreneurs (in such fields as goldmining), owners of rural estates, newspaper proprietors and editors. Others followed careers in academia, and even the Church.

Chapter 8 ("Duelling and Aggressiveness Among Irish Lawyers"). One aspect of the Irish character was a certain aggressiveness, often manifested in their homeland by a propensity towards duelling, especially among lawyers. This characteristic came with them to Australia.

Chapter 9 ("Conclusions"). This chapter draws together the various themes and topics considered in the substantive chapters of the thesis. In doing so the historiography relevant to the subject of the thesis is considered, as well as instances of hagiography which emerge from that historiography. The chapter expresses as a final conclusion that by the end of the nineteenth century there was an almost complete integration and coalescence of Irish lawyers in Australia with their non-Irish colleagues.

The foregoing substantive chapters are followed by three appendices.

Appendix A ("A Register of Noteworthy Irish Lawyers in Colonial Australia"). This appendix has an Introduction of its own, explaining the reason for this appendix, the material

and information which it contains, how it should be used, and the various criteria applied in choosing the persons who are included in this appendix. There is also a list of abbreviations appearing in Appendix A.

Appendix B ("Administration of Justice (Colonies, &c.), "Return of the Names, ...", Colonial Office, 15 April 1859. Part IV. Australian Colonies and New Zealand, pp 47-53"). This is the Parliamentary return tabled in the House of Commons which is considered in Chapter 2.

Appendix C ("Inscription upon the plinth of the statue of Sir Richard Bourke"). The statue of Sir Richard Bourke located outside the State Library of New South Wales in Sydney was the first public statue erected in Australia. The appeal for funds, arrangements for the fabrication of the statue and the wording of the inscription were all undertaken by the Irish Catholic lawyer Roger Therry, whose boundless admiration for the Irish Protestant Governor was revealed in the adulatory terms of the inscription.

Whilst there is much further research to be undertaken on the subject of Irish lawyers in colonial Australia, I hope that what emerges in this thesis will, at the least, assist in removing misunderstandings and misinformation of the nature which I have encountered and to which I have referred earlier in this Introduction. Further, that it will encourage other scholars to pursue in greater detail the study of this subject, possibly in directions which have here been considered in little detail, if at all. Those directions include such topics as the participation of Irish lawyers in the evolving political parties and in the trade union movement, their attitude towards Irish Home Rule, their concern for social reform is such areas as education, marriage, divorce, public health, social welfare benefits, or their involvement in the cultural, sporting and recreational activities of the colonies.

CHAPTER 1

HANOVERIAN IRELAND --- RICH AND POOR: CHURCH AND STATE

The Governance of Ireland --- *Poynings' Law* --- A Country Divided, by Class, by Religion --- The "Wild Geese" --- Relaxation of the Penal Laws --- Edmund Burke --- The Legal Profession --- Trinity College, Dublin (The University of Dublin) --- The King's Inns --- Demographics --- Dublin in the late Eighteenth Century --- Irish Society and its Recreations

Throughout the eighteenth and nineteenth centuries Irishmen in ever increasing numbers departed their homeland and made their lives and established their livelihoods throughout Europe, the Americas, and especially the colonies of the expanding British Empire. The purpose of this thesis is to consider the reasons why lawyers, in particular, departed Ireland; their various destinations and why throughout the nineteenth century the Australian colonies were their destinations of choice; what those lawyers did, individually, in Australia, and the consequences of their presence there, especially how it affected and impacted upon the practice of the Law in those Colonies. In exploring those questions, it is appropriate at the outset to consider the circumstances and nature of Ireland, its governance and its people during the nineteenth and the preceding centuries. This will provide the historical and social background against which the following two chapters of the thesis can be better understood.

The Governance of Ireland

The personal union between the Sovereigns of England and Ireland, dating from the invasions of the latter by King Henry II in the twelfth century, had its parallel in the administration of the two countries. Each had its own Parliament, consisting of the

Sovereign, a House of Lords and a House of Commons --- the one at Westminster, the other at Dublin.[1]

However, especially after the enactment in 1495 of legislation known as *Poynings' Law*,[2] there were substantial limitations upon the legislative powers of the Irish Parliament, which in those respects was subordinate to the English Parliament. *Poynings' Law* (also referred to as the *Statute* (or *Statutes*) *of Drogheda*) was enacted at a Parliament summoned to Drogheda in Leinster in 1494-1495 by Sir Edward Poynings, the Deputy Lieutenant of Ireland under King Henry VII. Not only did that legislation preclude the Irish Parliament from meeting or from enacting laws without royal consent, expressed by the Lord Lieutenant or his deputy in Council, but it also made effective in Ireland all statutes theretofore enacted by the English Parliament.[3] On account of the brevity of the text of the legislation, the changing nature of the relations between the English government and the Anglo-Irish administration, and the development of the organisation of the Irish Parliament, *Poynings' Law* passed through various stages of interpretation and significance, until its virtual repeal almost three centuries later.[4] It was only in its later stages that *Poynings' Law* came to be regarded as a hated symbol of the subordination of the Irish Parliament to the English Parliament and the Irish executive government.[5] Other differences between the Legislatures of Ireland and of England included the fact that until 1768 (when an eight year term was introduced[6]) there was

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[1] It was only in Tudor times that, by an Irish statute (33 *Hen.* VIII, *c.* 1 (Ir.) (1541)), the Crown of Ireland was united with that of England, the King of England (thitherto known as also Lord of Ireland) becoming also King of Ireland.

[2] 10 *Hen.* VII, *c.* 22 (Ir.) (1495).

[3] Uncertainties and ambiguities in the wording of the statute necessitated the enactment of an "Act declaring how Poynings's Act shall be expounded and taken" (3 & 4 Philip and Mary, *c.* 4 (Ir.) (1556)). A subsequent reference by the English Privy Council to the Chief Justices, Chief Baron, Attorney-General and Solicitor-General, resulted in a response which was summarised as follows: "[T]his question is now by common experience and opinion without any scruple resolved and that the Acts of Parliament made in England since the Act of 10 H. 7 do not bind them in Ireland; but all Acts made in England before the 10 H. 7 by the said Act made in Ireland anno 10 H. 7 cap. 22 do bind them in Ireland." (*Parliament in Ireland*; Hil. 10 Jac. 1 [1613], 12 Co. Rep. 110 at 112 [77 ER 1386 at 1388].)

[4] David B. Quinn, "The Early Interpretation of Poynings' Law, 1494-1534", *Irish Historical Studies* (Dublin, Oxford), Volume II, No. 7 (March, 1941), p 241.

[5] R. Dudley Edwards and T. W. Moody, "The History of Poynings' Law: Part I, 1495-1615", *Irish Historical Studies* (Dublin, Oxford), Volume II, 1940-1, p 415. (The projected Part II of this paper, intended to cover the period 1634-1782, was never published.)

[6] By 7 *Geo.* III, *c.* 3 (Ir.) (16 February 1768).

no fixed term for the Irish House of Commons, whose members, once elected, remained in office until the House was dissolved, an occurrence which usually happened only upon the death of the Sovereign.

Geographical and practical constraints meant that the English Sovereign fulfilled his role as King of Ireland by a representative in Dublin, who throughout most of the eighteenth century was known as the Lord Lieutenant of Ireland. Towards the end of that century, as a result of a movement for constitutional reform led by Henry Grattan, the Irish Parliament in 1782 achieved far greater legislative power, much of *Poynings' Law* being drastically amended,[7] and other British constitutional benefits being conferred on Ireland.[8] Grattan, one of the great Irish national and parliamentary leaders of his age, was, of course, a Protestant, since Catholics were prohibited from sitting in the Irish Parliament (or, indeed, in the British Parliament).[9] Despite those reforms, Grattan's Parliament (as the Irish Legislature from 1782 until the Union of Ireland with Great Britain on 1 January 1801 has come to be known) still remained, to an extent, subordinate to the British Parliament at Westminster and to the British executive government at Whitehall.

An impetus to the emigration of Irishmen --- especially the younger members of the Catholic gentry, as well as Catholic and non-Catholic members of the professions, particularly lawyers --- was given by political events in 1798 and again in 1848. The failed uprising in the earlier year had the consequence of the Union of Ireland with Great Britain on 1 January 1801. With the establishment of the United Kingdom of Great Britain and Ireland, Dublin ceased to be the capital of a separate Kingdom, and Ireland lost its Parliament, which, since

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[7] By 21 & 22 *Geo.* III, *c.* 47 (Ir.) (27 July 1782), known as *Yelverton's Act*, after its proponent, Barry Yelverton, an eloquent lawyer and leading member of the Irish House of Commons, who subsequently, after his appointment in 1783 as Chief Baron of the Exchequer, sat in the Irish House of Lords as Baron Yelverton, and later as Viscount Avonmore: Gerard O'Brien, "Yelverton, Barry (1736-1805)", *Dictionary of Irish Biography*, Volume 9, p 1093; James Kelly, "Yelverton, Barry, first Viscount Avonmore (1736-1805)", *Oxford Dictionary of National Biography*, Volume 60, p 784.

[8] These included an Act providing that judges should hold office *quam diu se bene gesserint* (21 & 22 *Geo.* III, *c.* 50 (Ir.)) (27 July 1782).

[9] Grattan, a graduate of Trinity College, Dublin (the University of Dublin), had been called to the Irish Bar in 1772: James Kelly, "Grattan, Henry (1746-1820)", *Dictionary of Irish Biography*, Volume 4, pp 200-205; James Kelly, "Grattan, Henry (*bap.* 1746, *d.* 1820)", *Oxford Dictionary of National Biography*, Volume 23, p 365.

the 1690s, had exercised (as in Great Britain) the power of the purse, and which, from 1782, as Grattan's Parliament, had enjoyed considerable legislative independence.

A Country Divided

At the time of the establishment of the Australian colonies, Ireland was, and for at least a century had been, a country divided --- divided by class and divided by religion. After the defeat of King James II at the Battle of the Boyne in 1690 the enactment of various Penal Laws against the practice by Catholics of their religion resulted in the religion of the vast majority of the population being (at least in theory) largely proscribed. For Ireland was a country where the nation's official power and social influence were concentrated among a small minority of the population. In particular, the Penal Laws had suppressed the Catholic majority, while favouring the Protestant landlords. As Edmund Burke put it in 1792, those laws "divided the nation into two distinct bodies, without common interest, sympathy or connection. One of those bodies was to possess *all* the franchises, *all* the property, *all* the education; the other was to be composed of drawers of water and cutters of turf for them".[10]

In Ireland, as throughout the British Isles (and also in those parts of Continental Europe where the rules of primogeniture regarding the inheritance of real property had application), it was necessary for the younger sons of the gentry or the land-owning classes to seek their way in life through their own efforts. But for almost a century after 1690 Catholics officially were precluded from the practice of the learned professions of law and medicine and from holding commissions in the armed services. Consequently, in autumn of every year, the "Wild Geese" --- sons, especially younger sons, of the Catholic gentry --- departed their homeland to seek their fortunes in the service, chiefly military, of Catholic, or even Orthodox, monarchs on the Continent.[11]

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[10] *The Writings and Speeches of Edmund Burke* (general editor, Paul Langford), 9 volumes, Volume IX (ed. R. B. McDowell) (Oxford, 1991), Part II. Ireland, "A Letter to Sir Hercules Langrishe, Bart., M.P., on the Subject of The Roman Catholics of Ireland ..." (1792), at p 597. The emphases appear in the original document.

[11] J. G. Simms, "The Irish on the Continent", 1691-1800, Chapter XIX in *A New History of Ireland*, Volume IV, *Eighteenth-Century Ireland 1691-1800*, eds. T. W. Moody and W. E. Vaughan (Oxford, 1986), pp 629-644.

It was not only Catholics in Ireland who, in consequence of religious constraints and political and economic circumstances, left their native land in the hope of a better life and advancement and success in their chosen careers in other parts of the globe. A combination of such circumstances as the Penal Laws, a dramatic increase in the population of Ireland, and a vast over-supply of university graduates, meant that the prospects of well educated young men, Protestant as well as Catholic (but especially Catholic young men), to make a successful career were severely limited in their home country. They perforce had to look to the Continent and, later in the eighteenth century, to the American colonies and Canada, and, especially throughout the nineteenth century, to the Australian colonies, New Zealand and other parts of the then expanding British Empire. Whilst there is a kernel of truth in the somewhat pessimistic statement attributed to Edward Gibbon Wakefield, "The Irish do not colonise, they only emigrate miserably",[12] many of the Irish lawyers who came to Australia achieved in that new land remarkable success in their profession.

Relaxation of the Penal Laws

As the eighteenth century advanced, and especially after Irish Catholics had declined to support the restoration of the House of Stuart and had retained their loyalty to the House of Hanover at the time of the Jacobite Rising in Scotland in 1745, the Penal Laws in Ireland, and their enforcement, were gradually relaxed. The extent to which the statutory prohibition from their practising the profession of the law could be evaded by Catholics is uncertain; also uncertain is the degree to which other penal laws were enforced in fact.[13] Sir William Blackstone, the great English legal scholar, remarked that the (analogous) penal laws in

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[12] Quoted in C. E. Carrington, *The British Overseas: Exploits of a Nation of Shopkeepers*, 2 ed. (Cambridge, 1968), p 500. Hilary M. Carey, *God's Empire: Religion and Colonisation in the British World, c 1801-1908* (Cambridge, 2011), p 123, states, "According to R. Garnett, *Edward Gibbon Wakefield: The Colonization of Australia and New Zealand, Etc.* (New York, 1898), p 294, this comment is said to have come from a section on Irish emigration excluded from [Wakefield's] *The Art of Colonization*, which is now lost." This reflection by Wakefield upon the Irish character accords with the following quotation (universally attributed to W. B. Yeats, but never otherwise specifically sourced), "Being Irish he had an abiding sense of tragedy, which sustained him through temporary periods of joy."

[13] Daire Hogan, *The Legal Profession in Ireland 1789-1922* (Dublin, 1986), p 15.

England "are seldom exerted to the utmost rigour", a consideration which "foreigners who only judge from our statute book are not fully apprised of".[14]

Edmund Burke was the Protestant son of a prosperous Dublin solicitor and a graduate of Trinity College, Dublin (the University of Dublin) (BA, 1748). Moving to London, he became a member of the Middle Temple, although he soon gave up his legal studies for a career in British, rather than in Irish, politics and as a political philosopher. Burke was strongly critical of the Penal Laws against Catholics.[15] More than a decade before his letter to Sir Hercules Langrishe, Burke, when seeking re-election to the House of Commons, famously said, in his speech to the electors of Bristol on 6 September 1780, "Bad laws are the worst sort of tyranny. In such a country as this they are of all bad things the worst."[16] He compared the small number of Catholics in England ("who are but an handful (enough to torment, but not enough to fear)"), of which his estimate was no more than 50,000 (it was probably 60,000[17]) with the Catholic population of Ireland, which he estimated at 1.6 million or 1.7 million.[18] This estimate was too low: it was at least 2.5 million, and possibly in excess of 4 million.[19]

Burke's salutary observations regarding bad laws and their effect upon the entire populace, and not just the Penal Laws against Catholics, could hardly have been construed as an encouragement to Irish young men, Protestant or Catholic, to enter the legal profession.

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[14] William Blackstone, *Commentaries on the Laws of England* (Oxford, 1769), Book IV, Chapter 4, pp 56-57.

[15] Burke's father, formerly a Catholic, had become a member of the Established Church. But Burke's mother, Mary née Nagle, remained a Catholic all her life and brought up her daughter as a Catholic. (Such an arrangement, where sons followed the religion of their father, whilst daughters followed that of their mother, was frequent in mixed-marriages of that period.) Burke's father-in-law, Dr Christopher Nugent, was a Catholic, although (to complicate Burke's denominational background still further) Nugent had married a strong Presbyterian, who brought up her daughter, the future Mrs Burke, in her own religion (*The Writings and Speeches of Edmund Burke*, *op. cit.*, n 10, Volume IX, Introduction to Part II, Ireland, p 407).

[16] *The Writings and Speeches of Edmund Burke*, *op. cit.*, n 10, Volume III, p 643.

[17] T. G. Holt, "A Note on Some Eighteenth Century Statistics", *Recusant History* (Bognor Regis, UK), (1969-70), Volume 10, pp 3-11.

[18] *The Writings and Speeches of Edmund Burke*, *op. cit.*, n 10, Volume IX, p 650.

[19] *Ibid.*; K. H. Connell, *The Population of Ireland* (Oxford, 1950), pp 4-5, 25.

Those observations did, however, represent a seminal expression of opinion that, whilst denouncing the shortcomings of existing statute law (especially those relating to the death penalty), would, in the early nineteenth century, inspire legal reforms by statesmen and politicians such as Jeremy Bentham, Henry Brougham, James Mackintosh, Robert Peel and Samuel Romilly. Burke's assessment may be assumed to represent a significant element in the decision of many young Irish lawyers to contemplate brighter prospects beyond the seas. Such public statements by Burke, a Member of Parliament and probably the greatest political philosopher of his generation, influenced official attitudes towards the relaxation, and ultimately the repeal, of the Penal Laws.

In Ireland itself the prohibition of the practice of the law by Catholics (which had obtained, in the case of solicitors, by statute since 1698; and, in the case of barristers, by regulation since 1704 and by statute since 1727[20]) was repealed in 1792.[21] The removal of this prohibition was part of a general relaxation of statutory restraints against Catholics in professional life, and occurred at a time when the powers of the Irish Parliament ("Grattan's Parliament") had been considerably enlarged. At the same time as those restraints were being removed by statute, the arrangements for legal education at the King's Inns, and the constitution of that body, were also undergoing change and improvement, by the grant of a new Royal Charter by King George III (by Letters Patent of 27 February 1792). That Charter was confirmed by statute enacted by the Irish Parliament later in the same year.[22]

Until 1792 the Judges of the Irish Courts and the barristers who appeared before them were drawn from the English legal profession or from the Irish practitioners of the Protestant

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[20] Hogan, *op cit.*, n 13, p 14.

[21] By 32 *Geo.* III, *c.* 21 (Ir.) (18 April 1792). That statute, known as the *Catholic Relief Act* of 1792, which had effect from 24 June 1792, was promoted by Sir Hercules Langrishe, Bart., MP (a supporter of the amelioration of the condition of Catholics in Ireland and of parliamentary reform in that Kingdom), to whom Edmund Burke had addressed his celebrated letter of the same year ("A Letter to Sir Hercules Langrishe, Bart., M.P., on the Subject of the Roman Catholics of Ireland ..." (1792), *loc. cit.*, n 10).

[22] 32 *Geo.* III, *c.* 18 (Ir.).

Ascendancy.[23] It should be recognised that in Ireland throughout this period the word Protestant referred exclusively to members of the Church of Ireland, that being the Irish equivalent of the Church of England, and that this designation did not encompass Presbyterians or Wesleyans (Methodists) or members of other non-Catholic denominations. However, in nineteenth-century Australia, Protestant became synonymous with non-Catholic Christian denominations. But even after 1792 Catholic barristers had to wait until the final repeal of the Penal Laws in 1829 before the prohibition against their appointment as King's (or Queen's) Counsel was removed. The first Catholics then appointed to the Inner Bar, in Trinity Term 1830, included Michael O'Loghlen, who subsequently, upon his appointment in November 1836 as a Baron of the Court of Exchequer in Ireland (two months later he was elevated to Master of the Rolls for Ireland[24]), became the first Catholic since the 1688 Revolution to be raised to judicial office in England or in Ireland.[25]

The Legal Profession

Throughout the late eighteenth and early nineteenth centuries most Irish lawyers came from the upper-middle class. They were not the landowning gentry, although they may have been related to the aristocracy by blood or by marriage. Neither were they from the working class, let alone from the impoverished peasantry. Lawyers enjoyed a high social status in contemporary Ireland. Sir Jonah Barrington, a colourful legal and political personality in the Ireland of that period, however, recalled a time "when the wives and daughters of attorneys ...

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[23] As to the meaning of the phrases "Protestant Ascendancy" and "Irish Ascendancy", see R. F. Foster, *Modern Ireland 1600-1972* (London, 1988), Chapter Eight, "The Ascendancy of the Mind", pp 167f, especially pp 170-180; R. F. Foster, "Ascendancy and Union", Chapter 4 in R. F. Foster (ed.), *The Oxford History of Ireland* (Oxford, 1992); Jarlath Ronayne, *The Irish in Australia: Rogues and Reformers, First Fleet to Federation* (Dublin, 2002, revised edition, 2003), pp 5-6.

[24] In that office O'Loghlen succeeded Sir William MacMahon, whose son, Sir Charles MacMahon, subsequently became Speaker (1871-1877) of the Legislative Assembly of Victoria, of which O'Loghlen's son, Sir Bryan O'Loghlen, was concurrently, in the early 1880s, also a member.

[25] Richard Lalor Sheil, *Sketches, Legal and Political* (ed. M. W. Savage), 2 volumes (London, 1855), pp 165-166; Patrick M. Geoghegan, "O'Loghlen, Sir Michael (1789-1842)", *Dictionary of Irish Biography*, Volume 7, p 651; J. D. FitzGerald, rev. Nathan Wells, "O'Loghlen, Sir Michael, first baronet (1789-1842)", *Oxford Dictionary of National Biography*, Volume 41, p 786. O'Loghlen was the father of a future Premier of Victoria, Sir Bryan O'Loghlen, also a barrister, who had practised at the Irish Bar before emigrating to Victoria in 1862. S. M. Ingham, "O'Loghlen, Sir Bryan (1828-1905)", *ADB*, Volume 5, p 364.

were never admitted to the viceregal drawing rooms".[26] Indeed, Barrington's was not an isolated complaint regarding the decline in social standards. "Such is the dearth of nobility and gentry in Ireland at the present," wrote one Irishman in 1818, "that they are obliged to admit the wives and daughters of the merchants to the [Dublin] Castle, which never was done before."[27] Professional men generally were more prominent in local life than were those in England, where there was a more numerous class of resident landed aristocracy.[28] This was especially so after the Union of Great Britain and Ireland. When Ireland ceased to have its own Parliament, from the end of 1800, the Irish members of the new Parliament of the United Kingdom of Great Britain and Ireland (members of the Lords, as well as of the Commons) were required to reside in London for protracted periods, during the parliamentary sessions.

There was one characteristic that most of the lawyers had in common --- certainly, almost all the barristers. They were graduates of Trinity College, Dublin (the University of Dublin).[29] Most Irish professional men, especially lawyers, had graduated from Trinity College before obtaining their professional qualifications. The majority of students entered Trinity at a quite young age: 16, 17 or 18 was usual, although 15 or even 14 was not unknown.[30] The prohibition against Catholics taking degrees at Trinity was removed by an Irish statute of 1793. Nevertheless, they could not hold professorships, fellowships or scholarships until all religious tests were abolished in 1873.[31] But for the ensuing century the Catholic Church in Ireland attempted (not always with any significant success) to deter its adherents from attending that great seat of learning. It was not until 1970 that the Church

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[26] Sir Jonah Barrington, *Personal Sketches of His Own Times*, 3 volumes, 2 ed., "revised and improved" (London, 1830), Vol. I, p 135.

[27] Henry McDermott to Charles O'Conor, 30 April 1818, O'Conor Papers, Huntington Library, quoted in William Forbes Adams, *Ireland and Irish Emigration to the New World from 1815 to the Famine* (New York, 1967), p 7.

[28] Hogan, *op. cit.*, n 13, p 2.

[29] The history of this remarkable educational institution, established under the patronage of Queen Elizabeth I in 1592 is detailed in various works, including J. W. Stubbs, *The History of the University of Dublin* (Dublin and London, 1889); William MacNeile Dixon, *Trinity College, Dublin* (London, 1902); Constantia Maxwell, *A History of Trinity College, Dublin, 1591-1892* (Dublin, 1946).

[30] George Dames Burtchaell and Thomas Ulick Sadleir (eds.), *Alumni Dublinenses* (London, 1924), at, for example, pp 184-185.

[31] By the *University of Dublin Tests Act*, 1873 (33 & 34 *Vict.*, *c.* 22).

ceased threatening its members with excommunication if they attended Trinity, unless with special permission from their Bishop.

But such threats did not deter, for example, such devout Catholics as John Hubert Plunkett (BA, 1823) or Thomas Callaghan (BA, 1836) from attending and graduating from Trinity, or Roger Therry (who enrolled in 1818, but left before taking a degree) Similarly, Valentine Fleming, a future Chief Justice of Tasmania, despite his Catholic upbringing, attended and graduated from Trinity (BA, 1832). Fleming did not continue to adhere to the religion of his ancestors, and he subsequently became a member of the Church of England.[32]

A generation later John Adye Curran (destined to be a distinguished practitioner at the Irish Bar and subsequently a County Court Judge), a devout member of a devout Catholic family, had no hesitation in entering Trinity in 1855, at the behest of his father. The elder Curran (also John Adye Curran, also an Irish barrister) had graduated from Trinity in 1823. Almost a century later the younger Curran (BA, 1859) said of his own entry into Trinity, "My father preferred I should go to that ancient seat of learning than to the Catholic University, which had just been opened, as I thereby saved two years in my course for the Bar".[33] He continued, "It has been said that in those times a Catholic student in Trinity College ran the risk of losing his faith. Such was not my experience, as during my four years' stay in that University not a word was ever spoken to me by the College authorities on the subject."[34] Curran does not suggest that any permission was ever sought, or received, from his Bishop before he entered Trinity.

Later in the nineteenth century another devout Catholic, Patrick McMahon Glynn (who practised briefly at the Irish Bar before subsequently achieving fame in Australia as a politician and Federationist), although educated in Catholic schools, perceived no problem in

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[32] J. M. Bennett, *Sir Valentine Fleming, Second Chief Justice of Tasmania 1854-1869* (Leichhardt, NSW, 2007), pp 3-4. Bennett suggests that Fleming's change of religion not only may have been influenced by his time at Trinity, but may have had a more pragmatical purpose for a young lawyer seeking an appointment in the colonies, since Catholics were not looked upon favourably by James Stephen, the powerful Permanent Under-Secretary at the Colonial Office (Bennett, *ibid.*).

[33] John Adye Curran, *Reminiscences of John Adye Curran K.C.* (London, 1915), pp 4-5.

[34] Curran, *op. cit.*, n 33, pp 5-6.

pursuing his tertiary studies at Trinity (BA, 1878).[35] Sir Michael O'Dwyer, who achieved distinction in the Indian Civil Service, was a son of a large Catholic family, and, although not himself a Trinity graduate, had two brothers who were, in the latter part of the nineteenth century. Of that university he said, "Trinity College, Dublin, with its strange Protestant atmosphere, was regarded by Catholics rather with pride than with favour".[36]

The usual path to a career at the Irish Bar was, first, to graduate from Trinity; then, having enrolled and kept terms at the King's Inns in Dublin and at an English Inn of Court in London, to be called as a barrister by each institution. The King's Inns had been founded in 1542 under the auspices of King Henry VIII.[37] However, this official recognition and royal patronage of the Bar in Ireland was deprived of much of its practical value and effect by a condition which the English barristers succeeded in imposing upon Henry, and he upon the Irish profession, to the effect that no barrister should practise before the superior courts in Ireland who had not been called to the Bar by one of the English Inns of Court.[38] In consequence of that restriction, which continued until 1886, it was necessary for the Irishman to keep terms (fewer than in the case of an English barrister) in London, and, having been called by an English Inn, on condition that he would practise only in Ireland, then to be called by the King's Inns.[39]

Until 1866 the King's Inns was the qualifying institution for attorneys and solicitors as well as for barristers. As in Australia until well into the second half of the twentieth century, the professional path for becoming an attorney in Ireland was by way of apprenticeship (in Australia, known as articles of clerkship). In Ireland the apprentice had to serve twenty terms (four terms a year) as an apprentice to an attorney, before himself being admitted as an

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[35] Gerald O'Collins, SJ, *Patrick McMahon Glynn - A Founder of Australian Federation* (Melbourne, 1965), pp 12-13.

[36] Sir Michael O'Dwyer, *India as I Knew It: 1885-1925* (London, 1926), p 16.

[37] The history of the KIng's Inns is set forth in Colum Kenny, *King's Inns and the Kingdom of Ireland: The Irish 'Inn of Court' 1541-1800* (Dublin, 1992).

[38] 33 *Hen.* VIII, sess. 2, *c.* 3 (Ir.) (1541-1542) (known as the *Statute of Jeofailles*); Kenny, *op. cit.*, n 37, Chapter 3, especially pp 40-48.

[39] R. W. Bentham, "The Bench and Bar in Ireland", *Tasmanian University Law Review*, Volume 1 (July 1959), p 209.

attorney by the King's Inns. The actual training was largely a matter of what the apprentice could learn from his master attorney.[40] Throughout most of the period being considered in this thesis the King's Inns did not concern itself with the academic training of either barristers or attorneys.[41]

Demographics

A very significant, and still not adequately explained, increase in the population of Ireland commenced in the latter part of the eighteenth century. On one estimate, not necessarily to be taken at face value, the increase between 1779 and 1841 was said to be almost 172 per cent.[42] Ireland's population at the beginning of the nineteenth century can be no more than a guess,[43] there being then no compulsory registration of births or deaths, and the first ten-year census began only in 1821. Probably, by 1800 the population of Ireland was about 5 million, that being about one-third of the total population of the British Isles at the time.[44] Despite that considerable increase in population, Ireland remained one of the least urbanised countries in western Europe.[45] Of Ireland's population in 1800, it is probable that three-quarters were Catholics.[46] It was not until 1835 that the Commissioners of Public

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[40] Edward Keane *et al.*, *King's Inns Admission Papers 1607-1867* (Dublin, 1982), pp vii-x.

[41] Thomas Callaghan, called to the Irish Bar in 1837, later confided to his diary a recognition of the inadequacy of his training for professional practice ("How terrible is the ordeal of the Bar as I have been educated for it, having no practical instruction whatever in law, ..." (J. M. Bennett (ed.), *Callaghan's Diary* (Sydney, 2005), p 31, November 12th 1840, Thursday).

[42] G. Talbot Griffith, *Population Problems in the Age of Malthus* 2 ed. (London, 1967), p 50.

[43] According to one estimate, the total population of Ireland in 1781 was between 2,500,000 and 2,700,000 (*The Writings and Speeches of Edmund Burke*, *op. cit.*, n 10, Volume III, p 650, n 2), whilst another estimate puts it as high as 4,048,000 (Connell, *op. cit.*, n 19, pp 4-5, 25). According to Arthur Young, *Tour in Ireland,* 2 ed. (1780), Volume II, p 195, the population in 1780 was 3,000,000 (quoted in Griffith, *loc. cit.*, n 42).

[44] R. B. McDowell, "Ireland in 1800", Chapter XX in *A New History of Ireland*, *op. cit.*, n 11, Volume IV, *Eighteenth-Century Ireland*, p 657.

[45] Cormac O Grada, "Poverty, Population, and Agriculture, 1801-45", Chapter V in *A New History of Ireland*, *op. cit.*, n 11, Volume V, *Ireland Under the Union, 1801-70*, p 119. According to both the 1821 and 1841 censuses, only about one-eighth of the population lived in towns or cities with a population of 1500 or more (*ibid.*).

[46] R. B. McDowell, *op. cit.*, n 44, p 686.

Instruction provided the first imperfect census of religious affiliations in Ireland. Before that, although it was recognised that Catholics made up a majority of the population, the extent of their numerical superiority was widely underestimated.[47] However, by 1871, Catholics accounted for over 75 per cent of the population, whilst the Church of Ireland, the second largest denomination, numbered only 12 per cent and Presbyterians 9 per cent.[48]

When the 1841 census disclosed that the population of Ireland had reached 8,175,124, Disraeli declared that Ireland was the most densely populated country in Europe; he further asserted, with grand and characteristic hyperbole, that, on arable land, the Irish population was denser than that of China.[49] That increase in the population was reflected in an expansion in the numbers of university graduates and especially the size of the legal profession. It has been stated that at the close of the eighteenth century the Irish Bar had over 400 members (although not all would have been practising barristers), and that in Dublin alone there were over 900 attorneys and proctors (the last being the practitioners in the Ecclesiastical Courts).[50] It has been surmised that the likely explanation for this large number of attorneys and proctors at a time when the population of Dublin was only about 150,000,[51] was that Ireland was a country dominated by the landed interest, and that landed property tended to breed legal problems and litigation.[52] This very large number of legal practitioners, especially relative to those members of the population who might be regarded as potential clients (the peasantry certainly could not be so regarded), did not, however, deter the young men who were wishing to enter the legal profession, especially after 1792, when Catholics as well as Protestants were able to do so, although many ultimately sought their fortunes beyond their native land.

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[47] S. J. Connolly, "Mass Politics and Sectarian Conflict, 1823-30", Chapter IV in *A New History of Ireland*, *op. cit.*, n 11, Volume V, *Ireland Under the Union, 1801-70*, p 78.

[48] W. E. Vaughan, "Ireland c. 1870", Chapter XXXII in *A New History of Ireland*, *op. cit.*, n 11, Volume V, *Ireland Under the Union, 1801-70*, p 738.

[49] Benjamin Disraeli, House of Commons, 15 February 1847, *Hansard*, Volume 89, p 1416; Report of Census Commissioners, 1841, p viii (cited in Cecil Woodham-Smith, *The Great Hunger: Ireland 1845-9* (London, 1962), p 31).

[50] R. B. McDowell, *op. cit.*, n 44, pp 707-708.

[51] Cormac O Grada, *op. cit.*, n 45, p 119.

[52] R. B. McDowell, *op. cit.*, n 44, p 708.

For those who remained in their homeland, the careers open to them were mainly in the law or medicine, as well as in the armed services, the Church (be it Catholic or Protestant), academia, or the Civil Service. There was an oversupply of young men qualifying for and embarking upon careers in those fields. That was especially so in legal practice, where the Bar, in particular, had become a "closed shop" (that is, where new members of a profession were accepted by their already established colleagues on the basis of family, social or political connections, rather than of actual or potential professional merit and ability).[53] Thus in 1840 Thomas Callaghan, destined for success at the New South Wales Bar and appointment to that colony's judiciary, recorded the doubts he had entertained before commencing Bar practice in Dublin in late 1837, and pondered whether, at that time, he "should have given up all idea of my profession, at least till I had otherwise acquired the means of living without being entirely dependent upon it for my maintenance".[54] Forty years later Patrick McMahon Glynn told his mother, "Here [in Ireland] Prejudice, interest and cliqueism is nearly everything."[55]

Dublin in the late Eighteenth Century

By the end of the eighteenth century Dublin had become a visually attractive city, with its two cathedrals (both Protestant), the rigorously disciplined and austere architecture of its Georgian terraces and squares, and its great public edifices, including those triumphs of James Gandon, such as the Custom House and the magnificent Four Courts. The construction of the distinctive and characteristic Dublin squares was largely a consequence of the Wide Streets Commissioners (officially, the Commissioners for Making Wide and Convenient Ways, Streets and Passages). That was a body of considerable power, which was originally established by an Act of the Irish Parliament in 1758,[56] at the request of the Dublin

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[53] J. M. Bennett, *Sir William Stawell, Second Chief Justice of Victoria, 1857-1886* (Leichhardt, NSW, 2004), pp 4, 6-7; J. R. O'Flanagan, *The Munster Circuit* (London, 1880), pp 149-150.

[54] *Callaghan's Diary*, *op. cit.*, n 41, November 12th 1840, Thursday, pp 30-31.

[55] P. M. Glynn, Dublin, to his mother Ellen Glynn (née Wallsh), 21 June 1880, in Gerald Glynn O'Collins (ed.), *Patrick McMahon Glynn: Letters to his Family (1874-1927)* (Melbourne, 1974), p 6.

[56] 31 *Geo.* II, *c.* 19 (Ir.) (29 April 1758).

Corporation, and continued in existence until early 1851.[57] The creation of this entity was an early instance of official town planning, the Commissioners having the power of compulsory acquisition of land, a power which, at times, was open to abuse.[58] The Four Courts was essentially completed in 1796. On 28 June 1922, in the civil war fought in the asserted pursuit of an already largely achieved Irish independence, the Four Courts was destroyed (along with the irreplaceable constitutional, parliamentary and legal records of 1000 years of Irish history and family information, including census returns and birth, death and marriage registrations). The Four Courts was rebuilt, largely to the same design, in 1932.[59]

Dublin itself, like the rest of Ireland, was divided, not only by religion, but also socially and economically. In contrast to the magnificent public buildings and to the ordered residences and busy social lives enjoyed by the professional and the middle classes, at the same time, and not far away, the poor of Dublin subsisted in "houses crowded together ... occupied by working manufacturers, by petty shopkeepers, the labouring poor, and beggars, crowded together to a degree distressing to humanity" and living in "a degree of filth and stench inconceivable except by such as have visited these scenes of wretchedness".[60] Public

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[57] G. N. Wright, *An Historical Guide to the City of Dublin*, 2 ed. (Dublin, 1825), p 171; Maurice Craig, *Dublin 1660-1860* (London, 1952; revised edition, 1992), pp 172f; Ann Crookshank, "The Visual Arts, 1740-1850", Chapter XVI in *A New History of Ireland*, Volume IV, Eighteenth Century Ireland 1691-1800, *op. cit.*, n 11, pp 504-505.

[58] For example, the sale by the Commissioners to one Henry Ottiwell, at an undervalue and without public advertisement or notification, of certain land which they had compulsorily acquired, received considerable adverse publicity and was the subject of an inquiry by a Committee of the Irish House of Lords in 1793 and 1794. The Committee's report of 25 March 1794 was severely critical of the conduct of the Commissioners: [Anon.], *Remarks on the Propriety and Expediency of the Agreement entered into between the Commissioners for Making Wide and Convenient Streets in the City of Dublin and Mr. Henry Ottiwell, grounded on the Evidence laid before the Committee of the House of Lords, appointed in the Session of 1794 to Enquire into the Conduct of the said Commissioners* (Dublin, 1794) (Mitchell Library, microfilm, RAV/FM4/2, Reel 1557, No. 16074.1).

[59] It has been asserted that Gandon's masterpiece was the model for the Supreme Court Building in Melbourne, completed in 1884 (and even, although no primary evidence has been presented to substantiate this claim, that the then Chief Justice of Victoria, Sir William Stawell, born and qualified in Ireland, influenced the ultimate design by suggesting that the Melbourne architects should model their design upon the Four Courts). However, a modern careful comparison of the architecture of the two buildings concludes that, despite superficial similarities, that assertion cannot be accepted. (Ursula de Jong, "Supreme Court of Victoria --- Centenary of Building: Architectural Appreciation", *Law Institute Journal* (Law Institute of Victoria) (March 1984), Vol. 58, No 3, p 208 at pp 212-213).

[60] John Warburton, James Whitelaw and Robert Walsh, *History of the City of Dublin*, 2 volumes (London, 1818), Vol. i, pp 443-444, quoted in R. B. McDowell, *op. cit.*, n 44, p 670.

education at primary level was largely non-existent, at least for Catholic children, until the end of the eighteenth century.[61]

As in any city, such poverty and deprivation gave rise to crime. Indeed, during a debate in the House of Commons in early 1833, the state of Ireland, on account of the prevalence of murders and burglaries, was described as being "worse than a civil war", the future Lord Macaulay saying, "This situation in Ireland was not such as to encourage professional classes to remain there."[62] But it was not merely denizens of the Dublin slums who were objects of Irish criminal justice. Attorneys such as Edward Eagar, George Chartres and William Fleming were convicted of crimes relating to fraud or forgery, and sentenced to transportation to New South Wales in the early nineteenth century, where at least the first two, in the absence of any other qualified lawyers in the colony, were permitted to appear before the Courts, as agents for their clients, if not as legal practitioners.[63] Sir Henry Browne Hayes, former Sheriff of Cork, having been convicted of abducting a Quaker heiress, was also transported to Sydney, where he was able to reside in considerable style upon the harbourside estate which he established at Vaucluse.[64]

There was also a large class of the respectable, or deserving, poor, whose struggles won them little achievement or improvement in their station in life. A relevant example with an Australian connection is the career of Patrick Real, whose life has been described as "a triumph of talent and determination over poverty and adversity".[65] Born in 1846 during the Great Famine, Real was the youngest child of a poor Limerick tenant farmer. The family's only prospects of improvement in life were to emigrate to Australia, doing so when Patrick was aged only four. But his father died during the voyage. After meagre schooling in Ipswich in Queensland, where his mother had settled with her children, Patrick from the age of twelve

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[61] R. B. McDowell, *op. cit.*, n 44, pp 689f.

[62] Thomas Babington Macaulay, MP, 6 February 1833, speech in the House of Commons, on Repeal of the Union with Ireland, published in Thomas Babington Macaulay, *Speeches Parliamentary and Miscellaneous*, 4 volumes (London, 1853), Volume I, p 136.

[63] J. M. Bennett, *A History of Solicitors in New South Wales* (Sydney, 1984), pp 18-20.

[64] N. S. Lynravn, "Hayes, Sir Henry Browne (1762-1832)", *Australian Dictionary of Biography* (hereinafter abbreviated as "*ADB*"), volume 1, p 526.

[65] B. H. McPherson, *The Supreme Court of Queensland 1859-1960* (Sydney, 1989), p 188.

undertook hard labouring work to support the family. When able to attend to his own future and career, he managed to obtain admission to the Queensland Bar and ultimately achieved professional success and appointment to the the judiciary.[66] Real was probably the only Irish born lawyer whose arrival in Australia was precipitated by the Potato Famine of the late 1840s. The overwhelming majority of those who on account of the Famine were forced to depart their homeland were landless peasants, most of whom (as will later be described) chose as their destinations the United States of America or Canada.

Irish Society and its Recreations

A lively picture of the social life in Dublin in the late eighteenth and early nineteenth centuries, especially that of the rich and powerful, and the entertainments of the Irish upper classes emerges throughout the memoirs of Sir Jonah Barrington, a barrister and a member of the Irish Parliament and, after the Union, of the United Kingdom Parliament.[67] A colourful legal identity of that period, he concurrently and subsequently served as a Judge of the High Court of Admiralty in Ireland. Barrington has the unique, and dubious, distinction of having been removed from judicial office, for "serious malversation in the discharge of his office of Judge of the High Court of Admiralty", by a joint resolution of both Houses of the United Kingdom Parliament, the first and only time that that procedure has been employed.[68] Concerning his changes of political tack, to meet changes in policy of the Irish administration, it was said of Barrington by a contemporary critic that he had "pretty much the same idea of blushing that a blind man has of colours".[69]

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[66] A. Rahemtula, "Real, Patrick (1846-1928)", *ADB*, volume 11, p 344; Ross Johnston, *History of the Queensland Bar* (Brisbane, 1978), pp 12, 70-73.

[67] Barrington, *op. cit.*, n 26; for example, Vol. I, pp 65f ("Irish Dissipation in 1778"), pp 77f ("My Brother's Hunting-Lodge"), pp 149f ("Patricians and Plebeians").

[68] *Parliamentary Papers*, House of Commons, Session 1830: Paper number: (382), p 3; W. N. Osborough, "Barrington, Sir Jonah (1756/7-1834)", *Oxford Dictionary of National Biography* (Oxford, 2004), Volume 4, p 73. Details of the progress through each House of Parliament of the proceedings for the removal of Barrington from office are set forth in Andrew Dewar Gibb, *Judicial Corruption in the United Kingdom* (Edinburgh, 1957), Chapter V, pp 64-70.

[69] Anonymous [but probably Henry MacDougall; or Henry McDougal], *Sketches of Irish Political Characters of the Present Day, shewing the parts they respectively take on the question of The Union, what places they hold, their characters as speakers, &c. &c.* (London, 1799), p 223.

Barrington (who considered himself "strictly orthodox both in politics and theology: that is to say, ... a sound Protestant, without bigotry; and a hereditary royalist, without ultraism"[70]) was totally opposed to the Union with Great Britain. He described the Union as "the purchase and sale of the Irish Parliament", and regarded it as "one of the most flagrant acts of corruption on the records of history, and certainly the most mischievous to this empire".[71] Barrington outlined how the Irish gentry of his day were regarded as falling into three categories: *Half-mounted* gentlemen; gentlemen *every inch of them*; and gentlemen *to the back-bone, g*iving the historical and sociological criteria attaching to each of those categories.[72] The recreational activities of the gentry ranged from social intercourse in Dublin drawing rooms and theatres, through horse races and the hunting fields in the countryside, to horsewhipping and duelling with pistols (often resulting in the death of one of the participants).[73]

Risk taking was a not uncommon Irish characteristic. Among the upper and upper-middle classes duels ranked with gambling as marks of honourable gain or honourable loss. A man with such a characteristic was Charles William Blakeney, who was born into an upper class Protestant family at Cooltigue Castle, County Roscommon in 1802 (or, possibly, in 1806[74]). Called to the English Bar in 1831, and to the Irish Bar five years later, he practised for a time in Ireland until his prodigal habits overtook him. Although he had inherited the family estate, Holywell in County Roscommon, by 1853 "his extravagance and gambling debts forced him to place it with the Encumbered Estates Court".[75] Greatly mortified, in 1859 he emigrated to Queensland (where his son, a future Registrar-General of Queensland, had

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[70] Barrington, *op. cit.*, n. 26, Vol. I, p xi.

[71] *Ibid.*

[72] Barrington, *op. cit.*, n 26, Vol. I, p 150. These emphases appear in the passage cited.

[73] Barrington, *op. cit.*, n 26, Vol. II, pp 1-58. Those activities of duelling and horsewhipping are considered in greater detail in Chapter 8 of this thesis.

[74] Burtchaell and Sadleir, *op. cit.*, n 30, p 73, state that when admitted to Trinity (he did not graduate) on 3 January 1820 Blakeney was aged 17, whilst Keane *et al.*, *op. cit.* n 40, p 40 give as his date of birth 8 July 1806.

[75] Jacqueline Bell, "Blakeney, Charles William (1802-1876)", *ADB*, Volume 3, p 180. The Encumbered (more correctly, the Incumbered) Estates Court is considered in Chapter 2.

been residing for the preceding three years[76]). There he achieved professional success, was elected to the first Legislative Assembly of the new colony (where he acquired the reputation of being a "radical"[77]) and eventually became a District Court Judge.

Most of the members of the Irish gentry and the upper-middle class in the late eighteenth and early nineteenth centuries were adherents of the Established Church, the Church of Ireland, although after 1792 Catholics were beginning to make their way into the professions. Despite the tight denominational ties of its inhabitants, however, one English visitor at the beginning of the nineteenth century observed that Dublin was not a noticeably religious city, remarking that "The rich had all the intolerance of bigots without any of their piety".[78] More than half a century later little had changed. The young W. E. H. Lecky, later to achieve renown as the celebrated historian of Ireland, while travelling on the Continent in 1861-1862, described his homeland as "*our unhappy country* which is almost the only one I know of that is cursed by *theological lawyers and preaching laymen*."[79]

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[76] L. M. Millar and H. Blakeney, *The Blakeney Family 1066-1966* (Sydney, 1966; privately printed), pp 21, 26.

[77] Johnston, *op. cit.*, n 66, p 177.

[78] George Cooper, *Letters on the Irish Nation* (London, 1800), p 34.

[79] H. Montgomery Hyde (ed.), *A Victorian Historian: Private letters of W. E. H. Lecky 1859-1878* (London, 1947), p 49, Lecky to his cousin, Knightley Wilmot-Chetwode, Florence, 2 February 1862. Emphases appear in the original document.

CHAPTER 2

LEAVING HOME

Reasons for Departure --- Famine and Hunger --- Political Turmoil ---"Bald justice and stinted eloquence" --- Early Irish Lawyers in Australia --- The Widow McCormack's Cabbage Garden --- Patronage and Emigration --- Introductions Lying upon the Governor's Table --- "Forty hats on the Munster Circuit and not enough work for twenty" --- Incumbered Estates - "Sold Up By a Dwarf in a Garrett" --- "A Fair Share of Loafs and Fishes" --- Conclusions

> **"**Since the beginning of the eighteenth century Ireland's greatest contribution to the world has been her people. Emigration has been a continuing phenomenon of Irish history."[1]

Reasons for Departure

The profession in which Irish lawyers practised, the lifestyle which they enjoyed, and the country (and especially its capital Dublin) in which they had been born and educated, have been described in the preceding chapter. The present chapter considers the reasons why lawyers of the Hanoverian and Victorian periods left Ireland to practise their profession overseas. The next chapter (Chapter 3) will consider why they preferred certain destinations to others. This chapter considers the elements for repellance from Ireland and the next chapter the elements for attraction to other destinations (or, to use the current vernacular, this chapter considers the "push" factors, and the next chapter considers the "pull" factors).

Benjamin Disraeli, towards the close of his first period as Prime Minister of the United Kingdom, expressed the following appreciation of the Irish character, which, to an extent,

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[1] J. J. Auchmuty, "The Anglo-Irish Influence in the Foundation of Australian Institutions", *University of Melbourne Gazette*, Volume 5, No. 3, 26 May 1969, p 3.

explains the departure of so many Irish from their homeland, and the success which so many achieved in other countries. The great statesman said,

> The Irishman is an imaginative being. He lives on an island in a damp climate, and contiguous to the melancholy ocean. He has no variety of pursuit. There is no nation in the world that leads so monotonous a life as the Irish, because their only occupation is the cultivation of the soil before them. These men are discontented because they are not amused. The Irishman in other countries, where he has a fair field for his talents in various occupations, is equal, if not superior, to most races; ...[2]

The successful careers in the Australian Colonies of so many Irish immigrants fully support Disraeli's statement.

The migration --- whether forced or voluntary --- of Irish lawyers to Australia in the eighteenth and nineteenth centuries should not be regarded in isolation from the generality of the Irish Diaspora. Members of the Irish gentry and of the Irish professional classes, not only those with qualifications in the legal profession, sought to make careers in colonies throughout the British Empire. Irishmen attained administrative positions in the Colonial Service[3] and in the Indian Civil Service; as medical practitioners; as clergy (Catholic as well as Protestant); as members of the armed services; as landholders and businessmen; as journalists and politicians; and also as lawyers; in North America, India, the West Indies, the Cape Colony, as well as in Australia and New Zealand.

Famine and Hunger

For half a century, Ireland was convulsed by severe political unrest, marked by a violent uprising in 1798 and a lesser disturbance in 1848. In between was the Great Famine of the

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[2] Benjamin Disraeli to the electors of Aylesbury, 19 November 1868, quoted in George Earle Buckle, in succession to W. F. Monypenny, *The Life of Benjamin Disraeli, Earl of Beaconsfield*, 6 volumes, Volume V, 1868-1876 (London, 1920), pp 91-92.

[3] Appendix B to this Thesis sets forth the offices occupied by Irish lawyers, and the salaries attached to those offices, throughout the Australian colonies of the British Empire in the late 1850s, as revealed in House of Commons *Parliamentary Papers* (Administration of Justice (Colonies, &c.)), ordered to be printed, 18 April 1859.

1840s. The Famine caused social disruption, notably the eviction of tenants and the razing of entire villages by their landlords. John Mitchel, solicitor and a leading participant in the Young Ireland uprising of 1848 (who in consequence was transported to Van Diemen's Land), described the contemporary economic conditions of Ireland as being such as "might have driven a wise man mad".[4] Gustave de Beaumont, the celebrated French social and political philosopher, travelled throughout Ireland in the mid-1830s, dispassionately observing its government, its economy and its populace. Although with no particular sympathy for the Irish people, he wrote more calmly that "there are misfortunes so far beyond the pale of humanity that human language has no words to represent them".[5] However, another observant visitor, the novelist William Makepeace Thackeray, questioned the basis upon which such a conclusion had been reached. After travelling throughout Ireland in 1842, he said that

> To "have an opinion about Ireland" one must begin by getting the truth; and where is it to be had in the country? Or rather, there are two truths, the Catholic truth and the Protestant truth ... I shall never forget the glee with which a gentlemen in Munster told me how he had sent off MM. Tocqueville and Beaumont "with *such* a set of stories."[6]

Thackeray would have been fortified in those observations by the personal view expressed seventeen years later by the young William Edward Hartpole Lecky, subsequently to achieve renown as the celebrated historian of Ireland. In his commonplace book for 1859 the twenty-one year old Lecky noted, "The great evils of Ireland are mendicity and mendacity ... The great desideratum is a lay public opinion."[7]

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[4] Quoted in T. J. Kiernan, *The Irish Exiles in Australia* (Dublin, 1954), p 47.

[5] Gustave de Beaumont, *L'Irlande sociale, politique et religieuse*, 2 volumes (Paris, 1839), a work praised by A. V. Dicey as being "full not only of profound wisdom but of practical guidance" (quoted in T. J. Kiernan, *op. cit.*, n 4, p 47). With only slight exaggeration, de Beaumont described the Irish as "an entire nation of paupers" (quoted in Elie Halévy, *The Age of Peel and Cobden. A History of the English People, 1841-1852* (London, 1947), p 259).

[6] W. M. Thackeray, *The Irish Sketch Book* (London, 1843), pp 422-423. Emphasis appears in the original.

[7] Trinity College, Dublin, Lecky MSS, R.7.30, quoted in Joseph Spence, "Lecky, (William) Edward Hartpole (1838-1903)", *Oxford Dictionary of National Biography*, Volume 33, p 27.

The depressed conditions of degradation observed by Mitchel and de Beaumont contributed to the Ireland of the first half of the nineteenth century being a violent and disorderly country. That fact may have been an additional reason for professional men to abandon their homeland and seek their fortunes abroad, a reason which has been largely overlooked by later scholars seeking to explain the departure of members of the professions throughout that period.[8]

Many emigrants left in consequence of the Famine, but few came from the middle classes, let alone from the professions.[9] Of those emigrants who went to Australia during, and for the twenty years after, the Famine the vast majority (44,188 between 1848 and 1870) received government assistance, their fares (not from Ireland, but from an English port of embarkation) being paid by an Australian colonial Government. The selection of those to receive such assisted passages required them to meet certain standards. The Colonial Land and Emigration Commissioners in London saw their duty as being to the colony, not to the emigrant, and their aim was to select from those who offered themselves for assisted passage, a potentially useful colonial working class.[10] Only those who followed certain occupations, men and women in equal numbers, married couples and single women travelling under their protection, and all of good character, were wanted by the colonists.[11] In consequence, those assisted migrants were not of the most destitute segments of rural Ireland, but of the respectable, or deserving, poor, or the "petit-bourgeois".[12] Upon their arrival in Australia they continued to receive some measure of government assistance until they were able to obtain employment.[13]

The situation of those Irish emigrants who travelled half way around the globe to reach Australia was in marked contrast to the almost unspeakable horrors and deprivations

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[8] The speech of Thomas Babington Macaulay in the House of Commons on this topic has already been noticed in Chapter 1, text to n 62.

[9] Cecil Woodham-Smith, *The Great Hunger: Ireland 1845-9* (London, 1962), Chapters 11 and 12.

[10] Richard E. Reid, *Farewell My Children* (Spit Junction, NSW, 2011), pp 2-3, 33-34.

[11] Richard Charles Mills, *The Colonization of Australia (1829-42)* (London, 1915), p 308.

[12] Reid, *op. cit.*, n 10, p 3.

[13] *Ibid.*

encountered by the well-nigh destitute Irish peasants who, in the appalling "coffin ships", where on some voyages their passage money entitled them to no food and little water, made the far shorter passage across the Atlantic to the United States or the British North American colonies (or who died in attempting to do so).[14] The Select Committee of the House of Commons appointed to consider the *Passenger Acts* of 1851 observed in its report, "It is evident that the Australian passage is comparatively free from the evils and abuses which are charged upon the American passage".[15]

Political Turmoil

A greater impetus to the migration of Irishmen generally --- especially the younger members of the Catholic gentry, as well as Catholic and non-Catholic members of the professions, particularly lawyers --- was given by political events in 1798 and again in 1848.

The uprising of 1798 had its origins in the Society of United Irishmen, founded in 1791, and was inspired by the ideals which gave birth to the United States of America and to the French Revolution, and by a desire for greater political rights for all Irishmen, irrespective of religion or ownership of land. The unsuccessful armed insurrection of mid-1798 was deprived of the promised military support from the *Directoire* government of France, and received no encouragement from the Catholic hierarchy in Ireland, let alone in Rome. The Catholic Church, confronted by the hostile, and increasingly anti-clerical, policies of French governments since 1789, was opposed to an armed insurgency to which France (then at war with Britain) was giving its enthusiastic support and was promising military aid. Indeed, at the outbreak of the uprising the authorities at the recently established Catholic seminary, for the training of priests, St Patrick's College at Maynooth in County Kildare, founded and endowed by Acts of the Irish Parliament (35 *Geo*. III, cc. 21, 30, 36 (5 June 1795)), on 30

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[14] The "coffin ships" were thus called since in so many instances passengers, starved and tortured by thirst, sailing on vastly overcrowded ships often dangerously old and rotten, died on the voyage. For instance, one vessel which sailed from Killala in County Mayo in July 1846 carried 276 persons of whom 42 died on the eight week voyage to Quebec (it should have taken only four weeks). "No sanitary convenience of any kind was provided, and the state of the vessel was "horrible and disgusting beyond the power of language to describe"." (Woodham-Smith, *op. cit.*, n 9, pp 216-217).

[15] House of Commons *Parliamentary Papers*, 1851, Volume 19, p 2.

May 1798 issued a loyal address to King George III.[16] This attitude on the part of the College authorities was hardly surprising. The President of the College at the time, the Reverend Peter Flood, had experienced at first-hand the virulent anti-clericalism spawned by the French Revolution. Flood, a distinguished theologian, had held responsible ecclesiastical offices in France. He was fortunate to escape with his life during the September Massacres of 1792, and was subjected to imprisonment by the revolutionary government before managing to return to his native Ireland in 1795. Flood was vehemently opposed to the violence of 1798, and supported the British government throughout the uprising.[17]

The uprising served to increase and emphasise already existing religious, political and social divisions, which thereafter continued for many generations. The immediate consequences of the failed 1798 insurrection were the Union of Ireland with Great Britain on 1 January 1801, and a delay of almost 30 years before the totality of the Penal Laws were ultimately repealed.

Among those who in the aftermath of the uprising found it expedient to leave their homeland were a number of lawyers, some of whom thereafter achieved professional success in the New World. Notable examples of such lawyer emigrants included Thomas Addis Emmet, who, like his younger brother, the renowned and ill-fated Robert Emmet, was a Protestant, and who practised at the Irish Bar from 1790. He was imprisoned for four years for his participation in the 1798 uprising. Since legal and practical considerations would have precluded his return to professional practice in Ireland, he emigrated to America in 1803 after his release. There he established a lucrative practice at the New York Bar, becoming

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[16] The authorities, having described themselves as "his Majesty's most loyal subjects the Roman Catholics of Ireland", then continued by expressing that they thought "it necessary at this moment publicly to declare our firm attachment to his Majesty's royal person, and to the constitution, under which we have the happiness to live; we feel, in common with the rest of his Majesty's subjects, the danger in which both are exposed from an implacable and enterprising enemy [the French] menacing invasion from abroad, and from the machinations of evil and disaffected men conspiring treason within his Majesty's kingdom" (quoted in William Hamilton Maxwell and George Cruickshank, *History of the Irish Rebellion in 1798* (London, 1845), p 447).

[17] Patrick M. Geoghegan, "Flood, Peter (c. 1742-1803)", *Dictionary of Irish Biography*, Volume 3, p 1029).

recognised as one of the leading lawyers of the nation, and subsequently holding office as Attorney-General of the State of New York.[18]

William Sampson, another Irish Protestant barrister, also left his homeland after serving a term of imprisonment for his part in the 1798 uprising. Sampson, who (after experiencing years of exile on the Continent) arrived in America in 1806, and thereafter successfully practised at the New York Bar, was described by Emmet's grandson as having been an intimate friend of Emmet, the two having been connected in the uprising.[19] In 1813 Sampson argued, with success, the celebrated case of *People v. Philips* (N.Y.Ct.Gen.Sess. 1813), regarding priest-penitent privilege.[20] Shortly after his arrival in America, Sampson observed of the New York courts, "Their judges are without wigs, and their lawyers without gowns; this might be called bald justice and stinted eloquence."[21]

Although no lawyers were among those Irishmen transported to Australia in consequence of the 1798 uprising, many of the transportees remained in the colony after their sentences had expired and became exemplary citizens in their new land. When he arrived in Sydney in 1829 Roger Therry observed that many who had been sentenced for their participation in the uprising were still living. Of them he wrote,

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[18] Donald Roper, "Emmet, Thomas Addis (24 Apr. 1764 - 14 Nov. 1827)", *American National Biography*, Volume 7, p 501; Marianne Elliott, "Emmet, Thomas Addis (1764-1827)", *Oxford Dictionary of National Biography*, Volume 18, pp 420-421; James Quinn, "Emmet, Thomas Addis (1764-1827)", *Dictionary of Irish Biography*, Volume 3, pp 622-625.

[19] Thomas Addis Emmet, M.D., LL.D., *Memoirs of Thomas Addis and Robert Emmet*, 2 volumes (New York, 1915), Volume I, p 435, footnote. It is possible that, despite his clients including Joseph Bonaparte, the former King of Naples and of Spain, and other French emigrés with whom he had been acquainted during his years of exile in France, Sampson's legal practice in New York was neither so large nor so lucrative as his later reputation would suggest (Maxwell Bloomfield, *American Lawyers in a Changing Society, 1776-1876* (Cambridge, Massachusetts, 1976), p 79).

[20] Walter J. Walsh, "The Priest-Penitent Privilege: An Hibernocentric Essay in Postcolonial Jurisprudence", *Indiana Law Journal* (Bloomington, Indiana, 2005), Vol. 80, p 1037. This topic, in the context of Australian (particularly Victorian) statute law, is referred to in Greg Taylor, "Four Curiosities of Victorian Evidence Law", *Law Institute Journal* (Law Institute of Victoria, Melbourne) (2006) 80(8), p 36.

[21] Sampson to Lord Spencer [1806], quoted in *Memoirs of William Sampson, An Irish Exile, written by himself* (reprinted from the second American edition) (London, 1832), p 282. Michael Durey, "Sampson, William (27 Jan. 1764 - 28 Dec. 1836)", *American National Biography*, Volume 19, p 232; Mary Helen Thuente, "Sampson, William (1764-1836)", *Dictionary of Irish Biography*, Volume 8, pp 758-759.

> Amongst them some truly good men were to be found, whose lives were unstained by the commission of any of the ordinary felonies and baser crimes for which convicts were usually transported. It is now conceded by all writers that perhaps there has never been a more trampled-down people than were the Irish peasantry at that period (1798). Life to them in their native country was a thing of no value. On the term of their transportation being completed abroad, they found themselves in the possession of competent means --- the saving of wages from indulgent masters during their period of assignment, and their earnings upon obtaining tickets of leave. Many of these men testified their attachment for their native country in the best practical shape, by sending to their families at home a portion of the fruits of their industry, and frequently defraying the expense of the voyage of other relatives whom they invited to join them and share their prosperity in the Colony.[22]

What Therry observed regarding those Irish ex-convicts inviting, and paying for, their kinsfolk to join them in New South Wales were early instances of the practice, increasing as the century advanced, which came to be known as "chain migration".

Early Irish Lawyers in Australia

Despite the absence of any lawyers among those Irishmen transported to Australia for their involvement in the 1798 uprising, several lawyers arrived from Ireland as convicts in the early nineteenth century. Edward Eagar was born of genteel ancestry near Killarney in 1787. Having served his apprenticeship, he was enrolled as an attorney in the Four Courts in Dublin. But he practised for less than a year, as in 1809 he was convicted of uttering a forged bill. His sentence of death was commuted to transportation for life, and he arrived in Sydney in 1811. Conditionally pardoned by Governor Macquarie in 1813, Eagar immediately set up legal practice, advertising his professional qualifications and asserted ability in the *Sydney Gazette* of 10 April 1813. At the outset Eagar's entitlement to appear in court, at least as agent for his clients, was not contested by the Judge-Advocate, Ellis Bent, and Eagar established a sizeable practice. But his professional career ended in 1815, when Jeffery Hart Bent, the recently appointed Judge of the Supreme Court of Civil Jurisdiction (created under the Letters Patent of 4 February 1814, known as the Second Charter of Justice) refused to recognise that

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[22] Sir Roger Therry, *Reminiscences of Thirty Years' Residence in New South Wales and Victoria*, 2 ed. (London, 1863) (facsimile edition, Sydney, 1974), p 93.

entitlement. Thereafter, Eagar took up trade and politics. In 1821 he went to London to represent the emancipists of New South Wales, who were seeking the removal of their civil and commercial disabilities. Active in lobbying the Colonial Office, Eagar was even consulted regarding the preparation of the statute commonly called the *New South Wales Act* of 1823 (4 *Geo*. IV, *c*. 96).[23]

In the same ship, the *Providence*, which brought Eagar to Sydney in 1811, was another Irish lawyer, George Chartres. He was the son of a Dublin physician, and had been admitted as an attorney in about 1799. After practising in Dublin for about eleven years, Chartres was convicted of fraud and was sentenced to transportation for seven years. Even before he had been conditionally pardoned in 1814, and even after being sentenced to the Coal River (Newcastle) for misconduct, Chartres advertised a conveyancing and legal practice in the *Sydney Gazette* of 3 October 1812. Like Eagar and an English convict attorney, George Crossley, Chartres was permitted by Ellis Bent to appear before the courts as an agent for his clients, if not as a legal practitioner. However, his application to Jeffery Hart Bent, the Judge-Advocate's elder brother, to practise before the new Supreme Court met the same fate as the applications of the other convict attorneys. After obtaining a free pardon from Macquarie in 1816, Chartres returned to Britain in the following year.[24]

A third Irish convict attorney in New South Wales was William Fleming. He was admitted to the Four Courts in Dublin, in which city he practised for twelve years, before being transported in 1810 for uttering a forged note. Unlike the other convict attorneys, Fleming was not granted leave by Ellis Bent to practise in his court. The likelihood of his being allowed to practise in the Supreme Court was so remote that Fleming did not even make an application to Jeffery Hart Bent.[25]

Those transported Irish lawyers were not destined to make any impression on the Australian legal profession. Nor is it apparent that, with the exception of Eagar, they applied

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[23] J. M. Bennett, *A History of Solicitors in New South Wales* (Sydney, 1984), pp 18-19; N. D. McLachlan, "Eagar, Edward (1787-1866)", *ADB*, Volume 1, p 343.

[24] Bennett, *op. cit.*, n 23, p 19; K. G. Allars, "Chartres, George (fl. 1810-1817)", *ADB*, Volume 1, p 218.

[25] Bennett, *op. cit.*, n 23, p 20.

themselves, in the following fashion, as the *Times* of London proposed, to re-establishing themselves in the community. That newspaper suggested that the purpose of transportation should be,

> To send the convict abroad to a distant colony, in which, after the expiration of a certain number of years, he is set free, with the certainty of employment before him, and without any of the temptations which prompted him in the first instance to the commission of crime, is to make a man of him once more --- to give him, as it were, a fresh start in life.[26]

The Widow McCormack's Cabbage Garden

Just as Irishmen had been convicted and transported to Australia in consequence of the 1798 uprising, half a century later a number of Young Irelanders, sentenced to death for their part in 1848 uprising, on their sentences being commuted, were also transported to Australia, this time to Van Diemen's Land. The Young Ireland uprising in July 1848 (the "Year of Revolutions") had less constitutional and immediate political impact upon the nation than the uprising of 50 years earlier.[27] But, coming during the Great Famine, it resulted in the departure, voluntary in a number of instances, or enforced in others, of professional men, including lawyers, for Australia.

The young men --- intellectuals, writers, lawyers and politicians --- who espoused the ideals of Irish nationality (not Irish nationalism) set forth in the writings of Thomas Davis (idealistic patriot, journalist and non-practising barrister)[28] became known as the Young Irelanders. In seeking the repeal of the Union, the failure of the Young Irelanders expressly to eschew violence had earlier in the 1840s resulted in a breach with Daniel O'Connell, whose pragmatic approach was that repeal should be achieved only by legal and constitutional means. The revolutions that swept over Continental Europe in the first half of 1848 achieved

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[26] *Times* (London), 17 April 1850.

[27] James S. Donnelly, Jr, "A Famine in Irish Politics", Chapter XIX in *A New History of Ireland*, Volume V, *Ireland Under the Union*, I, 1801-1870, ed. W. E. Vaughan (Oxford University Press, 1989), p 357.

[28] Davis's concept of Irish nationality is considered in John N. Molony, *A Soul Came into Ireland: Thomas Davis 1814-1845* (Dublin, 1995), especially Chapter 3, "An Ideology of Nationality" (pp 37-58).

their aims with little or no violence or bloodshed. The Young Irelanders, quite unrealistically, expected a similar success in their homeland. Unfortunately, a peaceful demonstration near a farmhouse owned by Mrs Margaret McCormack, outside Ballingarry in County Tipperary, deteriorated into a confrontation with the police; then, descending into violence, it resulted in the loss of several lives.

Of "the confused events of late July [1848], which finally brought the Young Ireland leaders to their brief and inglorious encounter with the police in the Widow McCormack's cabbage garden",[29] with the exchange of shots and some loss of life, it has well been said that the so-called rising of 1848 "was not in any practical sense a rising at all, nor until the very last minute was it ever intended to be one".[30] The political consequences of this tragic, but unintended, occurrence were, however, profound and far-reaching. Fierce resentment directed against the British authorities was nurtured by Irish emigrants, especially those who had departed their homeland for North America during the Famine. In Ireland ("where the age-old burden of alien rule inflamed every grievance and retarded every remedy"[31]) the Fenian movement, with its espousal of violence, a policy manifested over the ensuing century and a half, was a direct product of the events of 1848.[32]

Among the Young Irelanders transported to Van Diemen's Land was John Mitchel, the son of a Presbyterian minister, who was admitted as a solicitor in 1840, and until 1845 practised at Banbridge in County Down, not far from Newry, where his family resided.[33] There is little doubt that Mitchel had been a student at Trinity College, but there is less certainty that he graduated from that university (or that, if he did, it was at the very young age

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[29] Donnelly, *op. cit.*, n 27, p 369.

[30] Robert Kee, *The Green Flag: A History of Irish Nationalism* (London, 1972), p 270. A detailed consideration of the Young Ireland movement and its participants, especially from an Australian perspective, is presented in Thomas Keneally, *The Great Shame: A Story of the Irish in the Old World and the New* (London, 1998; reprinted, Vintage edition, Milsons Point, NSW, 2001), Chapters 11, 12, 13, 14 (pp 170-250).

[31] William Forbes Adams, *Ireland and Irish Emigration to the New World from 1815 to the Famine* (New York, 1967), p 1.

[32] Donnelly, *op. cit.*, n 27, p 369.

[33] G. Rude, "Mitchel, John (1815-1875)", *ADB*, Volume 2, p 234. T. J. Kiernan, *op. cit.*, n 4, p 43, refers to Mitchel as "a Unitarian, son of a Unitarian minister".

asserted by some of his biographers).[34] In 1845 Mitchel gave up his legal practice, removed to Dublin and, under Charles Gavan Duffy, became assistant editor of the *Nation*, a Dublin newspaper, the policies of which, unsurprisingly, were nationalistic, controversial and deemed to be seditious. Mitchel, whose death sentence for treason had been commuted, arrived in Hobart in 1850, but escaped in 1853 and went to America (where he essentially remained until his death in 1875). He did not practise as a lawyer in Australia.[35] It has been said of Mitchel, a supporter of slavery in America and hostile to the Jewish race, that he "was inspired not by love of liberty but hatred of England."[36]

Gavan Duffy, despite being a member of the Irish Bar (as a "young Irishman entangled in politics [he] had only one profession open to him[37]"), was relentlessly pursued by the government for his offensive editorials. On his fifth trial he was acquitted of the capital charge brought against him in consequence of the 1848 uprising, and, in a considerable change of fortune, he represented an Irish constituency in the House of Commons (1852-1855). However, in 1855, disillusioned with Ireland and politics at Westminster, and being financially stretched, he abandoned his homeland for Australia, where ultimately he became Premier of Victoria and was recognised by a knighthood.[38]

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[34] For differing assertions and evidence (or the lack thereof) regarding Mitchel's educational qualifications, see William Dillon, *Life of John Mitchel*, 2 volumes (London, 1888), Volume I, p 15; John Mitchel, *The Gardens of Hell: John Mitchel in Van Diemen's Land 1850-1853* (ed. Peter O'Shaughnessy) (Kenthurst, NSW, 1988) [being the Jail Journal of John Mitchel, 17 May 1848 - 29 July 1853], p 11; Trinity College, *Catalogue of Graduates* (Dublin, 1869), p 401; George Dames Burtchaell and Thomas Ulick Sadleir (eds.), *Alumni Dublinenses* (London, 1924), p 581; Thomas Keneally, *op. cit.*, n 29, p 101; John N. Molony, *op. cit.* n 27, p 15; *Dublin University Calendar*, 1836 and 1837 (Dublin, 1836, 1837), pp 60-62; Michael F. Funcheon, "Mitchel, John (3 Nov. 1815 - 20 Mar. 1875)", *American National Biography*, Volume 15, p 588; Brigitte Anton, "Mitchel, John (1815-1875)", *Oxford Dictionary of National Biography* (Oxford, 2004), Volume 38, p 382; James Quinn, "Mitchel, John (1815-1875)", *Dictionary of Irish Biography*, Volume 6, p 523.

[35] The subsequent histories of the leaders of the Young Ireland uprising of 1848, especially those who came to Australia, voluntarily or under duress, are set forth in Keneally, *op. cit.*, n 30, Book II (chapters 7-31), pp 299-636.

[36] Woodham-Smith, *op. cit.*, n 9, p 417.

[37] Sir Charles Gavan Duffy, *My Life in Two Hemispheres*, 2 volumes (London, 1898; facsimile edition, Dublin, 1969), Volume I, p 59.

[38] Joy E. Parnaby, "Duffy, Sir Charles Gavan (1816-1903)", *ADB*, Volume 4, p 109.

Patronage and Emigration

As the nineteenth century advanced there was an increasing stream of young Irish lawyers going to the Antipodes equipped with (as they thought) guarantees, through patronage, of Crown and governmental legal appointments, or with references of good character that might, with luck, find them places at the Bar or in a solicitor's practice. It is appropriate, therefore, to give consideration to this concept of patronage and to instances of its practical application to Irish lawyers in the Australian colonies.

A cornerstone of British colonial and imperial policy and administration throughout the eighteenth century and the first half of the nineteenth century was patronage. This was exerted at all levels of Crown and government appointments, and was not in any way regarded as improper or irregular. In Georgian times patronage was perceived to be almost a royal prerogative, as in the striking case of Robert Wilmot-Horton, who, as Parliamentary Under-Secretary of State for War and the Colonies (appointed in 1821 in Lord Liverpool's administration), sought advancement after six years' service. As Dr J. J. Eddy established, on study of the Huskisson Papers in the British Library, Horton "wished to try his luck in practical administration as Governor of Canada, but the King had candidates and the post was denied him".[39] Earl Bathurst, the recently retired Secretary of State for the Colonies, under whom Wilmot-Horton had served, was at the same time encouraging him to make a bold approach directly to the Prime Minister, Viscount Goderich, for a high office.[40]

Such obtrusion by the Crown diminished over the years, to be replaced, in the filling of official colonial posts, by contests in which candidates sought to overwhelm competing applicants and to impress the Secretary of State by the eminence of their referees and the impressiveness of their commendations, and also used their own connections within the

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[39] J. J. Eddy, *Britain and the Australia Colonies 1818-1831* (Oxford, 1969), p 260.

[40] Eddy, *op. cit.*, n 39, p 259. Somewhat curiously, Bathurst, whose views regarding patronage and jobbery were firmly fixed in the eighteenth century, was reluctant for Wilmot-Horton to become aware of his own official discussions with his government's Patronage Secretary, Charles Arbuthnot. For example, in February 1823 when Bathurst wished to speak with Arbuthnot, he told him it was safe to "come to his office because Mr. Wilmot[-Horton] (the under-secretary) was gone" (F. Bamford and the Duke of Wellington (eds.), *The Journal of Mrs. Arbuthnot* (London, 1950), volume i, p 210, 3 February 1823, quoted in Eddy, *op. cit.*, n 38, p 12.

administration. Debate has subsequently arisen about the efficacy of such a system, and especially whether it did not produce "drones, idlers and misfits".[41] A more compelling conclusion, however, is that the exercise of patronage was, in a surprising number of instances, governed by considerations of administrative efficiency rather than of political advantage. Had this not been so, it is difficult to see how British power in its expanding overseas Empire could have grown as it did during the eighteenth century.[42] Patronage was of benefit not only to the recipient but also to the dispenser. In the mid-nineteenth century the attitude of those with the final say in the exercise of patronage --- usually Ministers --- was thus robustly expressed by Disraeli, then Chancellor of the Exchequer, to his Cabinet colleague Lord Stanley, "Patronage is the outward and visible sign of an inward and spiritual grace, and that is Power."[43]

Nevertheless, the seeking of patronage could be a gamble, and its outcome uncertain. Under the British system of hereditary titles, a patron with a grand form of address might turn out to be a patron of straw. There might be little gained by the endorsement of a person such as the fictitious "My Lord Tomnoddy", ridiculed by the contemporary English, minor but prolific, writer and satirist Robert Barnabas Brough. "Tomnoddy" was depicted as a 34 year old first son of an ailing earl, his sole qualification being his aristocratic birth and his expectation of succeeding to his father's peerage. Brough wrote of him.

> Office he'll hold and patronage sway
> And what are his qualifications? --- ONE!

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[41] The disastrous consequences which (before the reforms instituted in 1855 by Sir Charles Wood, the Secretary of State for India) could, on occasion, result from appointments achieved through patronage rather than on merit were manifested during the First Afghan War. ("Thus it is to employ men selected by patronage [wrote Major-General William Nott to his daughters in mid-1840]. The conduct of one thousand and one Politicals has ruined our cause, and bared the throat of every European in this country [Afghanistan] to the sword and knife of the revengeful Affghan [*sic*] ... ": J. H. Stocqueler, *The Memoirs and Correspondence of Sir William Nott, GCB*, 2 volumes (London, 1854), Volume I, pp 256-257.)

[42] Arthur McMartin, *Public Servants and Patronage* (Sydney, 1983), p 10.

[43] Disraeli to Lord Stanley, 10 August 1858, quoted in W. F. Monypenny and G. E. Buckle, *The Life of Benjamin Disraeli, Earl of Beaconsfield*, 6 volumes (London, 1910-1920), Volume IV (1916), p 174.

He's the Earl of Fitzdotterel's eldest son.[44]

Then again, there was the risk that a patron might provide a reference the effect of which was diminished by its internal qualifications. A notable instance relevant to Australia was that of Saxe Bannister (not an Irishman), who was appointed first Attorney-General of New South Wales, largely on the commendation of William Tooke, a prominent English solicitor and President of the Society of Arts. The qualification in the commendation was a hint that Bannister was "not to be trusted in practical affairs" --- an impression swiftly verified by Bannister's eccentricities and poor performance in office.[45]

In the context of appointments to official positions in early colonial Australia, patronage operated at two levels. One related to senior appointments, such as, for legal purposes, judges and Crown Law officers. The other related to junior positions, in the scramble for which, applicants were at times treated shabbily, as will emerge.

The appointments of the first Irish born lawyers to official positions in New South Wales were achieved through powerful patronage. Roger Therry and John Hubert Plunkett, are pre-eminent exemplars. Each was a Catholic who suffered professional and social discrimination on account of his religion, both in Ireland and in Australia. They were of similar age, and may have been acquainted at Trinity, where they were contemporaries. Therry in 1827 became one of the private secretaries to the Prime Minister, George Canning (of Irish parentage), who held office for only four months before his death in August of that year. While secretary, Therry had undertaken to prepare, under the Prime Minister's supervision, an edition of Canning's speeches. Continuing that enterprise after Canning's death, Therry came under the favourable notice of William Huskisson, then Secretary of State for the Colonies. It was Huskisson who in 1829 secured for him (from Sir George Murray, Huskisson's successor at the Colonial Office) appointment as Commissioner of the Court of Requests in New South Wales, at a salary of £800 a year, with the right of private practice. Of that office the Parliamentary Under-Secretary of State, Horace Twiss, informed Therry that

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[44] Robert Barnabas Brough, "My Lord Tomnoddy", in Edmund Clarence Stedman (ed.), *A Victorian Anthology, 1837-1895* (Cambridge, 1895), p 830.

[45] Eddy, *op. cit.*, n 39, p 107.

"In respect both of the emolument and of the climate it is one of the very best situations in the gift of the Colonial Secretary of State."[46] From that position, despite setbacks attributable to his Catholic religion, Therry gradually advanced to higher appointments. It was said of Therry that he was the first Catholic gentleman to arrive in New South Wales and that Mrs Therry's bonnet was the first to be seen in a Catholic congregation in the colony.[47]

Plunkett's powerful and influential patrons were Daniel O'Connell and Plunkett's own kinsman Arthur James Plunkett, 9th Earl of Fingall (an influential member of the House of Commons). Plunkett sought, was offered, and accepted a colonial appointment as Solicitor-General of New South Wales. In accepting, Plunkett became the first Catholic to occupy high public office in that colony.[48] Until Plunkett's arrival in June 1832 Therry had been the leading Catholic layman in New South Wales. In an unusual case of latent patronage, Plunkett was unfortunate, on applying to succeed to the Chief Justiceship of New South Wales upon Sir James Dowling's death in 1844, to be challenged by Alfred Stephen, then in office for five years as a puisne Judge of the Supreme Court. Plunkett (by then Attorney-General) had an excellent claim to the vacancy, given his long and able service as principal Crown Law Officer of the colony and his undoubted brilliance as a lawyer. Although favourable treatment for Stephen at the Colonial Office because of his family connection with (Sir) James Stephen, the powerful Permanent Under-Secretary of State (on occasion referred to as "Mr Over-Secretary Stephen"), was officially denied,[49] the decision went against Plunkett and saw Alfred Stephen elevated as third Chief Justice of the colony. The conclusion is compelling that family ties had prevailed against a worthy candidate of the "wrong" religion.[50]

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[46] Horace Twiss to R. Therry, Esqr., 11 April 1829, CO 202/24, folio 17.

[47] [Wiliam Ullathorne], *The Autobiography of Archbishop Ullathorne*, (London, 1891), p 69. Presumably the other ladies, probably Irish lasses, could afford only headscarves.

[48] T. L. Suttor, "Plunkett, John Hubert (1802-1869)", *ADB*, Volume 2, p 337. The somewhat surprising desire of Plunkett, successful both at the Bar and in politics in Ireland, to leave his homeland has been attributed to a broken romance "that wounded both his heart and his pride" (John N. Molony, *An Architect of Freedom: John Hubert Plunkett in New South Wales 1832-1869* (Canberra, 1973), pp 5-6).

[49] Gipps to Stanley, 6 October 1844, CO 201/350, minute by James Stephen, 29 March 1845.

[50] John N. Molony, *op. cit.*, n 48, pp 60-69; J. M. Bennett, *Sir Alfred Stephen, Third Chief Justice of New South Wales 1844-1873* (Leichhardt, NSW, 2009), pp 129-134.

Five years earlier Alfred Stephen himself had almost missed out on his first judicial appointment, that of Acting Judge of the Supreme Court of New South Wales in 1839-1841, during the absence on leave of Mr Justice William Westbrooke Burton, on account of competing claims for patronage at the Colonial Office. Ross Donnelly, son of Vice-Admiral Sir Ross Donnelly, KCB, was descended from the Irish family of O'Donnelly, formerly of Gortcherran in County Tyrone.[51] A barrister by English call, the younger Donnelly had been admitted to the New South Wales Bar only in 1839. Nevertheless the Admiral sought for his son appointment to either the temporary judgeship or the office of Solicitor-General (despite the fact that there was not at the time any vacancy in that latter office), and called in aid a formidable raft of supporters, including Lord Normanby, the Secretary of State. In the event, the far more experienced and more highly qualified Alfred Stephen was successful, although his first cousin, James Stephen the permanent head of the Colonial Office, scrupulously refused to be involved in the selection, passing on the responsibility to the Parliamentary Under-Secretary of State, Henry Labouchere.[52]

Valentine Edwin Fleming, destined to become the second Chief Justice of Tasmania, was an Irishman, although by chance born in England. Called to the English Bar in early 1834, he looked for better opportunities overseas, and sought and obtained patronage from family members of the leading financial house Baring Bros. and Co. His principal sponsor was probably Sir Francis Thornhill Baring, Chancellor of the Exchequer from August 1839 to September 1841. The appointment of Fleming in August 1841 to a minor quasi-judicial office in Tasmania suggests that the Fleming family's sway with the Colonial Office was modest.[53] It is also possible that, upon religious grounds, Fleming, brought up as a Catholic, but who had abandoned the faith of his fathers for High Church Anglicanism, would not have been regarded with any particular favour by James Stephen, who was prominent among the evangelical wing in the Church of England.[54]

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[51] National Library of Ireland, Dublin, Genealogical Office, Ms 107, pp 124-125 (Copy of grant of arms to Vice-Admiral Sir Ross Donnelly, KCB, descended from the family of O'Donnelly formerly of Gortcherran in County Tyrone, 17 June 1837).

[52] J. M. Bennett, *op. cit.*, n 50, pp 105-106,

[53] J. M. Bennett, *Sir Valentine Fleming, Second Chief Justice of Tasmania 1854-1869* (Leichhardt, NSW, 2007), pp 3-4.

[54] Bennett, *op. cit.*, n 53, p 4.

The Irish lawyers just mentioned, who received appointments to public offices in Australia, benefited from the support of influential patrons in London, not in Dublin (by the time of Plunkett's appointment his patron Daniel O'Connell was already a Member of the House of Commons). Alfred McFarland, however, an early judicial officer appointed to Western Australia, received support from a different quarter. Born at Coleraine in County Londonderry, and graduating from Trinity College, he was called to the Irish Bar in 1847 and practised in Dublin for the next ten years. He specialised in Equity and was the author of two publications dealing with the practice and procedure in that jurisdiction. On the nomination of Sir Maziere Brady, the long serving Lord Chancellor of Ireland, in whose court he regularly appeared, McFarland in 1857 was appointed the sole judicial officer in Western Australia (as Commissioner of the Civil Court and Chairman of Quarter Sessions).[55] McFarland, an author also of historical and biographical works (his subjects including Captain Cook, the Bounty mutiny, Norfolk Island, and the Illawarra and Monaro districts in New South Wales), subsequently practised at the New South Wales Bar and became a Judge of the District Court of that colony. In Western Australia patronage continued to be an important element in official appointments until Responsible Government was achieved in 1890. One percipient observer of public affairs in that Colony, the diarist Alfred James Hillman, recorded, regarding appointments to the offices of Colonial Secretary and Surveyor-General in 1880, "but as long as we are a Crown Colony, such billets are not likely to be given to merit, but to needy adventurers whose friends may have supported the party in power at the Colonial Office."[56]

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[55] H. T. E. Holt, "McFarland, Alfred (1824-1901)", *ADB*, Volume 5, p 152; H. T. E. Holt, *A Court Rises* (Sydney, 1976), p 78.

[56] *The Hillman Diaries 1877-1884. The personal diaries of Alfred James Hillman from 21st December 1877 to 24 April 1884 with a foreword by Bentley Hillman.* (Privately printed by F. V. Bentley Hillman, Applecross, Western Australia, 1990) (hereinafter referred to as "The Hillman Diaries"), p 398, Monday, 16 August 1880.

James Dowling, although born in London, of an Irish father, had spent his childhood in Dublin and was proud of his Irish ancestry.[57] By members of his family he was regarded as being himself an Irishman,[58] and will be treated here as if an honorary one. His appointment in 1827 as a Puisne Judge of the recently established Supreme Court of New South Wales could not have been achieved without patrons whose support Dowling actively solicited. As has already been observed, in Chapter 2, in those days such solicitation was not regarded as inappropriate, let alone as improper. Dowling gained the favourable support of Mr Justice Bayley, of the Court of King's Bench, of Solicitor-General Sir Nicholas Tindal, and, especially, of Henry Brougham, eventually to be Lord Chancellor of Great Britain. Dowling had not been so successful, however, in his approach to Lord Lyndhurst, the then Master of the Rolls, his request for whose support was "not honoured with any notice on the part of his Lordship".[59] Even more importantly, Dowling's solicitation of a judicial appointment in the colonies was supported by Serjeant Henry Stephen, the elder brother of James Stephen, the latter then being permanent Counsel to (and later to be the Permanent Under-Secretary in) the Colonial Office.[60] Dowling took a considerable risk in declining, on the ground of oppressive climates, the first offer of the Secretary of State, being to the Chief Justiceship of either Dominica, in the West Indies, or Sierra Leone, in West Africa.[61] There was no certainty that any other offer would be forthcoming. In the event, Dowling's preferred choice, a judicial

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[57] Anthony Dowling, *Fortis et Egregius or Dowling of Ballyroan* (Sydney, 1996) pp 6, 63; Anthony Dowling (ed.), *Reminiscences of a Colonial Judge* (James Sheen Dowling) (Sydney, 1996), pp xv, 46, 47. Despite that pride in his Irish ancestry, Dowling cautioned his eldest son, James Sheen Dowling, against marriage to an Irish colleen, writing, "I confess that I should be *sorry* to see a son of mine wedded to any of the fair daughters of *Erin* ... [I]n general I fear they are slatterns --- ill regulated in their minds, and deficient in those matters of domestic economy & sobriety of carriage which characterize the Ladies of England ..." (James Dowling to James Sheen Dowling, 25 November 1838, Dowling Correspondence, Mitchell Library A 486; emphases appear in original manuscript).

[58] Anthony Dowling (ed.), *op. cit.*, n 57, p 46.

[59] "Narrative of Proceedings Prior and Subsequent to the Appointment of James Dowling, Esq., to the Office of Judge of the Supreme Court of New South Wales", *sub nom.* "Dowling's Journal" (Mitchell Library, A 485). Twelve years later Dowling, having received his well deserved knighthood, recounted, with wry amusement, to his son James that Lyndhurst who "never even condescended to answer my letter" had now written to him "in terms of the most friendly recognition, beginning 'My dear Sir James'." "It is astonishing [observed Dowling] how *greatness* brings a man into notice." (Dowling to James Sheen Dowling, 1 September 1839, Dowling Correspondence, Mitchell Library A 486, f 324A; emphasis appears in original manuscript).

[60] J. M. Bennett, *Sir James Dowling, Second Chief Justice of New South Wales 1837-1844* (Leichhardt, NSW, 2001), pp 6-9.

[61] Dowling to Goderich, 7 July 1827 (set forth in Dowling, *Fortis et Egregius or Dowling of Ballyroan*, *op cit.*, n 57, pp 64-69).

position in New South Wales, became available. The Secretary of State's offer, made after an enthusiastic recommendation from James Stephen, was immediately accepted, and led to Dowling's becoming, in due time, the second Chief Justice of the colony.[62] He was the first Chief Justice of an Australian colony to be of Irish ethnicity.

By the 1840s the exercise of patronage from London was being regarded with disfavour in New South Wales. The youthful Irish born James Martin, recently qualified as a solicitor, was engaged by Robert Lowe as editor of the latter's newly established weekly journal, the *Atlas*. Martin used its editorial columns to support the movement for Responsible Government in the colony,[63] as well as his personal views regarding local appointments resulting from patronage exercised by the Colonial Office in London. In this latter regard Martin was enthusiastic in his denunciations not only of the officials at Whitehall who exercised the patronage but also of the recipients of that patronage, including especially his fellow Irishmen, Plunkett, Therry, Callaghan. In an editorial of 23 August 1845 Martin wrote,

> There is no matter too small or too insignificant to escape the notice and the interference of these gentlemen [Lord Stanley, the Secretary of State, and James Stephen, the Permanent Under-Secretary]. In no case are we safe from their controlling power. They can send out their friends and their dependants to fill the highest office --- they can create new offices for the benefit of their petty agents of political corruption at home; and they may fix the salaries of these people in what amount they please …[64]

A month later Martin, in an editorial headed "The Patronage of the Colonial Office", presented perceived examples of the misuse of patronage as an argument in favour of Responsible Government, writing,

> So long as it [the Colonial Office] holds this patronage almost every office in the colonies will be placed in improper or inferior hands. [A] tithe of the servants of

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[62] Bennett, *op. cit.* n 60, pp 8-9.

[63] Under the heading "The Serfdom of the Colonies" is the following editorial, "The comparative insignificance of the distant dependencies has hitherto enabled the Colonial-office to assume the most despotic power without resistance or enquiry.
The idea of governing the colonies by the will of one man [the Secretary of State], is one which we cannot but look upon as the most monstrous that can well be conceived" (*Atlas* (Sydney), Saturday, 19 July 1845, p 397).

[64] *Atlas*, Saturday, 23 August 1845, p 457.

> the Crown in this colony would not be able to earn their salt if thrown upon their own resources. They are conspicuous among men of their own class around them, only for their remarkable inferiority ...
> We may select the department of the law by way of example; and there we have an Attorney-General who, whatever may be his merits as an indefatigable public officer, is very far from being the leader of the bar; and we have also a Solicitor-General who is inferior to the Attorney-General. As Criminal Crown Solicitor we have Mr. Moore Dillon who ... would never have presumed to practice as an attorney at all, if his friend, the Attorney-General had not found a legal birth [*sic*] for him, in which no legal knowledge was required. And last though not least, there are those two "stop-gaps", as a contemporary not inappropriately terms them --- Messrs. Cheeke and Callaghan who, though decent and pleasant people enough in their way, are not by any means to be compared with other members of the colonial Bar. We may be told that some of these gentlemen were originally appointed here, but if they were, it was through the influence of persons who were themselves appointed from home. If the Attorney-General had not been sent to us from Downing-street, we should never have had Messrs. Callaghan and Moore Dillon in any public situation in this colony. We are, therefore, justified in looking upon their appointment as a consequence of the patronage which the Colonial Office holds in its hands. In addition to those whom we have already named, we have on the Bench Mr Roger Therry --- a gentleman whose legal reputation is too well known to need any further illustration from such humble hands as ours. All the appointments which these officers hold, might be easily filled by abler men who are at this moment in the colony, and would be so filled if we had responsible government, and the patronage of Downing-street were abolished.[65]

The foregoing hostility manifested by Martin towards such fellow Irishmen as the extremely able and upstanding Plunkett (damned with faint praise), as well as the competent and hard working Therry (merely damned), and also the still youthful Callaghan (he had attained the age of 30 only two days before the publication, in which he was so patronisingly dismissed) was in marked contrast to the welcoming help usually shown by Irish practitioners to each other only a few years earlier. Perhaps Martin, a very newly admitted solicitor at the time, was labouring under a sense of inferiority, and felt a degree of resentment towards the members of the "senior branch" of the legal profession. Any such resentment would have been greatly inflamed by the reaction of the Bar eleven years later when, in circumstances of controversy, Martin, still a solicitor, was appointed Attorney-General in August 1856. He was admitted to the Bar several weeks later.

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[65] *Atlas*, Saturday, 20 September 1845, p 505. John Moore Dillon, an Irish attorney, held the office of Crown Solicitor for Criminal Business, 1839-1859.

Introductions Lying upon the Governor's Table

There was a class of young men, especially university graduates, including many young Irishmen, who went to the Australian colonies in the expectation of obtaining some official appointment, but without having influential patrons or sponsors, and without receiving any commitment from the Colonial Office before they departed their homeland. Some of them will be noticed in a later chapter.

Soon after arriving in Sydney, such a young Irish lawyer, Thomas Callaghan, recorded in his diary a conversation with an Irish doctor named Palmer, who had gone to Sydney in total reliance upon an introduction from Lord Normanby, the Secretary of State for the Colonies (who held office as such for only a few months in 1839), to Governor Gipps, and which proved to be nothing but "a mere lithographed circular". Callaghan continued,

> He [Palmer] said that he told the Governor that he understood that it was so, and the Governor told him that in fact he had already nearly 600 such letters then lying upon his table. This is a good prospect for me so far as my introduction from Lord Normanby goes! However I will do without it.[66]

Despite that disclaimer, Callaghan appears to have presented to the Governor his own introduction from Lord Normanby, and that introduction was relied upon by Sir George Gipps in subsequently seeking confirmation from the Secretary of State of the provisional appointment by the Governor of Callaghan as Crown Prosecutor, where Gipps referred to Callaghan as "A Barrister [who] was brought under my notice by Lord Normanby in a letter dated 1st June 1839".[67]

It is extraordinary (and was cruel to the subjects of such introductions) that Normanby should have provided so many *pro forma* introductions to the Governor of New South Wales regarding inexperienced and usually unqualified young men, who then incautiously went to Australia, relying on those introductions in the hope of securing some public office in the

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[66] J. M. Bennett (ed.), *Callaghan's Diary* (Sydney, 2005), pp 13-14, March 18th 1840, Monday.

[67] Gipps to Stanley, 6 January 1845, Mitchell Library A 1267/8, p 1933.

colony. The story recounted to Callaghan by the Irish doctor lost nothing from its repetition down the years. In the early 1850s R. Rudston Read, who had held official positions on the goldfields in Victoria, in writing of those newcomers who came to the Australian colonies with letters of introduction to the Governors, recorded that an immigrant from Manchester (who fervently wished himself back in his home city) told Read that "he had heard that his Excellency had had nearly *seven hundred* applications from people who had lately arrived, wanting employment".[68]

Formal introductions continued to flow on to the Governor's desk. In the early 1850s Gipps's successor, Sir Charles FitzRoy, worried about the hordes of young adventurers arriving in the colony, with letters of introduction to him, expecting government employment if they did not strike it rich on the goldfields. He found the plethora of such introductions a nuisance to himself, but he was the more alarmed at the fate awaiting many of the newcomers. FitzRoy expected that Sydney would soon emulate Melbourne where "hundreds of gentlemen by birth, education & profession" found neither gold nor employment suited to their station. The athletic secured a bare subsistence working on the roads, but for those used to sedentary employment, there was no opening. The Governor complained to Sir John Pakington, then Secretary of State for the Colonies, that those seeking introductions should before leaving England be apprised of the colony's real circumstances.[69] At about the same time similar views were expressed by a young English lady who with members of her family visited the Australian gold fields in the early 1850s. The future Mrs Charles Clacy advised prospective emigrants not to rely upon introductions ("they are but useless things at best --- they may get you invited to a good dinner ..."). Like Governor FitzRoy, she observed the sorry fate of those young men not accustomed to heavy physical work, writing,

> [I]t is distressing to notice the number of young men incapable of severe manual labour, who with delicate health, and probably still more delicately filled purses, swarm the towns in search of employment, and are exposed to heavy expenses which they can earn nothing to meet. Such men have rarely been successful at the

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[68] R. Rudston Read, *What I Heard, Saw, and Did at the Australian Gold Fields* (London, 1853), pp 112-113. The emphasis appears in the original publication.

[69] John Kennedy McLaughlin, "Sir Charles FitzRoy", Chapter 10 in David Clune and Ken Turner (eds.), *The Governors of New South Wales 1788-2010* (Leichhardt, NSW, 2009), pp 215-216.

> diggings! the demand for them in their accustomed pursuits is very limited in proportion to their numbers; they gradually sink into extreme poverty ... [70]

Other men, without promises of official appointment or influential patrons, were encouraged by friends or colleagues to seek professional success in the Antipodes. A striking instance was a chance meeting with Sir Alfred Stephen, the Chief Justice of New South Wales, on leave in Britain in 1860, which is said to have convinced Frederick Matthew Darley of the opportunities for advancement at the colonial Bar.[71] Darley, of an ancient Ascendancy family, was a graduate of Trinity, called to the Irish and English Bars. At the time of meeting Stephen, Darley, aged 30 and about to marry, was establishing a successful practice on the Munster Circuit in Ireland. However, encouraged by Stephen's recommendation, and also by family associations of both himself and his wife with Sydney,[72] Darley left Ireland and went to Australia in 1862. His decision was vindicated, as he was outstandingly successful at the Sydney Bar, and ultimately became the sixth Chief Justice of New South Wales.

Redmond Barry's decision to go from Ireland to Australia and practise law resulted from purely pragmatic reasons. Upon his father's death in 1839, Redmond, a younger son, who in that year was called to the Irish Bar, recognised that he had to make his own way in life. The prospect of doing so in the Antipodes attracted him more than that in the overcrowded profession of his native land. His diary recorded his decision perfunctorily --- "proposed Emigration to Jim [his brother], sow had 10 strong ones" --- as if the latter circumstance overshadowed the former.[73] His decision, like Darley's, was the right one. In Melbourne he achieved the highest professional and public recognition. Throughout the

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[70] Mrs. Charles [Ellen] Clacy, *A Lady's Visit to the Gold Diggings of Australia in 1852-53* (Melbourne, 1853) (ed. by Patricia Thompson, Melbourne, 1963), pp 147-148.

[71] J. M. Bennett, "Sir Frederick Matthew Darley: Sixth Chief Justice of New South Wales", *Journal of the Royal Australian Historical Society*, Vol. 63, Pt 1 (June 1977), p 40 at p 42; J. M. Bennett, *Sir Frederick Darley: Sixth Chief Justice of New South Wales 1886-1910* (Leichhardt, NSW, 2016), p 16; *Sydney Morning Herald*, 6 January 1910, p 6.

[72] Mrs Darley (née Lucy Forest Brown) was the sister of Thomas Alexander Browne (thus spelt), who as an infant had been brought to Sydney by his parents and who subsequently, under the *nom de plume* "Rolf Boldrewood", was to become a pioneer of Australian literature (J. M. Bennett, *Sir Frederick Darley: Sixth Chief Justice of New South Wales 1886-1910* (2016), *loc. cit.*, n 71).

[73] Ann Galbally, *Redmond Barry: An Anglo-Irish Australian* (Melbourne, 1995), pp 28-29.

middle of the nineteenth century he was seen by many as the leading citizen in that thriving metropolis. Without him, the educational and cultural life of Melbourne would have been much diminished.

As the British colonies in Australia advanced to Representative and then Responsible Government, patronage, as a local gift, became one of the most prized advantages of occupancy of the Treasury benches in the various colonial Legislatures. It was frequently abused. However, that is a consideration beyond the scope of the present examination of patronage originating in the British Isles as it applied to the emigration of Irish lawyers.

"Forty hats on the Munster circuit and not enough work for twenty"

Once they had graduated from Trinity and had been called to the Bar or been admitted as solicitors, the over-supply of young Irish gentlemen so qualified caused many, through practical and financial necessity, to look beyond their homeland for a successful career. As William Stawell (later to be the second Chief Justice of Victoria) put it in 1842, since "there were 40 hats on the Munster Circuit and not enough work for 20, it was time to go".[74] His lack of professional success in the short time he practised at the Irish Bar is surprising, since Stawell came of a legal family, long established in County Cork, within the Province of Munster. His grandfather, George Stawell, was a barrister and a Justice of the Peace, as was William's father, Jonas Stawell, although Jonas appears to have devoted himself to the family property near Mallow in County Cork, rather than to the practice of his profession.[75] His mother, Elizabeth Foster, was of a family distinguished in the Church, in the Parliament and in the Law, being the daughter of a Church of Ireland Bishop, a niece of the last Speaker of

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[74] Lady Stawell [Mary Frances Elizabeth Stawell], *My Recollections* (London, 1911), pp 196-197. Another version of this statement is "Forty-two hats went on that circuit, and not briefs to put in twenty of them; I must have work; if it is not to be got here, I'll go" ("Men Who have Guided the Church's Life: Sir William Foster Stawell", *Church Standard*, 18 October 1918, quoted in Charles Parkinson, *Sir William Stawell and the Victorian Constitution* (Melbourne, 2004), p 2). Stawell had practised, without any signal success, on the Munster Circuit during the preceding two years (J. M. Bennett, *Sir William Stawell: Second Chief Justice of Victoria, 1857-1886* (Leichhardt, NSW, 2004), pp 6-7).

[75] Bennett, *op. cit.* n 74, pp 1-3.

the Irish House of Commons and a granddaughter of a Lord Chief Baron of the Court of Exchequer in Ireland.

Neither did William Stawell, a Protestant and the grandson of a Church of Ireland bishop, suffer the disadvantages resulting from religion which his Catholic contemporary Thomas Callaghan encountered. The latter, when reaching his decision to emigrate to Australia, reflected upon his short time practising as a barrister in Dublin. He wrote in his diary, "I have never despaired while there is a glimmering of hope."[76] A few days later, when he had made his decision, Callaghan wrote, "I will try my fortune in the new hemisphere. I know not why **I**[77] should not succeed there as well as the others who have gone before me ... I know that I shall have many difficulties to surmount but it not the first time that I have encountered & overcome them."[78] On the day after his twenty-fourth birthday Callaghan

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[76] Diary of Thomas Callaghan (Mitchell Library MSS 2112, Box 1, Item 2), Thursday, 28 February 1839. Reference to this original manuscript is to be distinguished from reference to the published work, J. M. Bennett (ed.), *Callaghan's Diary* (Sydney, 2005). That latter work is hereafter referred to as *Callaghan's Diary.*

[77] Thus emphasised in the holograph original manuscript.

[78] *Op. cit.*, n 76, Sunday, 3 March 1839. It was not as if Callaghan was totally without connections in New South Wales. His elder brother, Standish Callaghan, who had come to Australia several years earlier, was already established in the Hunter region, having been appointed Postmaster at Newcastle on 19 August 1838, Clerk to the Bench of Magistrates at Newcastle in 1839 and Clerk of Petty Sessions at Newcastle from 1 January 1840 (Colonial Secretary Returns, [30253], [44520], *Government Gazette*, 1 January 1840). This could be described as an instance of the concept of chain migration, by which the migration of one member of a family results in his (or her) being joined by other family members, or close friends. Another, earlier, instance of such chain migration was manifested by the Chambers family. Charles Henry Chambers, an attorney of the Court of Exchequer in Ireland, arrived in Sydney in March 1822. Successful in professional practice in New South Wales, Chambers persuaded his parents (his father, David Chambers, was a solicitor in Belfast) and two of his brothers, David (also an attorney of the Irish Court of Exchequer) and Hugh John (who qualified and was admitted in New South Wales) to join him in Sydney (J. M. Bennett, *op. cit.*, n 23, pp 36-38, 74-75). The existence of the concept of chain migration in the case of emancipated convicts was recognised by Roger Therry (text to n 22).

recorded his private conclusion that "I should 'do better' by emigrating to Sydney ..."[79] In Australia his hopes were fulfilled, Callaghan ultimately achieving professional success at the New South Wales Bar and appointment to the judiciary of that Colony, but with many setbacks along the way.

Another Irish barrister, with hopes (unfulfilled) of a judicial appointment in South Australia, was Matthew Joseph Martyn, called to the Irish Bar in Trinity Term, 1843. Within hours of the death of George John Crawford, Judge of the Supreme Court of South Australia, Martyn, who had not then been admitted in South Australia, was advancing his claim to the vacant office. Unsurprisingly, he was not successful.[80]

Some years later another Irish barrister in Sydney, Frederick Matthew Darley (already noticed earlier in this chapter) was reporting to his father in Dublin regarding his professional activities in the colony. The father, Henry Darley (also a lawyer, holding an official position in the Irish Court of Chancery), wrote to the son in 1866, "When I look at many of your contemporaries doing nothing, [I] consider how acutely you would have felt your position if you had remained in Ireland and had not gone into practice". The following year Frederick was able to assure his family in Ireland that he had "the largest business of any man at the Bar in Sydney". Two years later the father wrote from Ireland, "I understand you are retained in

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[79] *Op. cit.*, n 76, Thursday, 19 September 1839. Before his departure Callaghan took various practical steps to facilitate his reception in Sydney. He obtained a formal letter of introduction from the Secretary of State to the Governor of New South Wales, dated 1 June 1839, being the letter which Callaghan later considered not relying upon (Gipps to Stanley, 6 January 1845, Mitchell Library A 1267/8, Reel 363, p 1933, CO 201/355, folio 1933; *Callaghan's Diary*, pp 13-14, 18th March 1840, Monday, n 65, *supra*). Callaghan then arranged an interview with Sir Michael O'Loghlen, the Master of the Rolls and the leading Catholic lawyer in Ireland (and later to be the progenitor of a legal dynasty in Victoria). O'Loghlen, who at the interview was kind and friendly towards Callaghan, furnished him with a letter of introduction to John Hubert Plunkett, the Catholic Attorney-General of New South Wales (*op. cit.*, n 75, Sunday, 14 July 1839). Callaghan was also put in contact with the Marchioness Wellesley, from whom he promptly received "a very friendly note" (*ibid.*). The reason for Callaghan's communication with Lady Wellesley is somewhat obscure. Nevertheless, almost three years after his arrival in Sydney Callaghan was hopeful of benefiting from Lady Wellesley's patronage (*Callaghan's Diary*, p 147, Wednesday, November 16th 1842). Her husband, the Irish born Richard, the Marquess Wellesley, was the elder brother of the Duke of Wellington, and had held office as Lord Lieutenant of Ireland (1821-1828, 1833-1834). Perhaps the facts that the Marchioness was a Catholic (as had also been the first wife of the Marquess) and that the Marquess was well disposed towards Catholic emancipation (of which his brother the Duke was a staunch opponent) were the reasons why Callaghan contacted the Marchioness. The Marchioness, a lady of American birth, was a direct descendant of Charles Carroll ("Carroll the Settler"). Neither the Marquess, his wife nor the Duke of Wellington appears to have manifested the slightest interest in Australia.

[80] Details of Martyn's application are set forth in Chapter 6, text to notes 64-67.

every important case" and making just over £3000 a year, continuing, "There are not five men at the Irish Bar making that income."[81] In 1878, the year before he took Silk, Frederick reported on his earnings from the circuit sittings at Wagga Wagga, to which the elder Darley responded, "Your trip to Wagga Wagga was both healthful and profitable. There are no such fees as £275 going here, and I am sure you are in receipt of a larger income from the Bar than any man at the Bar here."[82]

Incumbered Estates - "Sold Up By a Dwarf in a Garrett"

Among the various reasons that prompted Irish lawyers to emigrate was the curtailment of a lucrative conveyancing and related practice, that curtailment flowing from the enactment of the Irish Incumbered Estates legislation in the late 1840s and 1850s. The *Incumbered Estates (Ireland) Act* 1849 (12 & 13 *Vict*., *c*. 77) established a Commission (styled under the Act as The Commissioners for Sale of Incumbered Estates in Ireland, but usually referred to in practice as the Incumbered Estates Commission, or the Incumbered Estates Court). The Commission was not intended to be a permanent institution. After a series of extensions of its life the Commission was in 1858 replaced by the Landed Estates Court, consequent upon the *Landed Estates Court (Ireland) Act* 1858 (21 & 22 *Vict.*, *c*. 72). The new Court was, like its predecessor, a court of record. It was, however, to be a permanent court, and its members were styled judges. The jurisdiction of the Court was much more extensive than had been that of the Commission.[83]

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[81] Correspondence between Frederick Matthew Darley and Henry Darley, dated 23 April 1866, 17 June 1867, 8 September 1869, Darley Family Papers in the possession of the family in England (hereinafter referred to as "DFP"), quoted in J. M. Bennett, *op. cit.*, n 72, pp 24. By the end of the century the income of barristers in Ireland had hardly improved. One memoirist observed that no man became really rich at the Bar in Ireland, unless he was a Law Officer (that is, Attorney-General or Solicitor-General), and that "there were not ten [Silks] earning £3000, and hardly a Junior earned £2000" (Maurice Healy, *The Old Munster Circuit: A Book of Memories and Traditions* (London, 1939), p 286).

[82] 4 June 1878, DFP, quoted in Bennett, *op. cit.*, n 72, p 25.

[83] The circumstances surrounding the creation of the Commission and of the Court and the history of each institution are set forth in J. A. Dowling, "The Landed Estates Court, Ireland", *The Journal of Legal History*, Vol. 26, No. 2, August 2005, pp 143-182.

The establishment of those institutions had its origin in the 1845 report of the Devon Commission (the Royal Commission presided over by the Earl of Devon[84]). In the mid-nineteenth century a large section of the Irish landlord class were little better than nominal proprietors. A mountain-load of mortgages or a network of settlements rendered those owners powerless even to attempt to carry out any of the numerous reforms and improvements which a really free and independent owner might arrange with his tenantry. Since more than half the estates were subject to entail, the owner was no more than a tenant for life, and in most cases could not raise money on the land for purposes of improvement nor guarantee to a tenant the fruits of the latter's improvements.[85] Sales of estates were rare, and were attended with difficulty due to encumbrances.[86] In Ireland, but not in the rest of the United Kingdom, a judgment creditor (often owed only a small sum) was entitled to have the judgment operate as a charge on the debtor's lands, and to have receivers appointed over those lands. Creditors thus became encumbrancers similar to mortgagees, thereby exacerbating the difficulties in investigating title if the land were to be sold. Among the victims of this unsatisfactory system was Hercules Robinson. As a result of the enforced sale of the family estates Robinson in 1846 had to give up his chosen career in the Army, and he ultimately entered the Colonial Service, becoming, in due time, Governor of New South Wales (1872-1879).[87]

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[84] *Report of Her Majesty's Commissioners of Inquiry into the state of the law and practice in respect to the occupation of Land in Ireland*, *British Parliamentary Papers*, House of Commons Series, 1845 [605], xix, 1. The Earl, an English landlord, was the owner of an estate in County Limerick. The other members of the Commission were Irish landlords (J. C. Brady, "Legal Developments, 1801-79", Chapter XXIV in W. E. Vaughan (ed.), *A New History of Ireland*, Volume V, *Ireland Under the Union, I 1801-70* (Oxford 1989), p 456)).

[85] Adams, *op. cit.*, n 31, p 9.

[86] The problems caused by the law of entail and by encumbrances were considered by William Edward Hearn, *The Cassel Prize Essay on the Condition of Ireland* (London, 1851), pp 21-22. Hearn contrasted the efficiency of procedure under the Encumbered Estates legislation with the delays and inefficiencies in the Irish Court of Chancery, describing the legislation as "admirable, ... and most beneficial to the public, and most merciful both to debtors and creditors" (*op. cit.*, pp 85-86, 87). Hearn, a graduate of Trinity and called to the Irish Bar, was at the time of the Essay (for which he received a prize in the substantial sum of 200 guineas [£210]) Professor of Greek at Queen's College, Galway. He was later to have a distinguished academic career at the University of Melbourne, where he was one of the original Professors. He practised little at the Victorian Bar, to which he was admitted in 1860, and his appointment as Queen's Counsel in 1886 was a recognition of his scholarly work in the field of law (J. A. La Nauze, "Hearn, William Edward (1826-1888)", *ADB*, Volume 4, p 370).

[87] Bede Nairn, "Robinson, Sir Hercules George Robert, 1st Baron Rosmead (1824-1897)", *ADB*, Volume 6, p 48; Neil Graham, "Sir Hercules George Robinson (3 June 1872-19 March 1879)", being Chapter 14 in David Clune and Ken Turner (eds.), *The Governors of New South Wales 1788-2010* (Leichhardt, NSW, 2009), p 294.

The Devon Commission recommended that something be done to reduce delay and expense in the transfer of land, and to facilitate the process of making out title to land.[88] However, the measure, excellent in itself, was proposed and presented to Ireland at such a time (during the Great Famine) and under such circumstances (where tenants were being evicted and entire villages were being razed by their landlords) as to give it a decidedly sinister aspect.[89] The scheme included proceedings for a compulsory sale, whereupon the title of the purchaser could not be subject to challenge. Although such proceedings were available in the Court of Chancery, the procedure in that Court was complex and protracted, and the purchaser did not obtain the security of title which resulted from sale by the Incumbered Estates Commission and its successor, the Landed Estates Court. The Commissioners proceeded in an inverse method to that of the Court of Chancery. Instead of the order for sale being made as the final step in a long and complicated process in which the claims of the parties had been investigated, in the Commission the order for sale was made first, with the claims of the parties and other necessary investigations taking place thereafter.[90] The parliamentary title thus conferred upon purchasers was regarded as a particular benefit, to the extent that in some instances owners themselves created encumbrances on their estates simply to enable them to be sold by the Commission (or, subsequently, by the Court) and a parliamentary title to be given to the purchaser.[91]

The scheme, although popular with some landlords (as has just been observed, some even initiated the proceedings themselves), was not universally so regarded. For example, Lord Mountcashel (whose 61,711 acres, with a yearly rental of £18,500, were sold for £240,000) considered himself treated with peculiar harshness and injustice by the petitioners,

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[88] Dowling, *op. cit.*, n 83, pp 144-148.

[89] A. M. Sullivan, *New Ireland: Political Sketches and Personal Reminiscences*, 2 volumes, 4 ed. (London, 1878), Chapter XII, especially at pp 281-288; Woodham-Smith, *op. cit.*, n 9, pp 409-410.

[90] "The Incumbered Estates Court", 36 *Dublin University Magazine* (1850), p 311, at p 322; Dowling, *op. cit.*, n 83, p 151.

[91] Dowling, *op. cit.*, n 83, p 152.

despite outstanding writs of execution against his land totalling about £20,000.[92] Presumably he was content to receive a return of less than 8 per cent (calculated from the foregoing figures), without taking into consideration the inevitable costs of administration, repairs and maintenance, let alone of improvements. His Lordship was greatly angered by Mr Commissioner Hargreave, before whom the sale was ordered to be made. The Commissioner was a very diminutive gentleman, whose office, on an upper storey of a house in central Dublin, was at that time used as the courtroom of the Incumbered Estates Commission. Mountcashel, during the proceedings, was heard to exclaim that it was bad enough to have his estates confiscated, but to be "sold up by a dwarf in a garret" was more than he could endure.[93]

Whether popular or not with landlords, the scheme certainly was not popular with lawyers. It substantially reduced the considerable (and lucrative) conveyancing work which had previously been available to the legal profession, since the legislation had "the double effect of simplifying conveyancing and diminishing the number of Chancery suits".[94] One Irish attorney, who emigrated to Melbourne in the early 1850s, said that he had left his homeland because of

> the infernal Encumbered Estates Bill, which drove all the old families to ruin, and destroyed his profession. He was deprived of three hereditary receiverships under the Court of Chancery, which had been in the family for years, and brought business enough for his father's office and his own; and the paltry squibs of new litigation, which mostly went off at a single hearing, were not enough to pay poor rates.[95]

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[92] *Cork Constitution*, 24 November 1857, cited in James S. Donnelly, Jr., "Landlords and tenants", Chapter XVII in *A New History of Ireland*, Volume V, W. E. Vaughan (ed.), *Ireland Under the Union, I, 1801-70,* p 333 at p 345. Some years earlier in the House of Lords the noble Earl had opposed the extension of Poor Law relief to the destitute Irish peasants, including Mountcashel's own tenants, during the Great Famine (Earl of Mountcashel, House of Lords, 8 February 1847, *Hansard*, Volume 89, p 938).

[93] Sullivan, *op. cit.*, n 89, p 297. Hargreave, one of the original members of the Commission, was appointed to the Court upon its establishment, remaining in office until his death in 1866.

[94] *Irish Law Times and Solicitors' Journal*, Vol. 6 (6 April 1872), p 179; Daire Hogan, *The Legal Profession in Ireland 1789-1922* (Dublin, 1986), p 84.

[95] William Kelly, *Life in Victoria or Victoria in 1853, and Victoria in 1858*, 2 volumes (London 1859), Vol. I, p 73.

The Incumbered Estates legislation was probably one of the "recent legal enactments" referred to by an Irish lawyer who, applying to the Colonial Office for an official appointment in Melbourne, wrote in 1854,

> The loss of business caused by the operation of the Act for the abolition of imprisonment for debt and the disgraceful state of the bar owing to recent legal enactments have induced me to look to the colonies for a better field for my exertions.[96]

In Sydney in 1860 the repercussions of the Incumbered Estates legislation were still being treated as a source of grievance for Ireland. At the very well attended St Patrick's Day Banquet held on 17 March of that year the Irish-born Attorney-General, Plunkett, who presided over the occasion, in proposing the toast to "The Fatherland", said, "There was evidently much hope for Ireland, even in the face of the Encumbered [*sic*] Estates Act …"[97]

At least one member of the Irish judiciary was scathing in his public criticism of the Landed Estates Court. Christian LJ considered it to be "a blot and excrescence upon the symmetry of our judiciary", describing it as "ill-regulated and eccentrical, an excrescence and deformity" upon the judiciary.[98]

"A Fair Share of Loafs and Fishes"

By the mid-nineteenth century the subject of Irish born lawyers holding official positions throughout the British Empire sufficiently exercised Edward Grogan, MP for Dublin, to move in the House of Commons on 8 June 1858 for a return of the names, salaries, date of appointment, and nature of office, of all the principal persons connected with the

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96 CO 309/12, J. B. Barnes (quoted in Geoffrey Serle, *The Golden Age: A History of the Colony of Victoria, 1851-1861* (Carlton, Victoria, 1963) (1968 edition), p 49).

97 *Freeman's Journal* (Sydney), Wednesday, 21 March 1860, p 2.

98 *In re Tottenham's Estate* (1868) IR 3 Eq. 528.

administration of justice in the colonies.[99] The response, provided by the Colonial Office almost a year later, on 15 April 1859, was revealing.[100] That parliamentary report attracted some interest in Australia.

An article in the *Moreton Bay Courier* loosely summarised and commented upon that report.[101] It considered that the purpose of the inquiry was probably to ascertain whether the Irish Bar was receiving "its fair share of the loafs [*sic*] and fishes within the gift of the Colonial Office", compared to the English and Scottish Bars (whose members appeared to enjoy almost a monopoly of the law offices in the North American (that is, the future Canadian) colonies). In Melbourne the *Argus* summarised what appeared in the *Dublin Evening Packet*, in order to show that Irish barristers have contrived to get "the best things going" in Australia. The newspaper then listed a "catalogue of the fortunate Hibernians", but in fact showed only those holding official appointments in Victoria. The article concluded by observing that in Ceylon the Honourable P. I. Stirling, senior puisne judge (salary £1800); Mr Josh Cuffe, registrar of Supreme Court (salary £600); and Mr D. Purcell, police magistrate (salary £350), were members of the Irish Bar.[102]

The reaction of the *Freeman's Journal* (a publication of Irish and Catholic sympathies) was, however, somewhat different. It stated that Sir Edward Grogan's object "was to show in what proportion the colonial prizes have been awarded to members of the legal profession in England, Ireland, and Scotland", and continued, "Sufficient may be gleaned from a perusal of this state paper to show that the Irish bar has not received anything like its fair share of the

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[99] Sir Edward Grogan (1802-1891), a graduate of Trinity, who had been called to the Irish Bar in 1840, represented the City of Dublin in the House of Commons from 1841 to 1865. In reporting his creation as a baronet in 1859 the *Times* said of Grogan, "He is, of course, an uncompromising Tory of the old school" (*Times* (London), 5 April 1859, p 12). He had also been staunchly opposed to any relaxation of the Penal Laws. There was nothing in his parliamentary speeches or questions (which included such varied topics as taxation in Ireland and the observance of the Sabbath) to suggest that Grogan maintained any interest in colonial affairs. The reason why he proposed the motion of 8 June 1858 is a mystery.

[100] House of Commons *Parliamentary Papers* (Administration of Justice (Colonies, &c.)), ordered to be printed, 18 April 1859. A copy of that document constitutes Appendix B to this Thesis.

[101] *Moreton Bay Courier* (Brisbane), 14 August 1860, p 4.

[102] *Argus* (Melbourne), 21 September 1860, p 5.

loaves and fishes within the gift of the Colonial Office", before setting forth, and commenting upon, some of the appointments listed in the response of the Colonial Office.[103]

The parliamentary report demonstrated that the Irish Bar was well represented throughout the Empire. Judicial offices held by Irish barristers ranged from the Chief Justice of Victoria (Sir William Stawell, on a salary of £3000 a year) to a Police Magistrate in Ceylon (Mr Purcell, on £350 a year); whilst other legal offices held by Irish barristers ranged from the Attorney-General of the Cape of Good Hope (William Porter, on £1200 a year) to the Attorney-General of Natal (M. H. Gallwey, on £450 a year).

Regarding the Australian colonies, five Irishmen were listed as holding legal appointments in New South Wales. In Victoria, nine Irishmen were so listed. The author of the article in the *Moreton Bay Courier* stated that in Victoria "[t]he Irish element is more in the ascendant ... than in any other British colony, as of twenty legal functionaries, nine belong to the Irish bar", and identified those so listed as being "all Irishmen, and members of the Queen's Inns [*sic*], Dublin".[104] In Western Australia only the Civil Court Commissioner was listed as being a member of the Irish Bar. No members of the Irish Bar were disclosed as holding legal appointments in Tasmania or South Australia. (That statement, in respect to Tasmania, although strictly accurate, is somewhat misleading. Sir Valentine Fleming, at that time the Chief Justice of Tasmania, was an Irishman and a graduate of Trinity. He was called to the English Bar (Gray's Inn) in January 1834. He thereafter practised, with only limited success, at the English Bar, never at the Irish Bar, before departing for Australia in November

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[103] *Freeman's Journal* (Sydney), Saturday, 4 August 1860, p 4. The author of the article, in referring to the Gold Coast (presently called Ghana), where there were no Irish lawyers holding legal appointments, introduced a degree of levity, when he identified that Colony as being one "where it is said there are always two governors, one coming home dead and another going out alive!". That somewhat facetious statement was repeated in the *Moreton Bay Courier* of 14 August 1860, p 4, n 100, *supra*.

[104] The author of the article appears, however, to be incorrect in his inclusion of James Langton Clarke as a member of the "Queen's Inns, Dublin" (*scil.*, the King's Inns, Dublin), and there appears to be some doubt as to whether he was, in fact, an Irish barrister (in the sense of having been called to the Irish Bar). Clarke, who was born in Donegal, is not included in Edward Keane *et al.* (eds.), *King's Inns Admission Papers 1607-1867* (Dublin, 1982). He was admitted to Trinity College on 5 July 1824, aged 22. However, he does not appear to have taken a degree from that institution. The entry in George Dames Burtchaell and Thomas Ulick Sadleir (eds.), *Alumni Dublinenses* (London, 1924), p 153, includes the statement, "[Afterwards at Cambridge; County Court Judge, Australia.]".

1841, to take up a minor quasi-judicial appointment in Van Diemen's Land[105]) It will be appreciated that at the time of the Colonial Office response Queensland was still part of New South Wales, being erected into a separate colony only later in 1859.[106]

In the mid-nineteenth century Irish lawyers may not have been as favourably treated as their English and Scottish colleagues in the distribution of legal and judicial appointments throughout the Empire (especially in the North American colonies). But it is obvious that they enjoyed at least a reasonable share of those appointments in New South Wales and in Victoria.

Conclusions

Irish lawyers left their homeland for divers reasons. Many who went to America in the eighteenth and early nineteenth centuries did so to escape political or religious disadvantage, although in that regard they were often disappointed. Those who went to the Australian colonies in the nineteenth century usually hoped for greater professional prospects than in the overcrowded legal profession of Ireland, and for the possibility of official appointments. Sometimes their hopes were fulfilled; sometimes they were not. But the legal profession and the administration of justice in Australia would have been very different without them, as will be demonstrated in later chapters.

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[105] Bennett, *op. cit.*, n 53, pp 3-4. See text to notes 53, 54, *supra*.

[106] Letters Patent, 6 June 1859 (published in *Queensland Government Gazette*, 10 December 1859); Order in Council, 6 June 1859 (published in *Queensland Government Gazette*, 24 December 1859); A. C. V. Melbourne, *Early Constitutional Development in Australia* (ed., R. B. Joyce) (St Lucia, Queensland, 1963), p 445.

CHAPTER 3

CHOICE OF DESTINATIONS

England not a favoured destination --- The New World --- Religious toleration and its Denial --- Irish Lawyers in the Thirteen Colonies --- The American Frontier --- America not a popular destination --- Canada --- Choices of residence in retirement --- India and the Empire --- Disadvantages --- Australia more popular

This chapter will consider why Irish lawyers, having decided to emigrate from their homeland, chose the far distant Australian colonies, rather than nearby England or relatively close North America, or even India, or other colonies in the expanding British Empire.

The reasons for rejecting England as a destination were simple. Although the journey across the Irish Sea was short, the English legal profession was hardly less crowded than that in Ireland. Further, to practise in England the Irish lawyer would have needed to spend two additional unremunerative years there, enrolled in an English Inn of Court, in order to be called to the English Bar, or five unremunerative years of apprenticeship to an English equivalent practitioner in order to become an English attorney. The Irish practitioner, perforce, had to look to a destination where his professional qualifications would be recognised.

That was the problem confronting one young Irish barrister in the 1890s. Edward Augustine St Aubyn Harney, a graduate of Trinity and called to the Irish Bar, was desirous of practising in England, but his Irish qualifications did not entitle him to do so. A visit in 1896 to Western Australia, where his brother Francis was practising as a solicitor in Coolgardie, resulted in Edward being admitted as a lawyer in that Colony in the following year. After a successful Australian career, both political and professional (he served in the first Commonwealth Parliament as a Senator for Western Australia, and was subsequently appointed King's Counsel in that State), Harney returned to the United Kingdom in 1906.

However, it was not in Ireland that he resumed his professional and political life, but in England, where the admission rules had in the meantime been relaxed, to enable him to be called to the English Bar. That was what Harney had wanted all along. It was only because he could not practise in England that Harney had established himself in Western Australia, where, as an Irish barrister, he could be admitted as a practitioner by the Supreme Court of that colony. Once again he built up a successful career, both professional and political, in a new homeland, becoming an English King's Counsel in 1920 and being elected to the House of Commons, as the Liberal MP for South Shields, in November 1922, retaining the seat until his death in May 1929.

The Australian colonies would, at first sight, appear a somewhat strange choice for an Irish lawyer seeking to practise his profession away from his homeland. The colonies of North America were geographically much closer to Ireland. The passage across the Atlantic took only a matter of weeks, whereas (until the latter part of the nineteenth century) that to the Antipodes occupied as many months. Yet, as will be seen, the American colonies (and, later, States) were largely ignored by those Irish lawyers intending to abandon their homeland and practise in other climes.

India was also a closer destination, and, as one Empire was lost to the British Crown in America, a new Empire was arising in Asia. Yet, again, India and the emerging British colonies in the Orient were not favoured destinations for Irish lawyers. Why were the Australian colonies, especially New South Wales and Victoria, so favoured in the expectations (and, indeed, in their fulfilment) of so many Irish legal practitioners? Not only were there reasons which made Australia an attractive destination, but there were strong reasons which made most other destinations unattractive to Irish lawyers.

Irishmen in the New World

Neither Irishmen nor lawyers --- let alone Irish lawyers --- were particularly welcome in the British colonies of North America. For Irish lawyers seeking to establish themselves professionally in another country that unpopularity of the Irish in the American colonies was a very relevant consideration. It was an unpopularity which existed from the earliest British settlements in North America and continued well into the nineteenth century, by which time the Australian colonies had become the destinations of choice for emigré Irish lawyers. It is appropriate, therefore, to consider the causes of that unpopularity of the Irish and of lawyers in America.

From their establishment those American colonies were destinations for Irish settlers. Each of the early plantations of North America, wrote Sir Roger Therry (himself an Irish lawyer emigrant to Australia),

> was originally established by a separate band of adventurers from the parent state --- Roman Catholics, Puritans and Independents, at different seasons, flying from tyranny, and laws of religious persecution that would not tolerate their existence.[1]

But even before those flights from tyranny and persecution Irishmen had ventured abroad to seek their fortunes in the New World. Irishmen accompanied Raleigh to Virginia in 1587. Others emigrated before the Thirteen American Colonies declared their independence from Britain, and greater numbers followed to the newly established United States or to the continuing British possessions in North America.[2] However, at the outset there were no lawyers among them. According to one student of the period,

> Lawyers were johnnies-come-lately in the American colonies. In the seventeenth century there were hardly any lawyers in America. There was animosity toward the bar based upon the theocratic organisation of the New England colonies, Quaker mistrust in the middle colonies, and the jealousy of

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[1] Sir Roger Therry, *Reminiscences of Thirty Years' Residence in New South Wales and Victoria*, 2 ed. (London, 1863), p 4.

[2] Michael J. O'Brien, "The Irish in the United States", in Joseph Dunn and P. J. Lennox (eds.), *The Glories of Ireland* (Washington, D.C., 1914), pp 184-200.

> the aristocratic planters in the Southern provinces. There were early statutes in some colonies prohibiting the practice of law, and judges were deliberately appointed who had no legal training. But gradually in the eighteenth century (and none too soon as it turned out) the legal profession became established, first in the middle colonies, then in the South and in New England. The colonists who settled America with utopian ideals came to find out that no society, no free society at least, can exist without a legal profession.[3]

William Penn had planned that the laws of Pennsylvania should be so plain and the statements of the parties to controversies so simple, that everyone could plead his own case. "But, as has always happened, the event showed that lawyers were necessary to the administration of justice according to law."[4] The unfavourable reputation of lawyers in Maryland was evidenced as early as 1669, when a committee of the lower house of the General Assembly of the colony asserted that "the privileged attorneys are one of the great grievances of the country."[5] Similarly, the establishment of Georgia in 1732 was celebrated on account of "its being free from that pest and scourge of mankind called *lawyers*".[6] Such attitudes regarding the unpopularity of lawyers in the community continued well into the

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[3] Robert F. Boden, "The Colonial Bar and the American Revolution", *Marquette Law Review* (Marquette University, Milwaukee, Wisconsin) (1976) Vol. 60, No. 1, p 1 at p 2, citing Roscoe Pound, *The Lawyer from Antiquity to Modern Times* (St Paul, Minnesota, 1953), especially at pp 136, 139, 140 and 144-163. Also, as to lawyers and judges without legal qualifications in American Colonies and States, see Maxwell Bloomfield, *American Lawyers in a Changing Society,1776-1876* (Cambridge, Massachusetts, 1976), p 85, n 47, and works there cited.

[4] Pound, *op. cit.*, n 3, p 139. In New South Wales almost two centuries later there was an interesting parallel to Penn's unrealistic and impractical proposal. In the Parliament of that Colony a Bill was introduced, seeking to permit litigants to employ agents of any kind to represent them in court. In successfully opposing the Bill, the Irish born Premier, Sir James Martin (later to be the fourth Chief Justice of New South Wales), observed that it should have been entitled "a bill to abolish the legal profession, and prevent any person obtaining costs in any kind of litigation", saying that it would weaken the Bar and then the Bench, "if we were to have neither a skilled Bar nor a skilled Bench, we should be sweeping away all the results of our civilisation for the last one thousand years." (*Sydney Morning Herald*, 13 May 1871, p 4; J. M. Bennett, *Sir James Martin, Premier 1863-1865, 1866-1868, 1870-1872 and Fourth Chief Justice 1873-1886 of New South Wales* (Leichhardt, NSW, 2005), pp 204-205.)

[5] Quoted in Pound, *op. cit.*, n 3, p 150.

[6] Hugh McCall, *The History of Georgia containing Brief Sketches of the Most Remarkable Events up to the Present Day*, 2 volumes (Savannah, Georgia, 1811), Vol. I, p 54. The foregoing phrase has frequently been associated with James Oglethorpe, the founder of Georgia, although there is no evidence that it was used by him. The perceived prohibition against lawyers in the early years of the Colony was without statutory foundation. It was soon, however, recognised that for want of assistance from a legal profession in the Colony, "the poor miserable inhabitants were exposed to a more arbitrary government, than was ever exercised in Turkey or Muscovy" (McCall, *loc. cit.*, *supra*).

nineteenth century. Sir Charles Wentworth Dilke, an observant and perceptive English visitor to Michigan in 1867, recorded the absence of any lawyer in a certain town in that State being treated as a matter for approbation.[7]

Religious Toleration and its Denial

It has already been observed, in Chapter 1, that until the relaxation of the Penal Laws in 1792 Catholics could not practise the Law in England or Ireland and were subject to other legal restraints. The deprivation of civil rights from Catholics, and others who did not adhere to the Established Church, was not confined to Ireland or England. Those who left their homeland and emigrated to the English colonies in North America, in the hope of finding religious toleration denied to them in England or Ireland, were often sadly disappointed. Some of the those colonies continued, and entrenched by law, the practical manifestations of religious bigotry, not only against Catholics, but also against all non-Anglicans, which then obtained in England and Ireland.

Maryland is an example. That colony had been established to be a haven and refuge for Catholics and Dissenters --- it was even named after a Catholic Queen, Henrietta Maria, the consort of King Charles I. Maryland had a significant Catholic population (chiefly from Ireland), and was at its establishment a pioneer in religious toleration, in consequence of that colony's *Toleration Act* of 1649 ("... no person ... within this province ... professing to believe in JESUS CHRIST shall ... from henceforth be any ways troubled or molested ... in respect of his or her religion"). However, that religious toleration was denied to Catholics for a period in the 1650s while the Puritans were in control of the colony. Religious toleration, which had returned to Maryland with the Restoration of the Monarchy in 1660, ended in 1689. The Church of England became the established religion of the colony in 1701, and from 1718 Catholics were denied the right to vote or to sit in the colonial Legislature, to hold public office or to practise the law. That situation remained until the inauguration of the United States in 1789. Despite the guarantees regarding the free exercise of religion and the

[7] Sir Charles Wentworth Dilke, *Greater Britain*, new edition (1885) (London, reprint, 1907), p 60.

prohibition against any establishment of religion, contained in the First Amendment to the Constitution of the United States, successive constitutions of the State of Maryland have required of holders of public office a belief in the Christian religion (with a qualification in the case of Jews), or in the existence of God.[8]

Religion was not the only reason for the unpopularity of Irish settlers in the American colonies. Most of those settlers came from the lowest social and economic strata in their homeland. Thus they were unpopular with the Puritans in the theocracies of New England (for whom material success was evidence of divine approbation), and with the prosperous merchants and landowners in the Middle and Southern colonies.

One Irishman who experienced the foregoing strictures resulting from his birth and religion was Charles Carroll (known as "Carroll the Settler"). Carroll, although called to the English Bar (Inner Temple), does not appear to have practised in England, and certainly not in Ireland, before he arrived in Maryland to assume office as Attorney-General in 1687. He was probably the only Catholic Irish lawyer to settle in Maryland. Within two years, however, Carroll, on account of his religion, was deprived of his office and found himself in prison. Limited in practising his profession, Carroll succeeded in business, ultimately becoming not only the largest landowner and richest citizen in the Colony, but also the progenitor of a line of famous American lawyers and statesmen.[9]

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[8] Even the current Constitution of Maryland, thereby discriminating against atheists, provides, in Article 37, "That no religious test ought ever to be required ... other than a declaration of belief in the existence of God; ..." Similarly, by Article XXXVIII of the South Carolina Constitution of 1778, "the Christian Protestant religion" was declared to be the established religion of the State. The governor and other high officials and members of the Legislature were required to be "of the Protestant religion"; and acknowledgement of the being of a God and belief in a future state of rewards and punishments were listed among the qualifications of electors (Oliver Wendell Holmes Devise: *History of the Supreme Court of the United States*, Volume I *Antecedents and Beginnings to 1801*, ed. Julius Goebel, Jr. (New York, 1971), p 375, n 79). In Georgia, whilst lip service was paid to the liberty of conscience and the free exercise of religion, those rights were withheld from Catholics, and the latter right was subject to a proviso that "its ministrations and enjoyment were peaceable and caused no offence or scandal to the government" (Charles C. Jones, Jr., *The History of Georgia*, 2 volumes (Boston, 1883), Volume I, p 92).

[9] Ronald Hoffman, ""Marylando-Hibernus": Charles Carroll the Settler, 1660-1720", *The William and Mary Quarterly* (Williamsburg, Virginia), Third Series, Vol. XLV, No. 2 (April 1988), pp 207-236.

A generation later Daniel Dulany, another Irishman, but not a Catholic, did not experience the restrictions and problems encountered by Carroll, and achieved professional and political success in Maryland. Dulany (known as "Daniel Dulany the Elder") was born in Queen's County, Ireland, and supposedly attended, but did not graduate from, Trinity College.[10] He had no qualifications in the Law when he arrived in Maryland in 1703, with two older brothers, as, in a twenty-first century phrase, "economic migrants". Having been apprenticed to a local lawyer, Dulany in 1709 was admitted to practice before the Charles County Court in Maryland. In 1716 he travelled to London, where he entered Gray's Inn. Although he spent only a few months in England, upon his return to Maryland his affiliation with the English Inns of Court gave Dulany a status which few colonial lawyers then enjoyed. He served as Attorney-General of Maryland, was elected to the lower house and in 1742 was appointed to the upper house of the colonial Legislature.[11] Dulany could not have held any of those offices, and, indeed, could not have practised law in that colony after 1718, if he had been a Catholic. Despite Maryland's original aim to be a bastion of religious freedom, by the end of the seventeenth century Catholics were discouraged from settling there. Maryland became a colony where the Church of England was the religion established by law and where only its adherents enjoyed civil rights.

There were a number of Irish lawyers, or (probably more accurately) Irishmen who subsequently became lawyers or practised law, who left their homeland and crossed the Atlantic to the American colonies. However, it appears that very few of the Irishmen who achieved professional success as lawyers in America in the eighteenth century were already qualified practitioners at the time when they left Ireland. It is unlikely that, before the prohibition of Catholics from practising law in Ireland was repealed in 1792,[12] lawyers of that religion would have left home expecting to be able to practise law in the American colonies. If they did so, however, they would have been sorely disappointed had their destination been Maryland. In any event, few of those practitioners appear to have been Catholics. But it is

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[10] However, he does not appear in George Dames Burtchaell and Thomas Ulick Sadleir (eds.), *Alumni Dublinenses* (London, 1924), or in the Trinity *Catalogue of Graduates* (Dublin, 1869).

[11] Gregory A. Stiverson, "Dulany, Daniel (1685 - 5 Dec. 1753)", *American National Biography*, Volume 7, p 38.

[12] By 32 *Geo.* III, *c.* 21 (Ir.) (18 April 1792), known as the *Catholic Relief Act* of 1792. See Chapter 1, text to n 21.

still surprising that hardly any Protestant Irish lawyers sought to emigrate and establish their practices in the North American colonies. Perhaps the unpopularity of Irish in general and of lawyers in particular was the reason why Irish lawyers chose not to relocate to such an unwelcoming destination. Even in the nineteenth century, the hundreds of thousands of Irish immigrants to the United States and to British North America included very few legal practitioners. The factual circumstances which were the basis for the famous statement of Thomas Jefferson (himself a lawyer) in 1774 that "Our ancestors who emigrated hither were laborers, not lawyers"[13] remained unchanged throughout many succeeding generations.

Irish Lawyers in the Thirteen Colonies

In considering why the Australian colonies became the destination of choice for Irish lawyers departing their native land in the nineteenth century, it is instructive to consider some of those Irish lawyers who in that and the preceding centuries left Ireland for the American colonies, later the United States of America, their reasons for leaving Ireland, and what they did in America. The number of those who had qualified or practised their profession in Ireland was few. Some after their arrival obtained qualifications sufficient to enable them to practise in America. Their careers should be compared and contrasted with those of the Irish lawyers who chose Australia as their destination. Very few of the Irishmen who achieved professional success as lawyers in America in the eighteenth and nineteenth centuries were already qualified practitioners at the time when they left Ireland. This was in marked distinction from the situation in the Australian colonies, where lawyer immigrants were ordinarily already qualified to practise before their arrival, and often had been in practice for some years beforehand. The essential reason for the departure of lawyers from Ireland was the hope for better prospects of professional success than they could expect to achieve in that country's over-crowded legal profession.

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[13] Thomas Jefferson, *A Summary View of the Rights of British America*, July 1774, Jefferson Papers, 1: 121-135 (published in *The Founders' Constitution*, Volume 1, Chapter 14, Document 10 (Chicago, 1987)).

There were several men of Irish birth who, having arrived in America as infants or children, later qualified in the law, and some achieved fame in their profession or in politics. Such were William Paterson, one of the Founding Fathers of the United States Constitution, and one of the most distinguished legislators and jurists of his generation,[14] and James Smith, a signatory to the Declaration of Independence.[15] But it is difficult to describe, with any accuracy, Paterson or Smith as being Irish lawyers. Others, born in Ireland who came to America as adults achieved fame and celebrity as lawyers in the early years of the United States. But, likewise, they had not qualified or practised as lawyers in their native land. Most fought, usually against the British, in the Wars of Independence, and subsequently held political office. The reasons why they left Ireland were various, often an expectation of better prospects than in the impoverished and over-crowded professional world in Ireland. Such were probably the reasons for the emigration of Aedanus Burke, likely a Catholic, who, without legal qualifications, either in Ireland or in America, was elected to the judiciary of South Carolina, where he enjoyed a distinguished career in the politics and the courts of that State.[16] Similarly, Thomas Burke,[17] a medical practitioner in Ireland, who in America gave up medicine for the law, before achieving success as a legislator and politician (becoming the State's third Governor) in North Carolina.[18]

The element of religious and political persecution described by Therry in his *Reminiscences* is revealed in the circumstances of the departure from his homeland of John Daly Burk. He is said to have been admitted to Trinity College on 5 June 1792, but to have

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[14] Maeva Marcus, "Paterson, William (24 Dec. 1745 - 9 Sept. 1806)", *American National Biography*, Volume 17, p 119.

[15] Patrick M. Geoghegan, "Smith, Col. James (c. 1713-1806)", *Dictionary of Irish Biography*, Volume 8, p 1020. Smith's elder brother, George Smith, had also qualified and practised as a lawyer in Pennsylvania. (Geoghegan, *ibid.*)

[16] Harry M. Ward, "Burke, Aedanus (16 June 1743 - 30 March 1802)", *American National Biography*, Volume 3, pp 947-949.

[17] Although referred to as a cousin of Aedanus Burke (O'Brien, *op. cit.*, n 2 p 191), no genealogical material has been advanced in support of such a relationship, and neither Ward, *op. cit.*, n 16, nor Harry M. Ward, "Burke, Thomas (ca. 1747 - 2 Dec. 1783)", *American National Biography*, Volume 3, p 954, nor "Burke, Thomas (ca. 1747-1783)", *Biographical Directory of the United States Congress* (bioguide.congress.gov) make any reference to such a connection.

[18] Harry M. Ward, "Burke, Thomas (ca. 1747 - 2 Dec. 1783)", *American National Biography*, Volume 3, p 954.

been expelled, for "deism[19] and republicanism", in 1794. Associated with such political persecution was a commitment, actively pursued by some Irishmen, alike in the Plantation Colonies in America, as in Australia (by, for example, Daniel Deniehy), to have done with the British Crown and to create a republican form of government. To avoid prosecution for sedition, Burk fled to America in 1796, where in Virginia he "began to practise law (although he had no formal qualifications)".[20] Renowned for his fiery temper (that characteristic being not unknown in Irishmen[21]), Burk on 11 April, 1808 was fatally wounded in a duel with a Frenchman, whose countrymen Burk had denounced as a "pack of rascals".[22]

The American Frontier

After the Thirteen Colonies had achieved independence and the new nation began its expansion westward, Irishmen, including several lawyers, were among the settlers in the new States and Territories. At least one achieved notoriety as a "firebrand Irishman" rather than as a competent professional practitioner. That was Luke E. Lawless, an early legal practitioner in the newly acquired territory (part of the Louisiana Purchase) which subsequently became the State of Missouri. He is said to have been a Catholic, born in Dublin in 1781, to have been a graduate of the University of Dublin and a member of the Irish Bar (as well as having served in senior and responsible positions as an officer in the French Army under Napoleon) before arriving in St Louis in 1824.[23] Those statements, for which no authority is cited, are disputed in the standard history of Missouri, where the date of his arrival in St Louis is given as 1816 or 1817. Whether or not he had qualified as a lawyer in Ireland, Lawless certainly practised

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[19] Deism is the belief in the existence of a god on the testimony of reason, without accepting revelation.

[20] James Quinn, "Burk, John Daly (1772?-1808)", *Dictionary of Irish Biography*, Volume 2, pp 20-21 at p 21. However, Sally L. Jones, "Burk, John Daly (1772-1808)", *American National Biography*, Volume 3, pp 946-947, makes no reference to Burk ever practising law.

[21] See Chapter 8 of this Thesis, "Duelling and Aggressiveness Among Irish Lawyers".

[22] Jack Lynch, "Felled on the Field of Honour - The Seditious Patriot: Mr. John Daly Burk", *Colonial Williamsburg Journal* (Williamsburg, Virginia), Autumn, 2005. Lynch confines himself to the statement that, while in Petersburg, Burk "began to practice [*sic*] law", without citing any authority for that assertion.

[23] Anton-Hermann Chroust, "The Legal Profession in Early Missouri", *Missouri Law Review* (University of Missouri School of Law, Columbia, Missouri), Volume 29, Issue 2, Spring 1964, Article 1, p 135.

as such in Louisiana, where "his aggressive conduct at once made him a figure of mark".[24] Lawless, in his relations with his fellow practitioners and with the judiciary, certainly manifested many of the less admirable elements of the Irish character --- aggressiveness, unrestrained temper, personal confrontation, umbrage at perceived slights. He was involved in several duels. That unpopularity of Lawless would probably have deterred most other Irishmen from desiring to be associated with him at the Missouri Bar. Indeed, Arthur L. Magenis (to whom further reference will shortly be made) appears to have been the only other Irish lawyer in Missouri at that time.

According to Louis Houck, the historian of Missouri, it has been stated that "Lawless was connected with the Irish rebellion in 1798 and very likely was colonel in that uprising rather than in the French service."[25] Although the name of Luke Lawless does not appear in the Trinity *Catalogue of Graduates* or in *Alumni Dublinenses*, one Luke Lawless (not Luke E. Lawless) was called to the English Bar in 1803 and subsequently to the Irish Bar in 1806.[26] The obituary of Lawless which appeared in the Dublin newspaper, the *Nation*, on 7 November 1846, giving details of his exploits in the French Army under Napoleon, does not question that the Missouri practitioner and the Irish barrister referred to in the *King's Inns Admission Papers* were the same man.[27]

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[24] Louis Houck, *A History of Missouri*, 3 volumes (Chicago, 1908; reprint edition, New York, 1971), Volume III, p 19.

[25] John Fletcher Darby, *Personal Recollections of Many Prominent People I have Known* (St Louis, 1880), quoted in Houck, *op. cit.*, n 24, p 19. Houck does not, however, identify the location of this statement attributed to Darby.

[26] Edward Keane *et al.* (eds.), *King's Inns Admission Papers 1607-1867* (Dublin, 1982), p 280, where the following entry appears, "2nd s. of Philip, Warren Mount, Co. Dublin, brewer, and Bridget Savage; aged 24 on 20 July 1805, has gone through a complete course of classical education and served for some time in HM Navy. 28 October 1802, L.I., 26 April 1803, 12 June 1806."

[27] *Nation* (Dublin), 7 November 1846, quoted in W. V. N. Bay, *Reminiscences of the Bench and Bar of Missouri* (St Louis, 1878, p 444). Neither is that identicality questioned by the authors of the relevant entry in the *Dictionary of Irish Biography* (Patrick M. Geoghegan and C. J. Woods, "Lawless, John (1780-1837)" and "Lawless, Luke (1781-1846)", *Dictionary of Irish Biography*, Volume 5, pp 353 and 354). However, it is not without significance that the latter article states, "Curiously he [Luke Lawless] is listed continuously as a barrister in *Wilson's Dublin Directory* (1809-1836), firstly at 29 French St., Dublin, later (from 1819) without an address ...". It is possible that either Lawless himself or his subsequent biographers or obituarists have adopted for the Missouri practitioner the identity of the Dublin barrister. It must be remembered that Luke Lawless, Dublin barrister, was one of twenty-one children of his parents, and that at least two of his brothers were also lawyers (Patrick M. Geoghegan and C. J. Woods, *op. cit.*, *supra*, p 354).

Lawyers appear to have been involved in most of the duels fought in Missouri until the practice (often resulting in the death of one of the participants) came to an end shortly after 1840. As in the Ireland of the eighteenth century, trials in Missouri in the forty years following its acquisition by the United States were bitterly contested, and members of the Bar often made their professional and political encounters into personal affairs, with consequent challenges being issued.[28] Edward Bates (who arrived from Virginia in 1815 and was admitted to the Missouri Bar in the following year, and later was to be Attorney-General in Lincoln's first Cabinet in 1860) on occasion found himself in dispute with Lawless, at least one such encounter bringing them to the verge of a challenge.[29]

A courtroom confrontation in the United States District Court for the District of Missouri between Lawless and Judge James H. Peck in 1826[30] resulted in the former being dealt with for contempt of court, with the consequence that, at the instance of Lawless, Judge Peck was impeached before the United States Congress.[31] Lawless himself was for several years in the 1830s a Federal Circuit Judge, but his appointment was not renewed, being opposed by the members of the Bar of the Third Judicial Circuit (centred at St Louis), who, presumably, had been objects of "his pungent sarcasm".[32] Just as in the Ireland of the preceding century, it was not unusual in frontier settlements in the United States for lawyers,

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[28] William Francis English, "The Pioneer Lawyer and Jurist in Missouri", *The University of Missouri Studies*, Vol. XXI, No. 2 (University of Missouri, Columbia, Missouri, 1947), p 113. For example, Lawless acted as second for his friend Thomas H. Benton (later to become one of the first Senators for the newly admitted State of Missouri), also a lawyer, in a duel with another lawyer. In a trial in October 1816 in which both participants had been appearing for opposing parties there was a dispute as to the evidence. The duel ensued, and the other lawyer was killed by Benton (Houck, *op. cit.*, n 24, p 77). Lawless has been described as "Benton's intimate crony, an Irish adventurer named Luke Lawless" (George Cochran, "The Reality of 'A Last Victim' and Abuse of the Sanctioning Power", *Loyola of Los Angeles Law Review* (2004), Volume 37, p 691 at p 696).

[29] Lawless to Bates, 18 August 1820; Bates to Lawless, 19 August 1820 (Bates Papers, Missouri Historical Society, St Louis, Missouri, cited by English, *loc. cit.*, n 28).

[30] By that time Benton had become a Senator for the State of Missouri. His senatorial colleague from that State described the litigation in which the courtroom confrontation between Lawless and Peck took place as being "a subject to sheer speculation by a few lawyers, including a corrupt Senator [Benton] and a common swindler [Lawless]" (Walter Nelles and Carol Weiss King, "Contempt by Publication in the United States", *Columbia Law Review* (1928), Volume 28, p 401 at p 426).

[31] Arthur J. Stansbury, *Report of the Trial of James H. Peck, Judge of the United States District Court for the District of Missouri, before the Senate of the United States on an Impeachment preferred by the House of Representatives Against Him for High Misdemeanours in Office* (Boston, 1833).

[32] Houck, *op. cit.*, n 24, p 21.

not merely those of Irish extraction, to invoke a duel as a means of settling a professional dispute.[33] On account of the disturbed political and social conditions in Missouri at that period, it was quite common for lawyers, and even judges, to come into the courtroom armed with pistols and ataghans,[34] the presence of such weapons hardly constituting a deterrent to lawyers already temperamentally inclined to resort to a duel as a means of resolving the litigation.[35] Such conduct on the part of Lawless resulted in his unpopularity among the lawyers and judiciary of Missouri, making it unlikely that other Irish lawyers would have chosen to be his colleagues in that State.

However, one colleague of Lawless at the Missouri Bar, and a witness at the impeachment of Judge Peck, was another Irishman, Arthur L. Magenis, who, born in Belfast, had migrated to the United States in 1819. Although apparently without formal legal qualifications (he was neither a graduate of Trinity nor called to the Irish Bar[36]), Magenis, active in Democratic Party politics and the Irish community in St Louis, achieved professional success and preferment, arguing cases before the Supreme Court of the United States and being the United States Attorney for Missouri (1834-1840).[37]

With the exception of Charles Carroll the Settler (and possibly of Luke E. Lawless), none of the foregoing Irishmen who practised law in America had obtained professional qualifications in Ireland, and Carroll had gone to Maryland in order to assume public office, not to embark on private practice. None of the others had departed Ireland with the intention of practising law. Some seem to have entered the legal profession almost by chance, in an age and at locations when there appear to have been few formal requirements necessary to

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[33] Houck, *op. cit.*, n 24, pp 74-75. For example, in 1807 in Cape Girardeau, Missouri (well before the territory had acquired statehood) a duel was fought between the first clerk of the courts of the Cape Girardeau district, Joseph McFerron, an Irishman by birth (although probably not a lawyer), and William Ogle, the latter being killed (Houck, *op. cit.*, n 24, p 75).

[34] In Missouri this word was apparently used to describe a knife or a dagger, rather than, more accurately, a curved Turkish sabre (usually spelled "yataghan"): English, *op. cit.*, n 28, p 80, quoting from Henry Marie Breckenridge, *Recollections of Persons and Places in the West* (Philadelphia, 1868), p 267.

[35] English, *op. cit.*, n 28, p 80; Breckenridge, *loc. cit.*, n 34.

[36] The name of Arthur L. Magenis does not appear in the Trinity *Catalogue of Graduates* (Dublin, 1869) or in Edward Keane *et. al.* (eds.), *King's Inns Admission Papers 1607-1867* (Dublin, 1982).

[37] Marmion Family Tree: www.marmionfamilytree.com/index.html.

practise as a lawyer and no professional requirements for election as a judge. The situation in Australia was completely different. The Supreme Court of each colony was empowered to admit legal practitioners, and those who had been admitted in England or Ireland were entitled to local admission in Australia. Judges in Australia were required to be legal practitioners and were appointed by the Crown, originally on the nomination of the Secretary of State for the Colonies and later, after the achievement of Responsible Government, by the Governor on ministerial advice, under local legislation. The concept of election to the Judiciary has always been totally unknown in Australia.

It was reasonable that lawyers desirous of making a career away from the overcrowded profession in Ireland would choose a destination where persons of their race, profession and religion were not unwelcome. It should be a destination where their professional qualifications would be recognised, and they could immediately be admitted to practice, and where there would be no competition from persons without legal qualifications. Further, it should be a destination where, in the case of barristers, the judges before whom they would be appearing would themselves be professionally qualified and enjoy security of tenure. It is unlikely that such a destination would be America. Thus those Irish lawyers had to look elsewhere.

Some Irishmen achieved success professionally in the Law, and especially in politics, after their arrival in America. However, the only Irishmen who had practised law in their homeland before going to America were those who, like Thomas Addis Emmet and William Sampson (already referred to in Chapter 2 and to whom further reference will be made later in the present chapter), found that, in consequence of their participation in the 1798 uprising, they could no longer remain in the land of their birth. The others, whatever their reasons for departing Ireland, did not go to America with the intention of practising the Law.

America Not a Popular Destination

Throughout the nineteenth century, when (as will emerge) the Australian colonies were a popular destination for Irish lawyers, the several millions of Irish emigrants to the United

States included few members of the middle classes, let alone of the professional classes. Those emigrants came mainly from the less prosperous sections of Ireland's population.[38] Most were of the impoverished and labouring classes, although some were farmers or tradesmen. Especially during and after the Great Famine of the 1840s they largely comprised starving or dispossessed peasants (of the class in the preceding century which had been described by Ireland's greatest historian as "[t]he peasantry ... sunk in poverty and ignorance"[39]). Curiously, although in Ireland they had eked out a living from the land, once in America they tended to congregate in the cities and rarely ventured into country areas.[40] In such cities as New York, Boston and Philadelphia the Irish formed an impoverished underclass, subsisting in circumstances of squalor, poverty and disease, no better and often far worse than those they had left in their homeland.[41]

In contrast to the Australian colonies, America was not a popular destination for Irish lawyers desirous, for whatever reasons, of leaving Ireland in the nineteenth century. As has already been observed, earlier in this chapter, the Irish were unpopular in America, as also were Catholics and lawyers. Whilst many Irish lawyers, already qualified as such, emigrated to Australia, remarkably few emigrated to America --- certainly few of any celebrity or publicity. Of the millions of Irish emigrants to America some, but very few, acquired qualifications as lawyers in their new country.

One who certainly did was Thomas Francis Meagher, a Young Irelander, sentenced to death consequent upon the 1848 uprising. Although admitted to the King's Inns in 1843, he was never called to the Irish Bar. His death sentence was commuted to transportation to Tasmania, whence he escaped to America in 1852. There he became a United States citizen and was admitted to the New York Bar, although it is unclear whether he ever practised as a

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[38] R. V. Comerford, "Ireland 1850-70: post-famine and mid-Victorian", Chapter XX in *A New History of Ireland*, Vol. V, *Ireland Under the Union*, I, 1801-1870, ed. W. E. Vaughan (Oxford, 1989), pp 383-385.

[39] W. E. H. Lecky, *A History of Ireland in the Eighteenth Century* (London, 1912), Chapter VI, p 111.

[40] There were, of course, exceptions to this generalisation, such as the Irish rural settlement in the State of Minnesota (Malcolm Campbell, "Immigrants on the Land: A Comparative Study of the Irish Rural Settlement in Nineteenth-Century Minnesota and New South Wales", being Chapter 9 in Andy Bielenberg (ed.), *The Irish Diaspora* (Harlow, UK, 2000), pp 176-188).

[41] Cecil Woodham-Smith, *The Great Hunger: Ireland 1845-9* (London, 1962), pp 246-254.

lawyer. A general in the Union Army and commander of the Irish Brigade during the Civil War, Meagher was subsequently appointed Secretary, and then Acting Governor, of the Montana Territory, where he died by drowning in somewhat mysterious circumstances.[42] But Meagher can hardly be regarded as a typical example of an Irish immigrant to America in the second half of the nineteenth century. Of a prosperous middle class family and educated by the Jesuits at Stonyhurst College in England, his departure from Ireland was not voluntary; he did not travel directly to America, but by way of Australia. In Ireland Meagher's fame rests upon his nationalist activities in the 1840s, and in America upon his military exploits in the 1860s, rather than upon any professional qualifications he may have obtained in his new country.

It is highly unlikely that semi-literate peasants, subsisting on the edge of destitution, would have had aspirations, let alone the ability or qualifications, to enter the legal profession in their new country. Doubtless, some of their descendants in subsequent generations succeeded in doing so. But there still remains the question why practising Irish lawyers who chose to emigrate preferred British colonies to the United States. Perhaps the explanation is the simple one of their familiarity with the legal and constitutional framework of the former contrasted with the latter. Also, in America it would have been necessary for them to acquire citizenship, and thereby to renounce their allegiance to the Crown. Whilst that may not have been a problem for some, presumably Catholic, Irish lawyers, it certainly would have presented a considerable obstacle to those of the Protestant persuasion.

Nevertheless, it is extraordinary that so few Irish lawyers who had qualified and practised their profession in their native land chose America when they decided to emigrate from Ireland. Of those very few, two did so in consequence of circumstances beyond their control, rather than of personal choice. They were Thomas Addis Emmet and William Sampson (to each of whom reference has already been made in Chapter 2). Emmet and Sampson, each a Protestant, succeeded in being admitted to the New York Bar, although neither was an American citizen. After the admission of the latter in 1806 the New York

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[42] G. Rude, "Meagher, Thomas Francis (1823-1867)", *ADB*, Volume 2 p 217; Thomas Keneally, *The Great Shame: A Story of the Irish in the Old World and the New* (London, 1998; reprinted, Vintage edition, Milsons Point, NSW, 2001), pp 470-475.

Supreme Court publicly declared that thereafter no non-citizen would be admitted to the Bar of that State.[43]

As the nineteenth century advanced, waves of emigration brought Irish settlers to America in ever-increasing numbers, accelerated by such occurrences as the potato famine in Ireland in the 1840s, the discovery of gold in California in 1849 and continuing economic depression in their homeland. Most of those emigrants came from the peasantry. No legal practitioners have been discovered among them. Occasionally a son, who as an infant or a boy had been part of a family emigration to America (as had been William Paterson in the preceding century), qualified in adulthood as a lawyer and entered professional practice. But such instances were rare. Even in succeeding generations it was far from common for a child, or even a grandchild, of Irish immigrants to enter the legal profession.

One reason why lawyers wishing to leave Ireland and practise their profession in another country avoided America was that, as has already been recorded earlier in this chapter, neither lawyers nor Irishmen were made welcome in North America in the colonial era or throughout the nineteenth century.[44] Such unpopularity and prejudices against Irish settlers continued in America until well into the twentieth century. That was despite the achievements of children and other descendants of Irish immigrants. For example, Andrew Jackson, a son of Irish immigrants, who was a lawyer as well as a soldier, and an enthusiastic duellist, became the seventh President of the United States. Another descendant of Irish immigrants, John Fitzgerald Kennedy, became his country's thirty-fifth President. But most of the Irish emigrés were destined for low class labouring and unskilled employment and filling the ranks of the police forces in New York, Boston and Philadelphia. Further, an Irish lawyer in America, even if popular among his fellow countrymen, would soon find, first, that

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[43] Bloomfield, *op. cit.*, n 3, p 71. The court's ruling is printed in 1 Johnson (N.Y. Sup. Ct.) 528 (1806).

[44] For example, one particular object of local detestation in Colonial America was Charles Shinner, Chief Justice of South Carolina from 1762 to 1768. Shinner, "an Irishman of the lowest class", who has been described as "a vulgar bully and blackguard" (Edward McCrady, *The History of South Carolina under the Royal Government 1719-1776* (New York, 1899), p 465), held no qualifications in any profession, let alone in the Law. He achieved his office through corrupt favouritism. The appointment of an ignorant and uncouth Irishman such as Shinner served only to increase the detestation in which the Irish were held by respectable non-Irish settlers. Inappropriate and corrupt appointments, such as that of Shinner, served to increase the unpopularity of the British administration in the Thirteen Colonies in the period immediately preceding the Wars of Independence.

they had little need of his professional services; and then, even if they did have such need, that they could not afford to pay for those services.

Irish Lawyers in the British North American Colonies

The fortunes of Irishmen proceeding to the British North American colonies (later to become Canada) were somewhat different from those of Irishmen who went to the Colonies which later became the United States. This was probably due, at least in part, to the continued supervision of the colonial administration of justice by the British authorities at Whitehall. Neither does the legal profession in those continuing British colonies appear to have suffered the obloquy experienced by lawyers in the Thirteen Colonies that were to become the independent United States. In regard to both the supervision of the administration of justice and the public attitude towards lawyers, the British North American colonies had much in common with the Australian colonies.

The constraints which an Irish legal practitioner was likely to encounter in the Thirteen Colonies were not as great in the continuing loyalist British colonies. But differences of law, language and ethnicity (and, possibly, of religion) would have precluded an Irish lawyer, especially a Protestant one, from seeking a professional future in Quebec. In the late eighteenth and early nineteenth centuries two Irishmen, Richard John Uniacke[45] and Bryan Robinson,[46] achieved professional success in Nova Scotia and Newfoundland respectively. But at the outset neither had gone to those colonies with that intention, or even as a qualified lawyer (although Uniacke returned to Ireland to complete his legal studies).

For one Irish lawyer, John Foster McCreight (1827-1913), Canada was his ultimate career destination, despite Australia being his original destination of choice. It came about in this way. Born into the Protestant Ascendancy at Caledon in County Tyrone, McCreight was

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[45] B. C. Cuthbertson, "Uniacke, Richard John", *Dictionary of Canadian Biography Online*, Volume VI (1821-1835).

[46] Phyllis Creighton, "Robinson, Sir Bryan", *Dictionary of Canadian Biography Online*, Volume XI (1881-1890). Robinson (1808-1887) was a paternal uncle of Sir Hercules Robinson, Governor of New South Wales (1872-1879).

the son of a Church of Ireland clergyman. His mother, Elizabeth Foster, was of an influential family, distinguished in the Church, in the Parliament and in the Law, being the daughter of a Church of Ireland bishop, a niece of the last Speaker of the Irish House of Commons and a granddaughter of a Lord Chief Baron of the Court of Exchequer in Ireland. McCreight graduated from Trinity College, and was called to the Irish Bar in November 1852. Probably aspiring to greater professional success in the Antipodes than was possible in the overcrowded legal profession in Ireland, he immediately went to Australia, where he was admitted to the Bar in Melbourne on 29 September 1853.[47]

Doubtless McCreight was encouraged in his choice of destination by the fact that at the time of his departure from Ireland four of his cousins (sons of various siblings of his mother) and his sister[48] had already emigrated to Australia. John Leslie Fitzgerald Vesey Foster, who had come to Australia in 1841, was by the time of McCreight's arrival the Colonial Secretary of Victoria, and soon was to be, briefly, the Acting Administrator of the colony. William Foster Stawell (subsequently to become the second Chief Justice of Victoria) had arrived in Melbourne in December 1842, and when McCreight reached Victoria was the Attorney-General of the colony. Two other cousins had also established themselves in Australia. One, Leopold Fabius Detegan Fane de Salis, had arrived in Sydney in 1840, and became a successful pastoralist. Later he was elected to the Legislative Assembly and subsequently was appointed a member of the Legislative Council of New South Wales. The other, William John Foster, had first arrived in Victoria in 1852, to seek his fortune on the goldfields, and was back in Victoria (after a brief visit to Britain) in 1854. Subsequently qualifying in law, Foster was another instance of an Irishman who achieved professional, and political, success in

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[47] It has been suggested by McCreight's biographer that "[a] theory has been advanced that some matrimonial entanglement or scandal caused the journey to Australia, but this is difficult to prove or refute" (Patricia M. Johnson, "McCreight and the Law", *British Columbia Historical Quarterly* (Victoria, British Columbia), Vol. XII, No. 2, April 1948, p 127 at p 130). (This is the second in a series of four articles in the *British Columbia Historical Quarterly* by Patricia M. Johnson dealing with aspects of the career of John Foster McCreight. The other articles appear in Vol. XII, No. 1, January 1948; Vol. XII, No. 3, July 1948; Vol. XII, No. 4, October 1948.)

[48] Letitia Dorothea McCreight married Edward William Jeffreys (1817-1899), a civil engineer, squatter and landowner, in Ireland on 21 May 1848, accompanying her husband back to Victoria in the following year. Jeffreys had originally settled in the Port Phillip District in late 1840, being subsequently joined by his brothers and his mother (J. O. Randell, "Edward William Jeffreys and his Collection of Country Views", *The La Trobe Journal* (State Library of Victoria, Melbourne), No. 31, April 1983, p 49 at p 50).

Australia. He practised at the Bar in New South Wales, where he became a member of the Legislative Council, was Attorney-General, and ultimately a Judge of the Supreme Court of that colony.[49]

With close kinsmen occupying such responsible positions, especially John Foster (who subsequently assumed the surname Foster-Vesey-Fitzgerald[50]) as Colonial Secretary and Stawell as Attorney-General, and later Chief Justice, of Victoria, McCreight should have achieved success as a barrister in Melbourne. Indeed, his professional career there does appear to have been successful. McCreight (who at the time of his arrival in Melbourne was aged only 26) served for various periods as a Crown Prosecutor in the Courts of General Sessions, at a salary of £600 a year, as well as enjoying the right of private practice.[51] He had been elected to the Melbourne Club, the leading gentlemen's club in that city, in 1854.[52] Yet, surprisingly, after only six years in Melbourne McCreight left Australia for Canada, arriving in Victoria, British Columbia, in 1860, where he practised his profession and then entered politics.

The reasons for McCreight's departure are obscure. Johnson has suggested that not only was he overshadowed by his cousins, Stawell and John Foster (notwithstanding the fact that Foster had already left the colony two years before McCreight did so), but that McCreight's relationship with his important cousins "might prove a difficulty as well as an advantage".

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[49] Martha Rutledge, "Foster, William John (1831-1909)", *ADB*, Volume 4, p 206.

[50] Betty Malone, "Foster, John Leslie Fitzgerald Vesey (1818-1900)", *ADB*, Volume 4, p 205.

[51] On 20 July 1855 McCreight was appointed Crown Prosecutor of the Courts of General Sessions for the several districts of Belfast (now Port Fairy), Buninyong and Ballaarat [such being the normal spelling at that time], Portland, and the Grange (*Argus* (Melbourne), Saturday, 21 July 1855, p 5), and on 14 January 1858 he was appointed Crown Prosecutor at Ballarat, Carisbrooke, and Hamilton (*Star* (Ballarat), Thursday, 14 January 1858, p 3); House of Commons *Parliamentary Papers* (Administration of Justice (Colonies, &c.)), ordered to be printed, 18 April 1859, p 50. A copy of that document constitutes Appendix B to this Thesis. McCreight's 1855 appointment was also referred to as the North Western District, where the Judge presiding was Arthur Nicholas Wrixon (another Irish born lawyer, who had arrived in Melbourne in 1850) (Hotham to Lord John Russell, 27 September 1855, Despatches from Governor to Colonial Office, 1851-1860, Mitchell Library A 2344, f 3656 at f 3658).

[52] Paul de Serville, *Pounds and Pedigrees: The Upper Class in Victoria 1850-80* (Oxford, 1991), p 314. McCreight's brother-in-law, Edward William Jeffreys, had been elected to the same club in 1846 (de Serville, *op. cit.*, pp 307-308). Jeffreys (and also one of his brothers, Henry Charles Jeffreys) had been appointed a Territorial Magistrate (that is, a Justice of the Peace) at Kyneton in 1852 (La Trobe to Earl Grey, 19 February 1852, General Commission of the Peace for the Colony of Victoria, Despatches from Governor to Colonial Office, 1852, Mitchell Library A 2341, f 721 at f 726).

Further, she suggests that at the time of the Eureka uprising (for which "Foster took the obloquy which William Stawell earned"[53]), and the consequent trials of participants, in which Stawell prosecuted, McCreight found himself forced to side with his cousins, whether or not he was in agreement with them. Johnson also suggests that McCreight was at a disadvantage in appearing before Stawell after the latter's appointment as Chief Justice in 1857.[54] But none of these proffered reasons adequately explains the decision of a young barrister to give up a successful professional career in Melbourne, where he had the benefit of family contacts with his sister and two influential first cousins, and to cross the Pacific and to attempt to establish himself in British Columbia, where at the time of his arrival he appears to have had no professional or personal contacts. Many years later a social column in one of the Melbourne newspapers intimated that the reason for his departure was that McCreight did not see an "opening" in Victoria.[55] That statement was hardly consistent with his official appointments and family contacts.[56]

However, in his new home McCreight was outstandingly successful in both law and politics. Elected to the Legislative Assembly when British Columbia became a Province of Canada, McCreight, somewhat curiously (as he was opposed to Responsible Government), was chosen to be the first Premier of the new Province in November 1871. After the defeat of his government thirteen months later, McCreight returned to the law, and was appointed a Judge of the Supreme Court of British Columbia in 1880. Shortly after his retirement in 1897, he departed Canada, not for his native Ireland, but for England, where he resided for the remainder of his life.[57] McCreight is one of the few examples (Edward Harney is another) of an Irish lawyer who established himself successfully in Australia, and then chose to depart for a professional career in another country, never to return to Australia, or to Ireland. However,

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[53] P. S. Cleary, *Australia's Debt to Irish Nation-Builders* (Sydney, 1933), p 107.

[54] Johnson, *op. cit.*, n 47, p 132.

[55] *Table Talk* (Melbourne), Saturday, 24 November 1894, p 3.

[56] By the time of his departure from Melbourne McCreight's sister Letitia had already left Victoria, returning to Europe with her husband and children, where they ultimately established their residence in London (J. O. Randell, *op. cit.*, n 48, p 53). McCreight's cousin John Foster was also by then no longer residing in Melbourne, having departed in 1857 for England (Betty Malone, *op. cit.*, n 50, p 205 at p 206).

[57] Tina Loo, "McCreight, John Foster", *Dictionary of Canadian Biography Online*, Volume XIV (1911-1920).

it should be recognised that, despite his significant achievements in British Columbia, Victoria was McCreight's favoured destination when he decided not to make his career in Ireland.

A parallel can be drawn between McCreight's choice of residence in his retirement and that of Sir Roger Therry when the latter retired from the Supreme Court of New South Wales in 1859. Having spent more than thirty years in Australia, Therry proposed retiring to his native Ireland. But there he found himself unknown and unrecognised. After only two months he wrote,

> Ireland does not improve upon acquaintance ... The generation I had known in early life has passed away, and that which has succeeded it does not strike me as an improvement on the one that preceded it. I found myself quite a stranger in my native land.[58]

Thereafter Therry spent his years of retirement in England and travelling on the Continent. In his *Reminiscences* Therry writes sadly of the disappointment experienced by a returning colonist such as himself, who finds all things changed, especially the friends of his youth,

> By the majority of those acquaintances who survive, he is forgotten; by the minority but half-remembered ... he feels that he is a stranger, "unknowing and unknown," in the crowd.[59]

Similarly it was Nice on the French Riviera (not Ireland, or England, where he had been a Member of the House of Commons) that Sir Charles Gavan Duffy chose as his home, when he retired after a stellar career in law and politics in Victoria. That decision may have been due, in part, to his siring a young family by his third wife. The French Riviera was also the choice of Sir Henry Wrenfordsley, who retired to the town of Antibes. Edward Harney, upon leaving Western Australia when aged only 40, neither returned to Ireland nor entered retirement, but made a new career for himself in England.

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[58] Macarthur Papers, Volume 34, Mitchell Library A 2930, pp 341-342, quoted in Sir Roger Therry, *Reminiscences of Thirty Years' Residence in New South Wales and Victoria* (second edition, London, 1863, facsimile edition (Sydney, 1974)), Introduction by J. M. Bennett, p [47].

[59] Therry, *op. cit.*, n 58, pp 358-359.

India and the Empire

The professional qualifications of Irish practitioners were recognised in the British Courts in India and in the colonies throughout the expanding British Empire. Yet India was no more a favoured destination for Irish lawyers in private practice than was North America.

Many Irishmen of the middle and professional classes (including some qualified as lawyers) in increasing numbers obtained employment in the administration of India, and, as the nineteenth century advanced, in the Indian Civil Service. A very high proportion of the military who served in India, both officers and other ranks, were Irishmen. That can partly be explained by the fact that the prohibition (at least in theory, but probably not strictly enforced in fact), until 1792, against Catholics serving, either as officers or in other ranks, did not exist in the armies of the East India Company. Thus a military career which was not available to them in their homeland or in Britain was open to Catholics in India. In the second quarter of the nineteenth century almost half the recruits entering the Bengal Army were Irish.[60]

That high representation of Irishmen in military service in India was not, however, reflected in the practice of the law in the Subcontinent. Throughout the late eighteenth and early nineteenth centuries registers were maintained of European inhabitants who were not in the service of the East India Company, in each of what became the three Presidencies of Bengal, Madras and Bombay. Those registers disclose, in the case of each such person, his occupation, country of origin, and country from which and year in which he had come to the respective settlement.[61] A consideration of those registers reveals valuable information

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[60] For example, from 1825 to 1850, of 7620 recruits, 2844 or 37.3 per cent, were English, 830 or 10.9 per cent were Scots, and 3639 or 47.9 per cent were Irish, while 307 or 4 per cent were born elsewhere (mostly born in India, or other garrison parts of the British Army) (Bengal Register of Recruits, India Office, quoted in Sir Patrick Cadell, "Irish Soldiers in India", *The Irish Sword*, *The Journal of the Military History Society of Ireland*, Vol. 1 (1950-1951), No. 2, p 73 at p 78). Cadell postulates, without citing authority, that "[t]he great majority of Irish officers [in the armies of the East India Company] must, however, have come from Protestant families" (*op. cit.*, at p 76), and that "[i]n the 'other ranks', the proportion of Irishmen was much greater" (*op. cit.*, p 77). He also observes that the percentage of Irish recruits was far greater in the late 1840s than in the earlier part of the quarter, stating, "[t]his was doubtless due to the famine years in Ireland, and to the increasing pressure of the population, which was only beginning to use the outlet to America" (*op. cit.*, p 78).

[61] India Office Records, maintained in the British Library, London, Biographical Records series, 0/5/26-31, consisting of Annual Lists of names for each Presidency, in alphabetical order, giving country of origin, length of residence, occupation and dwelling.

regarding Irish lawyers who chose to practise their profession in each of the three Presidencies throughout the relevant periods.

The register for October 1786 discloses that in Bengal there were five lawyers, three of whom had originated from England and two from Ireland, but all had come to India directly from England. Although the register is stated to be of "Inhabitants who are not in the Service of the Honble Company" [that is, the East India Company], one of those lawyers, Benjamin Sullivan, who had arrived in Calcutta in 1777 (and who was later to become the Second Puisne Judge of the Supreme Court of Judicature at Madras), was described as "Company's Solliciter [*sic*]".[62] The inference can be drawn that Sullivan was not in the full-time employment of the Company, but was on a retainer, presumably with the right of private practice.[63] The only other Irish lawyer shown in that register is Pullein Spencer, who had arrived in Calcutta in 1784, and who was described as "Attorney of the Mayor's Court".[64]

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[62] India Office Records, Biographical Records series, 0/5/30, Vol. 1, folio 4. Benjamin Sullivan (1747-1810) was born in Ireland, the son of an attorney who also held official appointments for the Counties of Cork and Wexford (*Debrett's Baronetage of England* (revised, corrected and continued by George William Collen) (London, 1840), p 532). Benjamin Sullivan was a kinsman of Laurence Sullivan (or Sulivan), MP, Director, and at various times chairman or deputy chairman of the Court of Directors of the East India Company, of which he was regarded as "the uncrowned king" (Patrick M. Geoghan, "Sulivan, Laurence (*c.* 1713-1786)", *Dictionary of Irish Biography*, Volume 9, p 149; see, also, P. J. Marshall, "Sulivan, Laurence (*c.* 1713-1786)", *Oxford Dictionary of National Biography* (Oxford, 2004), Volume 53, p 294). Doubtless, the career and appointments held by Benjamin Sullivan in India were advanced by his influential kinsman. Benjamin Sullivan was called to the Irish Bar in 1770 (Edward Keane *et al.*, (eds.), *King's Inns Admission Papers 1607-1867* (Dublin, 1982), p 468).

[63] It has, however, been stated that Sullivan, en route for Calcutta, visited Madras in 1778, and was there persuaded to stay on as Government Advocate, at a salary of £1200 a year, apparently with the right of private practice. When that right was withdrawn two years later, his salary was doubled to £2400 a year (H. D. Love, *Vestiges of Old Madras, 1640-1800* (1913), at p 140, cited in Samuel Schmitthener, "A Sketch of the Development of the Legal Profession in India", *Law & Society Review*, Vol. 3, No. 2/3 (Nov. 1968 - Feb. 1969), pp 337-382, at p 343). It is difficult to reconcile the statement that Sullivan accepted an official appointment in Madras in 1778 with the information concerning him which appears in the relevant annual registers for Calcutta. At the same period the salary of the Advocate-General of Calcutta was £3000 a year, augmented by a generous allowance of £250 a month, thus bringing his annual emoluments to the very handsome sum of £6000 (Love, *op. cit.*, p 301, cited in Schmitthener, *loc. cit.*)

[64] India Office Records, n 62, folio 4. Spencer, born in County Down and schooled in England, was enrolled at Trinity on 3 February 1773, when aged 16, but does not appear to have taken a degree (George Dames Burtchaell and Thomas Ulick Sadleir, *Alumni Dublinenses* (London, 1924), pp 770-771). The Mayor's Courts had been established in 1726, one in each of Calcutta, Madras and Bombay. Each consisted of a mayor and nine aldermen, and each had jurisdiction in civil proceedings between Europeans.

Subsequent annual registers disclose Sullivan (also rendered as "Sulivan"[65]) as continuing to be the Company's solicitor until, in the register of 27 January 1791, he is shown as "Attorney General".[66] The register of 1789 discloses only four lawyers, three of whom originated from Ireland. The new Irish lawyer was Stephen Popham, who is stated to have arrived from England in 1778 (although his name does not appear in the 1786 register). Popham's occupation is shown merely as "Attorney".[67] The 1791 register lists five lawyers, three of whom (Sullivan, Popham and John White) originated from Ireland. The newcomer White, who is described as an "Attorney at Law", was stated, somewhat curiously, to have come to Calcutta from Bengal (despite Calcutta being the chief city and the administrative centre of the Bengal Presidency), in 1790. Each of the other two lawyers, each described as "Attorney at Law", being Robert Williams (formerly a Cornet in the 19th Dragoons, who arrived in 1789[68]) and one Wilkinson (whose surname only was given and who arrived in 1790, and was also stated to have come to Calcutta from Bengal), was an Englishman.[69]

Strangely, Sullivan does not appear in the register dated 1 January 1792, only three lawyers being there listed, Williams, White and Wilkinson (still identified by only his surname).[70] But Sullivan again appears in the register of 25 January 1793, being described as

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[65] *Loc. cit.*, n 62, folio 9.

[66] *Loc. cit.*, n 62, folio 16.

[67] *Loc. cit.*, n 62, folio 9. Stephen Popham (1745-1795), the son of English parents, had been educated in England (Westminster School, and Cambridge (Trinity), BA 1767, MA 1774) and called to the Bar (Lincoln's Inn) in 1772 (although ten years earlier he had enrolled at the Middle Temple). He had sat in the Irish House of Commons (for Castlebar, County Mayo), 1776-1783. That fact probably explains the not entirely accurate statements in the Calcutta registers that Popham's country of origin was Ireland. He subsequently sought to repair his depleted fortunes in India, originally being appointed secretary to Sir John Day, Advocate-General of Bengal. Popham himself favoured the legal profession in Madras being a "closed shop". In a submission to the East India Company in 1791 he advocated that the number of attorneys in that Presidency be limited to six, stating, "In my opinion six well informed attornies [*sic*] are sufficient for the legal discussion and management of all the controversies and concerns of this colony, and all above that number must live by law created for their support. I know it from experience that the more Lawyers the more law." ([Stephen Popham], *Address from Mr Popham of Madras To the Proprietors of East India Stock* (Madras, 1791), p 54.) It is apparent that Popham desired to maintain the professional monopoly enjoyed by the small number of legal practitioners in Madras, of which he was one.

[68] *Loc. cit.*, n 62, folio 27.

[69] *Loc. cit.*, n 62, folios 15, 16.

[70] *Loc. cit.*, n 62, folio 27.

"Company's Attorney-General"[71]. He does not thereafter appear in the Bengal registers. By 1802 he had become a Puisne Justice in the Supreme Court of Judicature at Madras, and had received a knighthood. He is shown as such in the Madras register dated 1 January 1802.[72]

From 1793 until 1799 the only Irish lawyers practising in Calcutta were Stephen Popham and John White, although Popham does not appear in the register of 1 January 1792, or in any register after 1793.[73] White, who appears in the registers of 25 January 1793, 1794 and 1796 (but not in that of 1795), does not appear in any later register.[74]

In the list of 1 January 1799 appear the names of two new Irish lawyers in Calcutta. Charles Walters is described as "Advocate to the Court of Record", and a Mr Disney (no given name is shown) is described merely as "Lawyer".[75] It would seem that Disney did not remain long in Calcutta, for in the following year he is shown in the list for Madras, dated 1 March 1800, being there described as "Advocate in the Recorder's Court".[76] Two years later, in the Madras register of 1 January 1802 (which does not provide the country of origin for those appearing therein), Disney has acquired a given name, Fownis, and has moved to the other branch of his profession, being described as "Barrister in the Supreme Court of Judicature".[77] Whilst Disney appears in the list (thus entitled) for 1 January 1803, he does not appear thereafter.[78]

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[71] *Loc. cit.*, n 62, folio 37.

[72] *Loc. cit.*, n 62, folio 142.

[73] *Loc. cit.*, n 62, folios 36, 52. By 1791 Popham had removed to Madras (n 67; n 82 and text thereto, *infra*).

[74] *Loc. cit.*, n 62, folios 39, 73, 103. From 15 December 1797 the designation "Register" is replaced by that of "List".

[75] *Loc. cit.*, n 62, folios 116, 122.

[76] *Loc. cit.*, n 62, folio 131.

[77] *Loc. cit.*, n 62, folio 139. That given name appears as "Fownes" in *King's Inns Admission Papers 1607-1867*, n 62, p 134. Disney was admitted as an attorney in the Irish Court of Exchequer in Easter Term, 1778.

[78] *Loc. cit.*, n 62, folio 144.

Another Irish lawyer who practised as an advocate (that is, a barrister) in Calcutta in the early part of the nineteenth century, although his name does not appear in the foregoing registers or lists, was Solomon Hamilton.[79] Born at Newry in County Down, Hamilton had been called to the Irish Bar in 1777.[80] As will later appear, Hamilton, through his daughter Eliza Hamilton Dunlop, had an indirect and posthumous association with New South Wales in the late 1830s. William Hickey, the celebrated memoirist, maintained a very poor opinion of Hamilton's personality and professional activities, stating him

> to be as great a thief as ever was unhung, but a devilish shrewd, clever fellow, fit for the practice of the villainous profession he belongs to, and fully competent to encounter all the chicanery and dirty tricks of his scoundrel brother attornies [*sic*] ... He was bred for, and was called to, the Irish Bar, but upon his arrival in Calcutta [between May 1779 and March 1783], finding the life of an attorney better suited to his capacity and his talents he abandoned the gown to adopt the practice of an attorney, in which he soon got immense business, ...[81]

The first available Madras list (thus entitled) is that of 1 March 1800. For the next ten years no country of origin is specified. Interestingly, Popham's name does not appear in any of the Madras registers (or lists), although from at least 1791 until his death four years later Popham resided in that Presidency.[82] The Madras register (thus entitled) for 31 December 1810 reverts to the earlier practice in Bengal of specifying the country or place of birth of the

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[79] *A New Oriental Register, and East India Directory for 1802* (London, 1802), p 67; *The East-India Register and Directory for 1819*, second edition (London, 1819), p 125.

[80] *King's Inns Admission Papers 1607-1867*, n 62, p 210.

[81] Alfred Spencer (ed.), *Memoirs of William Hickey*, 2 ed., 4 volumes (London, 1914-1925), Volume III (1782-1790), p 146. Other instances of Hamilton's chicanery and sharp dealing are given by Hickey at Volume III, p 168; Volume III, p 180; Volume III, pp 227-228. Hickey's statement that in Calcutta Hamilton practised as an attorney is inconsistent with Hamilton being listed as an advocate in *A New Oriental Register, and East India Directory for 1802* (London, 1802), p 67; and in *The East-India Register and Directory for 1819*, second edition (London, 1819), p 12. Hamilton died in 1820.

[82] In Madras Popham was influential in transforming the squalid "Black Town" of old Madras into a model Georgian suburb (Peter Popham, "Popham the Improver", *The Independent* (London), Saturday, 6 June 1998). Such a project would have been consistent with William Hickey's description of Popham, "... in Madras he [Popham], by his abilities, had raised himself to the top of his profession, and had for many months been Attorney to the Company [the East India Company], which honourable and lucrative situation added to his private practice must very speedily have secured for him a handsome independent fortune had he stuck to the law alone, instead of which he had twenty wild schemes on foot at one and the same time, which prevented his attending to his business in court, so that every person who employed him had too much reason to complain of his negligence." (Alfred Spencer (ed.), *Memoirs of William Hickey*, *op. cit.*, n 81, Volume III (1782-1790), p 95).

inhabitant, whence he arrived, the date of his arrival, his present (and also his former) occupation, as well as relevant "Remarks". From that date until the end of 1818 there was no Irish lawyer in Madras.[83] However, in July 1819 T. I. Stritch, an Irishman, formerly an Army warrant officer, but by then a proctor (the equivalent in the ecclesiastical courts of an attorney in the Courts of Common Law or a solicitor in the Court of Chancery), arrived in Madras.[84] These annual registers for Madras continued until 1828, but, apart from the foregoing reference to Stritch, there was no Irish lawyer in Madras between July 1819 and the end of 1828.

Even fewer lawyers, let alone Irish lawyers, chose Bombay as their destination in India. As in Calcutta and Madras, annual registers were maintained of the European inhabitants of Bombay and Surat from 1719 to 1792. But no country of origin is disclosed therein. The only lawyer appearing in those registers is in 1748, where David Medley is described as "Attorney in the Mayor's Court, Bombay".[85]

The conclusion to be drawn from the foregoing Indian records is that very few Irishmen settled in any of the three Presidencies, and that hardly any of those Irishmen were lawyers. From the arrival of Benjamin Sullivan in 1777 until 1799 there appear to have been only six Irish lawyers in Calcutta, and of those one, Sullivan, held official positions, first as the

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[83] India Office Records, Biographical Records series, 0/5/30, Vol. 2, folios 198-330.

[84] India Office Records, Biographical Records series, 0/5/30, Vol. 3, Annual Register, 31 December 1819, folio 379.

[85] India Office Records, Biographical Records series, 0/5/31, Vol. 1, folio 72.

Company's solicitor and then as Attorney-General; and another, Disney, remained for no more than two years before removing to Madras.[86]

In Madras only one Irish lawyer has been identified for the period from 1800 to 1810, and he, Disney, had previously practised in Calcutta. It is, however, possible that in that period, when the annual registers did not disclose the country of origin, some of the other seven lawyers in Madras may have been Irishmen.[87] But it is apparent that from 1810 to 1818 there were no Irish lawyers in Madras.

Despite Irishmen in increasing numbers (some even with qualifications in the law) choosing, as the nineteenth century advanced, to make their careers in the civil administration of India, the Subcontinent does not appear to have been equally popular as a destination for Irish lawyers wishing to practise their profession away from the overcrowded legal world of

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[86] It may also be argued that the memoirist William Hickey should also be included in the category of Irish lawyers who practised in India. Hickey born in London of an Irish solicitor father in 1749, received his legal training in England, being articled to his father. Sent to India, more or less in disgrace, as a writer to the East India Company in Madras, Hickey subsequently practised as a lawyer in Calcutta (throughout most of the period from 1777 to 1808): Alfred Spencer (ed.), *Memoirs of William Hickey*, *op. cit.*, n 81; P. J. Marshall, "Hickey, William (1749-1827)", *Oxford Dictionary of National Biography*, Volume 27, p 16. Although his mother was English, Hickey certainly manifested many Irish characteristics, including hot-bloodedness, dissipation, indolence and financial improvidence (it being in consequence of the last that he was sent to India). The extent to which Hickey in his *Memoirs* has attempted to disown his Irishness and the Irish connections upon which his professional and social success were largely grounded is considered in James R. Farr, "A Georgian Briton's Forgotten Irishness? Autobiography, Identity and Memory in William Hickey's *Memoirs*" (Early Modern Memory Conference, University of Worcester, UK, 8-9 May 2014), citing, significantly, Craig Bailey, *Irish London: Middle-Class Migration in the Global Eighteenth Century* (Liverpool, UK, 2013), pp 15, 55, 124, 136-139, 144. As Bailey observes, Hickey "undoubtedly would have said that he was an Englishman, but ... his memoirs reveal how fundamental Irish family members and friends were in his day to day life" (Bailey, *op cit.*, p. 124).

[87] Those other seven lawyers and the Madras registers in which each was first listed were: H. A. D. Compton, Barrister in the Supreme Court of Judicature (1802); Robert Orme, Attorney in the Supreme Court of Judicature (1802); Emanuel Samuel, Attorney in the Supreme Court of Judicature (1802); Robert Williams, Barrister in the Supreme Court of Judicature (1802); Alexr Anstruther, Barrister in the Supreme Court of Judicature (1803); R. A. Maitland, "in the firm of Abbott & Co. & one of the Justices" (1803); William Light, Attorney (1804) (India Office Records, Biographical Records series, 0/5/30, Vol. 1, folios 139, 141, 142, 143, 143, 146, 155). Somewhat earlier, Hugh Macauley Boyd, Irish born and a graduate of Trinity (BA, 1765), who was called to the English Bar in 1776, but does not appear to have practised in Ireland, accompanied Lord Macartney when the latter went to Madras as Governor in 1781. Boyd did not practise as a lawyer in India, although he held various official positions in Madras and was an emissary from Macartney to Ceylon. However, Boyd (who was reputed by some contemporaries to be the author of the *Letters of Junius*) preferred journalism to the law, and in 1792 founded one of the first English language periodicals in the Subcontinent, the *Madras Courier* (Linde Lunney, "Boyd, Hugh Macauley (1746-1794)", *Dictionary of Irish Biography*, Volume 1, p 708; Hannah Barker, "Boyd, Hugh Macauley (1746-1794)", *Oxford Dictionary of National Biography*, Volume 7, p 35).

their homeland. For example, in 1860 of the 29 lawyers described as advocates (that is, barristers) in Calcutta only three were Irishmen, being shown as graduates of Trinity College, Dublin.[88] One of those three, George Smoult Fagan (a graduate of Trinity (BA 1848), who had also studied at Cambridge, and had been called to the English Bar in 1845[89]), was at the time serving as Magistrate of Police, and thus was unlikely to have been in private practice. It would appear, therefore, that not quite 7 per cent of the members of the Calcutta Bar were Irishmen.

Ten years later the proportion of Irishmen practising at the Calcutta Bar had diminished. In 1870 of the 56 members of the Calcutta Bar only four had been called by the King's Inns, Dublin. One of those four, John Pitt Kennedy (the son of a Londonderry solicitor, a graduate of Trinity (BA 1844), called to the Irish Bar in 1845[90]) held the official positions of Secretary to the Bengal Government Legislative Department and Secretary to the Bengal Legislative Council, at an annual salary of £1000.[91] It is unlikely that he would also have been in private practice as a barrister. Thus it would appear that hardly more than 5 per cent of the members of the Calcutta Bar were Irishmen.

This reluctance of Irish lawyers to practice in India is very strange, especially when it is recognised that the earnings of practitioners in India were vastly greater than those of lawyers in England. For example, an official report of 1823 revealed that fees which barristers charged in Bombay were "seven times as great as those usually received in England."[92] The Indian Law Commissioners' Report of 1844 referred to "the rate of bar fees exceeding by two, three, four and five times that in England."[93] Perhaps one reason for that reluctance was the low reputation of lawyers in private practice in India in the eighteenth and nineteenth

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[88] *The New Calcutta Directory for 1860* (compiled by A. G. Roussac) (Calcutta, 1860).

[89] *Alumni Dublineses*, n 64, p 271.

[90] *Alumni Dublinenses*, n 64, p 460; *King's Inns Admission Papers 1607-1867* (Dublin, 1982), p 264.

[91] *Thacker's Bengal Directory 1870 - The Bengal Directory for 1870* (Calcutta, 1870), p 147.

[92] F. G. D. Drewitt, *Bombay in the Days of George IV* (1935), p 63, quoted in Schmitthener, *op. cit.*, n 63, p 346.

[93] *Report from the Indian Law Commissioners to the Honorable the President of the Council of India, in Council, upon Judicature in the Presidency Towns. Dated February 5th 1844*. This document was published as Art. VI in *Calcutta Review*, October 1846, p 522 at p 530.

centuries. The highly esteemed Indian administrator Mountstuart Elphinstone described the legal profession there as "this institution, that mystery that enables litigious people to employ courts of justice as engines of intimidation and which renders necessary a class of lawyers who among the natives are great fomenters of disputes."[94] Macaulay, who in the mid-1830s spent four years in India as the "Law Member" of the Supreme Council for India (at a salary of £10,000 a year), went even further, describing the lawyers of Bengal as "ravenous pettifoggers who fattened on the misery and terror of an immense community."[95] The reputation of the legal profession in India clearly had not improved since William Hickey more than thirty years earlier had described it as a "villainous profession".[96]

Another reason for the reluctance of lawyers, whether Irish or English, to practise in India was probably that, just as in Ireland, in the three Presidency towns there was a "closed shop" attitude among the members of the legal profession. (Such an attitude was expressly espoused by Popham in his 1791 *Address ... To the Proprietors of East India Stock*.[97]) Their monopolistic conduct was the subject of strong criticism in the foregoing Report of the Indian Law Commissioners of 1844. The Commissioners, in comparing the cost of litigation in England and in India, stated that in England there was free competition in the legal profession, whilst "*here* [that is, in India] a monopoly which officers, barristers and attornies [*sic*] mutually endeavoured, in former times, to make as productive to one another as possible. This is the Upas tree; what we have described, some of its fruits: ..."[98]

The members of the civil administration of India, however, enjoyed a high reputation for respectability and integrity. It should be appreciated that many of those Civilians (officers of the Indian Civil Service) performed judicial functions and held office as magistrates or judges, although they had no formal legal qualifications and had never been legal

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[94] K. A. Ballhatchet, *Social Policy and Social Change in Western India* (1957), p 144.

[95] J. W. Kaye, *The Administration of the East India Company* (1853), p 330, quoted in Schmitthener, *op. cit.*, n 63, p 353.

[96] Text to n 81, *supra*.

[97] Stephen Popham, *op.cit.*, n 67.

[98] *Report from the Indian Law Commissioners* ..., *op. cit.*, n 93, p 529.

practitioners. Many of those were Irishmen.[99] For example, Charles James O'Donnell, a graduate of Queen's College, Galway, who arrived in India in 1872, served in the Revenue and Judicial Departments of Bengal, being an assistant magistrate, a joint magistrate and a magistrate, those offices alternating with purely administrative positions.[100] James O'Kinealy, also a graduate of Queen's College, Galway, had arrived in India ten years earlier than O'Donnell, and had progressed through similar magisterial ranks. He then advanced through higher judicial offices, serving as an Additional Sessions Judge, then as a District and Sessions Judge, and ultimately as officiating Judge, and, from February 1883, as Judge of the High Court of Judicature, Calcutta.[101] Sir Dennis Fitzpatrick was a Catholic graduate of Trinity, but at the outset of his career he had no legal qualifications. Having passed the Indian Civil Service entrance examination in 1858, he was posted to the Punjab as an assistant magistrate at Delhi. Subsequently he returned to England on special duty, connected with the Begum Sumroe's (or Samru's) Case, in March 1869,[102] and while there he was called to the English Bar (Inner Temple). "[E]arly in his career he had established a considerable reputation as a lawyer in London and India."[103] At his death in 1920 the *Times* said of him, "The best quality of his mind was essentially legal, and he acquired a great reputation for clear-headed insight into the many matters which came up for legislative consideration."[104]

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[99] There are, of course, numerous instances of non-Irish members of the Indian Civil Service, with no formal legal qualifications, holding judicial office. For example, William Fraser McDonell (1829-1894), an Englishman, served in the Bengal Civil Service from 1850, and had been awarded the Victoria Cross for outstanding bravery during the Indian Mutiny in 1857. Although without legal qualifications, he held various magisterial and judicial offices, ultimately being appointed a Judge of the High Court of Judicature at Calcutta in 1878 (India Office Records; Bengal, Madras and Bombay Civilians series 0/6/26, folio 1248).

[100] *The India Office List for 1892* (London, 1892), p 334.

[101] *Ibid*.

[102] *Op. cit.*, n 100, p 248. The Begum Samroe's Case was an appeal to the Judicial Committee of the Privy Council from a decision of the High Court of the Punjab (2 April 1869), regarding the resumption of land and the seizing of arms and stores by the Government of India. The original suit was brought by representatives claiming under the Begum's will, *sub nom., Forester and ors. v. Secretary of State for India*. The decision of the Privy Council was given on 11 May 1870 (*Supplemental Cases on Appeal from the East Indies, and not reported in Moore's Indian Appeals* (London, 1880), p 11).

[103] S. V. Fitz-Gerald, "Fitzpatrick, Sir Dennis (1837-1920)", *Oxford Dictionary of National Biography* (online, 2006); S. V. Fitz-Gerald, rev. Katherine Prior, "Fitzpatrick, Sir Dennis (1837-1920)", *Oxford Dictionary of National Biography*, Volume 19, p 910.

[104] *Times* (London), 22 May 1920, p 16.

Appointment to judicial office in India or, as the nineteenth century progressed, in one of the colonies in the ever expanding British Empire was usually a greatly coveted professional achievement for a legal practitioner in the overcrowded professions in England and Ireland. But not even the very generous salaries paid to Judges and Law Officers in India could always persuade a practitioner with a flourishing practice in London to accept appointment in the Subcontinent.[105] For example, John Rolt (1804-1871), a London barrister establishing a successful practice at the English Bar, in 1845 declined an offer of appointment as Advocate General of Bengal, at a salary of nearly £4000 a year. The position was filled by James William Colville, who ten years later became Chief Justice of Bengal.[106] Rolt's decision was a wise one. In the fulness of time he became Attorney-General in Lord Derby's administration, and subsequently a Lord Justice in the Court of Appeal in Chancery and a Privy Counsellor.

However, at about the same time as Rolt was declining a lucrative appointment in India, Sir James Emerson Tennent, MP for Belfast, who had held minor political office, in 1845 resigned his parliamentary seat in order to accept appointment as Colonial Secretary of Ceylon (modern Sri Lanka), the salary for that office being £2000 a year. It will be appreciated that as a Member of Parliament Emerson Tennent received no salary. Born in Belfast and a graduate of Trinity, Emerson Tennent had been called to the English Bar (but not to the Irish Bar), although it is doubtful whether he ever practised. During his five years in Ceylon, a period marked by his administrative ineptness, Emerson Tennent was for a short period Acting Governor of that colony (the Governor's salary being £7000). Emerson Tennent's capacities as an administrator have been described as dubious.[107] Nevertheless, in 1851 it was rumoured that he would succeed Sir Charles FitzRoy as Governor of New South

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[105] In 1870 the annual salary of the Chief Justice of the High Court of Judicature at Calcutta was £6000, whilst that of each of the thirteen Puisne Judges of that Court was £4166 (*Thacker's Bengal Directory 1870 - The Bengal Directory for 1870* (Calcutta, 1870), p 146). At the same time the salary of the Chief Justice of New South Wales was £2000 a year.

[106] Sir John Rolt, *The Memoirs of the Right Honourable Sir John Rolt* (London, 1939), pp 99-101.

[107] Jessica Marsh and Lawrence William White, "Tennent, Sir James Emerson (1804-1869)", *Dictionary of Irish Biography*, Volume 9, p 312, at p 313; G. C. Boase, rev. Elizabeth Baigent, "Tennent, Sir James Emerson, first baronet (1804-1869)", *Oxford Dictionary of National Biography*, Volume 54, p 129.

Wales, as a reward for political support.[108] However, upon his return to the United Kingdom Emerson Tennent re-entered Parliament, where he again held minor office. Upon his retirement from Parliament he became the Secretary to the Board of Trade (1852-1867). It was fortunate for New South Wales that Emerson Tennent did not become Governor of that colony. Disraeli, although of the same political persuasion, in 1866 described Emerson Tennent and his period at the Board of Trade as "the most inefficient & useless of our public servants: no sound information: his dept. in a disgraceful state & himself a mere club gossip & office lounger".[109] Obviously it was the generous remuneration which attracted Emerson Tennent to the appointment in Ceylon.

Rolt's decision regarding the Bengal appointment should be contrasted with that of Thomas Kennedy Lowry, an Irish barrister, who became a colonial Judge. Lowry, an Ulsterman and a graduate of Trinity (MA 1832, LL D 1857), had practised at the Irish Bar since 1835 (since 1860 as Queen's Counsel), with chambers in both Dublin and Belfast, had for many years been joint Crown Prosecutor for the Counties of Armagh and Antrim, and was a respected member of his circuit.[110] Yet in 1867 he accepted appointment as a District Judge in Jamaica, at £800 a year.[111] Perhaps, as sometimes happens, his practice had declined after he took Silk.

There were many instances of Irish practitioners receiving judicial, or other official, appointments in the British colonies throughout the nineteenth century, but hardly any departed their homeland with the intention of practising their profession in those outposts of

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[108] *Melbourne Morning Herald*, 25 February 1851; *Moreton Bay Courier*, Saturday, 22 March 1851, p 4.

[109] Disraeli to Derby, 3 December 1866, Derby Papers, Box 146/2, quoted in Robert Blake, *Disraeli* (London, 1967), p 324; see also K. M. De Silva, "Sir James E. Tennent: colonial administrator and historian", *Journal of the Royal Asiatic Society of Sri Lanka* (Colombo), volume xli (1996), pp 13-37 at p 23.

[110] Upon his appointment to Jamaica the North-East Circuit of Ireland, of which he was a member, presented Lowry with a piece of silver plate, inscribed, "Presented to Thomas Kennedy Lowry, QC, LL D, by the members of the North-East Circuit of Ireland, on his leaving this Society to become a Judge in Jamaica, where they feel assured he will do honour to their profession in the office he has accepted, or any other to which he may be hereafter advanced. Four Courts, Dublin, May 1, 1867." (Arthur N. Birch and William Robinson (eds.), *The Colonial Office List for 1868* (London, 1868), p 249).

[111] *Loc. cit.*, n 110.

Empire. The only one who has been so identified was Bernard Gustavus Norton, and even he was soon prepared to accept an official colonial appointment. Norton, a graduate of the Queen's University of Ireland, was called to the English Bar in 1855, where he appears to have practised for the ensuing five years. However, in 1860 he emigrated to British Guiana (now Guyana), where he practised as a barrister. Three years later Norton was appointed Solicitor-General of British Guiana, at a salary of £300 a year (presumably with a right of private practice). His official income considerably increased when in 1865 he was appointed Second Puisne Judge of that Colony, at a salary of £1500 a year. In 1868 he was appointed First Puisne Judge, but with no increase in salary.[112] All but one of the foregoing Irish barristers gave up private practice in their homeland in order to accept official colonial appointments. With the exception of Norton to British Guiana, none departed Ireland with the intention of embarking upon private practice in the colonies.

As in India under the Raj, members of the Colonial Service with no formal legal qualifications were on occasion appointed to positions in which they exercised judicial functions. Among Irishmen in this category was William E. Thompson Sharpe, who after graduating from Trinity in 1857, was in the same year appointed to the Colonial Service in Ceylon. Having occupied administrative positions in that colony for eight years, Sharpe was for three years a District Judge (at £600 a year).[113] At about the same time Herbert Webb Gillman, who had graduated from Trinity in 1854 with honours in science and in classics, was appointed to Ceylon in 1856. Despite his lack of legal qualifications, Gillman held office as a District Court Judge at various locations in that colony in the 1870s.[114] Shortly thereafter J. A. R. Smyth (stated to have been a graduate of Trinity[115]) was in 1868 also appointed to the Colonial Service in Ceylon, where two years later he was appointed acting police magistrate, being confirmed in that position in 1871.[116]

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[112] *Op. cit.*, n 110, p 257.

[113] *Op. cit.*, n 110, p 343.

[114] *Op. cit.*, n 110, p 299.

[115] However, his name does not appear in *Alumni Dublinenses*, n 64, or in *A Catalogue of Graduates of the University of Dublin* (Dublin, 1869) for the relevant period.

[116] *Op. cit.*, n 110, p 346.

Several Irishmen were appointed to judicial office in the British colonies of the Cape of Good Hope ("the Cape") and Natal, and there were a number of Irish born Governors of those colonies. However, the colonies in Southern Africa were not a popular destination for Irish lawyers desirous of practising abroad. The suggestion made in the 1840s by the Irish born Attorney-General of the Cape, the humanist William Porter, that Ireland should be a source of emigrants to South Africa does not seem to have been taken up by lawyers in his native land.[117]

Among the disadvantages of official appointment to judicial office in India (and also in some of the other African and Asian colonies) were an unhealthy climate, prevalence of disease and the possibility of fatal encounters with wild animals and poisonous serpents. It was largely the tropical climate of Dominica in the West Indies and of Sierra Leone in West Africa which in July 1827 caused James Dowling to turn down offers of a lucrative judicial position in each of those colonies and to hold out for appointment of lesser rank in the more temperate climate of New South Wales. There in due time he became the second Chief Justice.[118] But the foregoing disadvantages do not appear to have discouraged young men who were seeking to make their careers in the Indian Civil Service or in the Indian Army. Nevertheless, it is strange that, despite the extremely high incomes which could be earned by lawyers in nineteenth century India, very few Irish practitioners chose to establish or to re-locate their practices in or to the Subcontinent. Perhaps those disadvantages were regarded as outweighing the financial returns.

Australia a More Popular Destination

The generality of Irish emigrants to America chose that destination for many reasons (some, sadly, misplaced) --- religious freedom, economic benefits, social advantage, desire for adventure, congenial climate. But their numbers contained few professional men. The Irish

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[117] Donal P. McCracken, "A Minority of a Minority of a Minority: the Irish in South Africa", in Marjaz Klemencic and Mary N. Harris (eds.), *European Migrants, Diasporas and Indigenous Ethnic Minorities* (Pisa, Italy, 2009), pp 163, 166.

[118] J. M. Bennett, *Sir James Dowling: Second Chief Justice of New South Wales 1837-1844* (Leichhardt, NSW, 2001), pp 8-9. See Chapter 2, text to notes 56-61.

who came to Australia included many who were motivated by the foregoing reasons. In addition, the lure of gold enticed Irishmen from all strata of society (including even lawyers, such as George Higinbotham, later to become the third Chief Justice of Victoria). Most of the Irish lawyers who made Australia their destination had already practised in their homeland for some years, and felt that they could achieve success in a country where the professions were less crowded than in Ireland, and where, in a numerically far smaller legal profession, that success was more frequently a consequence of talent and ability than it was in the "closed shop" professional environment in their homeland. As late as 1880 the young Irish barrister Patrick McMahon Glynn, when contemplating departure from his homeland to practise in Australia, complained to his mother that in the Irish profession "prejudice, interest and cliqueism is nearly everything."[119]

It must be recognised that the vast majority of Irish emigrants to Australia were Catholic by religion (as also was the case for the Irish emigrants to America). But that preponderance of Catholics was not reflected in the Irish members of the various professions (especially the legal profession) who practised in the Australian colonies. No doubt, the public offices held by Therry and Plunkett gave encouragement to their co-religionists (such as Callaghan and, somewhat later, O'Loghlen), but Stawell and his cousins were all Protestants, as were Barry, Higinbotham, Molesworth and Darley.

Irish professional men in nineteenth century Australia did not, in the main, experience unpopularity on account of their religion, since so many of them shared the same Protestant religion to which the leading officials in the colonies manifested their (at least nominal) adherence. There were, of course, tensions in Australia, as there were in Ireland itself, between Catholic Irishmen and Protestant Irishmen. For example, Callaghan recognised bigotry in at least one member of the Chambers family,[120] although that bigotry did not deter those Protestant solicitors from briefing the Catholic Callaghan (or even having hopes that he might marry into their family). Stawell himself was perceived to be anti-Catholic, it being

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[119] P. M. Glynn, Dublin, to his mother Ellen Glynn (née Wallsh), 21 June 1880, in Gerald Glynn O'Collins (ed.), *Patrick McMahon Glynn: Letters to his Family (1874-1927)* (Melbourne, 1974), p 6.

[120] J. M. Bennett (ed.), *Callaghan's Diary* (Sydney, 2005), p 28, September 19th 1840, Saturday, where David Chambers is described as "a wretched bigot".

remarked that anyone wishing a position in Victoria "while Mr. Stawell holds office should add Orange theology to the indispensable brogue."[121]

But Australia in the nineteenth century did not experience either the anti-lawyer or the anti-Irish attitudes with which the American colonies were imbued throughout that and the preceding century. Thus, socially as well as professionally, Australia would have been a more attractive destination than America for upper-middle class Irish lawyers (be they Protestant or Catholic). In Australia they found colonies loyal to the British Crown, where the principles of the law and the administration of justice hardly differed from those in their homeland, and where no civil or legal disabilities derived from religion. Further, their Irish qualifications entitled them to automatic admission as lawyers in the Australian colonies, a right which was not available to them in England. In America they would have encountered an environment hostile to all Irishmen, especially Catholics (who in many of the colonies were deprived of civil and legal rights), and where lawyers, whatever their birthplace, were unpopular. At least in the State of New York it would have been necessary for them to renounce their British allegiance and to become American citizens before they could practise the law.[122]

Reference has already been made to Roger Therry and John Hubert Plunkett, the first Irish lawyers to be appointed to official positions in Australia, the former ultimately becoming a Judge of the Supreme Court of New South Wales, the latter being, first, Solicitor-General, and then, for almost 20 years, the Attorney-General of that colony. Further reference will be made to Therry and Plunkett and to the very many other Irish lawyers who came to the Australian colonies, whether appointed to take up official positions or to practise their profession. The names and other details of those Irish lawyers are set forth in Appendix A to this Thesis.

Despite the practical disadvantages which have already been described, it is quite apparent that as the nineteenth century advanced, appointments to official and judicial offices in the colonies of the expanding British Empire were a popular career path for many recently

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[121] P. S. Cleary, *Australia's Debt to Irish Nation-Builders* (Sydney, 1933), p 107.

[122] Text to n 43, *supra*.

qualified young Irish lawyers, and also for some, more mature, Irishmen who had practised their professions (presumably without great financial success) for longer periods in their native land. Even some without qualifications as lawyers ultimately achieved judicial office.

But it was only in the Australian colonies that any significant number of Irish lawyers sought to establish themselves in private professional practice. As will appear in later chapters, many of those lawyers achieved success and acclaim in their new homeland, certainly in the law, but also in politics, business, and as editors or owners of newspapers and as proprietors of landed estates.

Not only did it require courage, often accompanied by a sense of resignation, even to contemplate "leaving home", but the very prospects of the journey were daunting. As Sir Victor Windeyer wrote of his great-great-grandfather Charles Windeyer, who left England for Australia in 1828,

> To leave England [Ireland might equally have been written] for Australia was a big decision in those days: to leave one's native land; to say goodbye to friends and kinsfolk knowing that almost surely this was for ever; to set out on a long, and sometimes hazardous, voyage in a sailing ship to a new land, still known as a Convict Colony --- to do this with a young family, to do it voluntarily and deliberately, required courage. Many of the men and women who made this decision were not adventurers going out to seek a fortune and expecting to return and spend it at home. Rather they came to make their homes in a new country ... Hope, not bitterness or compulsion, led them to a new land which was to be their home.[123]

How their education, professional experience and upbringing in the land of their birth resulted in the achievements, the successes and the misfortunes of many of those Irish lawyers in the new land of their adoption will be considered in further chapters of this thesis.

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[123] Sir Victor Windeyer, *Charles Windeyer, 1780-1855 and Some Events of His Time* (Sydney, 1977), p 12.

CHAPTER 4

A NEW HOME IN THE ANTIPODES

"Considering the general feeling towards Irishmen here" --- The Legal Profession --- Irish Women and the Law --- "What kindness have I received from Irishmen" --- Thomas Callaghan --- Relationship of Plunkett and Therry with Governor Bourke --- Norfolk Island --- Kindness reciprocated --- Friends at the Bar --- Accents and Idioms of Irish Lawyers --- Comparisons and Contrasts --- Court attire --- Differences and Similarities --- St Patrick's Day --- Conclusions

This chapter will consider the lives, professional and personal, of Irish lawyers who made Australia their home in the nineteenth century, and the consequences to them and to their new country.

A few Irish lawyers chose to emigrate to the Australian colonies, and there to practise their profession, in the 1820s. More arrived in the 1830s. But it was in the 1840s before any appreciable, let alone any significant, numbers of Irish lawyers arrived in Australia. By then both in Sydney and in Melbourne there was a well established legal profession, consisting essentially of practitioners who had qualified as barristers or as solicitors in England. In seeking professional recognition and success, the Irish lawyers had to compete with or integrate with their English colleagues, the latter longer settled in the Australian colonies and more favourably regarded by the official establishment. In doing so the Irish practitioners had to overcome the unpopularity in which many Irishmen in the colonies were held not only by the English colonists but also by the local administration. It is not surprising, therefore, that among the Irish lawyers there developed a considerable degree of mutual support, irrespective of their religion. That was especially so among the Irish members of the small colonial Bar. Valuable first-hand information concerning the Courts, the legal profession and its Irish members in New South Wales in the early 1840s, and the general attitudes of colonial society

and the local administration towards the Irish emerges clearly from the pages of the diary maintained by the young Irish barrister Thomas Callaghan throughout that period.[1]

The unpopularity of the Irish, poor and often ex-convicts, continued until the 1850s when, with the discovery of gold in both New South Wales and Victoria, Irishmen of every class, from labouring to professional, arrived, vastly increasing the population and altering the demographics of those Colonies.

"Considering the general feeling towards Irishmen here"

Callaghan swiftly became aware of the unpopularity of his countrymen in the colony and a degree of prejudice against them manifested by the colonial administration. This was despite the fact that each of the leading law officials was Irish and Catholic. They were John Hubert Plunkett, the Attorney-General since 1836 (who had previously, since his arrival in Sydney in June 1832, been the Solicitor-General), and Roger Therry, the Commissioner of the Court of Requests (a small debts court), who also had the right of practice as a barrister. The childless Plunkett, to whom Callaghan presented a letter of introduction upon the day of his arrival and who subsequently moved Callaghan's admission to the Bar several days later, became not only a good friend to his lonely fellow countryman, but also the young barrister's professional mentor and patron. The Attorney-General, the older by thirteen years, recognised the potential behind Callaghan's diffidence (professional modesty being then, as later, totally unrecognised in the Colony), and a year after the latter's arrival in Sydney told him that he "had an *excellent* prospect at the Bar", saying that "at *first* there was no friendly feeling towards me [Callaghan] at the Bar, but that *now* there was a very friendly feeling in my favour amongst them and that, considering the general feeling towards Irishmen here, it was

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[1] Diary of Thomas Callaghan (Mitchell Library, MSS 2112, Box 1, Item 2). Part of this diary, commencing with Callaghan's arrival in Sydney in February 1840, has been published as J. M. Bennett (ed.), *Callaghan's Diary* (Sydney, 2005). This publication is hereinafter referred to as *Callaghan's Diary*. Callaghan (1815-1863), a graduate of Trinity (BA 1836), was called to the Irish Bar in December 1837. He arrived in Sydney in early February 1840, and was admitted to the New South Wales Bar on 13 February 1840. See Chapter 2, n 75, and text thereto.

very much in my favour and very creditable to me."[2] The inference to be drawn from this statement attributed to Plunkett is that the latter considered there to be a prejudice in the legal profession against Irish practitioners --- a prejudice which Plunkett himself may have encountered, despite the fact that the Chief Justice and the Attorney-General, as well as leading barrister Therry, were all Irish, either by birth or by descent.

The existence of such prejudice, even at a Vice-Regal level, is supported by the terms in which two years later Governor Gipps in Sydney reported to Superintendent (later Lieutenant-Governor) Charles La Trobe in Melbourne the appointment of a replacement for John Walpole Willis, who had been "amoved" from office as Resident Judge at Port Phillip. Gipps wrote that he had appointed the recently arrived barrister William Jeffcott, "although an Irishman",[3] as if that fact were somehow a disqualification for the office. Callaghan was of the view that the Colonial authorities had a preference for English barristers over Irish barristers, and the younger man took the liberty of advising Plunkett that the Attorney-General should not be neglectful of his own interest, if the rumoured retirement of Dowling as Chief Justice were to come to pass.[4] In the latter part of the nineteenth century Sir Henry Parkes when Premier of New South Wales had many occasions (as will be observed later in this chapter) to manifest his prejudice against Irishmen and Catholics, especially against Irish Catholics.

The prejudice against the Irish in Australia was directed not merely to the labouring classes, but also to members of the professions and of the colonial administration (in which

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[2] *Callaghan's Diary*, p 49, Tuesday, March 9th 1841. (The emphases appear in the original document.)

[3] Gipps to La Trobe, 17 June 1843 (A. G. L. Shaw, *Gipps - La Trobe Correspondence* (Melbourne, 1989), p 214). In the same letter Gipps wrote that Jeffcott had "left so good a practice in Ireland, that all his friends were surprised at his going to New South Wales." See, also, B. A. Keon-Cohen, "William Jeffcott: The Poor Man's Judge", *The Australian Law Journal*, Volume 50, July 1976, p 334.

[4] *Callaghan's Diary*, p 65, Monday, May 3rd 1841. In the event, Dowling died in office on 27 September 1844, and was ultimately succeeded by Alfred Stephen. Plunkett never achieved the Chief Justiceship or, indeed, any judicial appointment. The protracted competition to succeed Dowling and the grounds upon which each of the rival applicants, Plunkett and Stephen, sought to persuade the Governor and the Secretary of State (who had the final decision) in his favour are set forth in detail in John N. Molony, *An Architect of Freedom: John Hubert Plunkett in New South Wales 1832-1869* (Canberra, 1973), pp 62-69. In Professor Molony's conclusion, "The whole episode was a dismal affair in which few of the actors seem to have emerged with their honour unscathed" (*op. cit.*, p 68).

many senior officers were Irishmen). An interesting example of that prejudice (anti-Irish, but not, seemingly, anti-Catholic) relates to the three Prendergast brothers. They were members of an English legal family, and at various times in the 1850s each brother emigrated to Victoria. None remained there permanently, although the eldest brother, Michael, served for several years in the Victorian Legislative Assembly, representing Maryborough from 1859 to 1862. The youngest brother, James, after trying his luck at the Ballarat diggings, became a magistrate's clerk, before returning to London where he completed his interrupted legal studies and was called to the Bar.[5]

Both Michael and James Prendergast were vehement in their expression of anti-Irish sentiments and were scathing in their denunciations of what they discerned to be the power of the Irish Protestants in Victoria during the 1850s. Despite themselves being members of the Church of England, the Prendergast brothers considered the greatest villains to be the members of the Loyal Orange Lodge (which had originated in Ireland), whom they perceived as holding great sway and exercising enormous influence in the colony. For example, in 1854, when he was employed as a magistrate's clerk, James in a letter to his father in London referred to a "mean little Irish Barrister, appointed Police Magistrate and altogether unfit for his place"[6] (this, presumably, being one of the magistrates for whom James was then working). James's eldest brother held the Irish Protestants in the colony to be responsible for the termination of James's government employment, Michael Prendergast writing to his father in London in 1855,

> By this time you will have heard from James that his removal from the Government service is solely attributable to the malice and jobbery of the detestable Irish Orange set that are the curse of the Colony.[7]

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[5] The subsequent career of James Prendergast, culminating in his appointment as third Chief Justice of New Zealand in 1875, is referred to in Chapter 7, text to notes 25-29.

[6] James Prendergast, "Letter sent from Melbourne to his father in London", Alexander Turnbull Library, Wellington, MS - Papers 1791, 28 October 1854, quoted in Grant Morris, "Bench v Bar: Contempt of Court and the New Zealand Legal Profession in *Gillon v. MacDonald* (1878)", (2010) 41 *Victoria University of Wellington Law Review*, p 541 at p 544.

[7] Michael Prendergast, "Letter sent from Melbourne to his father in London", Alexander Turnbull Library, Wellington, MS - Papers 1791, 17 May 1855, quoted in Morris, *op. cit.*, n 6, p 544.

Perhaps the disloyalty towards his employers, which is revealed in James's letter to his father of 28 October 1854, may also have contributed to the termination of his employment.

Another, albeit rather trivial, source of their unpopularity was the distinctive accent of some Irishmen --- the Irish brogue --- which was not well regarded in the Australian Colonies. A year after his arrival in Melbourne Redmond Barry's maiden aunt, Miss Arabella Barry, Irish born but residing in England, had warned her nephew against acquiring an Irish accent ("You know a brogue is horrid --- indeed every accent is vulgar that tells where the person has come from"), at the same time denouncing the Irish barristers with whom Redmond would be associating in Melbourne,

> I fear that you often mix with unpolished youths ... Irish barristers in general are particularly disagreeable in good company --- perpetual jokes & quizzing & taking the lore of every word you utter --- you have too much sense & good taste to sing Irish songs in English company[;] they dont [*sic*] understand the wit & are disgusted with the vulgarity.[8]

The strong Irish accents of some legal practitioners were commented upon by contemporary observers. One visitor to Victoria in 1853 made a second visit to that Colony five years later. In describing a civil trial in the County Court, he wrote. "I observed a vast number of new faces under horse-hair, and the predominant tone of the new comers smacked strongly of the Liffey."[9]

Against such a background of anti-Irish (and often anti-Catholic) sentiment those middle class Irishmen who arrived in Australia in the second and third quarters of the nineteenth century had to establish their careers. It is hardly surprising that they developed an attitude of mutual support, especially in the legal profession. The *camaraderie* among members of the Bar, which had long existed in England and in Ireland, was strengthened and reinforced by the prejudices against them which Irish barristers encountered in Australia.

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[8] Arabella Barry to Redmond Barry, 27 November 1840, Barry Papers, Box 601/1(g), Publlc Record Office Victoria (PROV), quoted in Ann Galbally, *Redmond Barry: An Anglo-Irish Australian* (Melbourne, 1995), pp 42-43.

[9] William Kelly, *Life in Victoria or Victoria in 1853, and Victoria in 1858*, 2 volumes (London, 1859), Volume I, p 361. The River Liffey flows through Dublin.

The Profession

The legal profession in Australia had a formal and statutory foundation. Although several solicitors (including Charles Henry Chambers, to whom further reference will shortly be made) had been admitted to practice in the colony under the Letters Patent of 4 February 1814 (the Second Charter Justice), most of the Irish lawyers noticed in this chapter were admitted pursuant to the provisions of the Letters Patent of 12 October 1823 (the Third Charter of Justice, issued consequent upon the Act 4 *Geo*. IV, *c*. 96 (known as the *New South Wales Act* of 1823), which also provided for the establishment of the Supreme Court of New South Wales. Clause 10 of the 1823 Letters Patent provided for the admission of legal practitioners admitted in Great Britain (that is, in England or Scotland) or Ireland, and authorised the newly established Supreme Court of New South Wales to admit "so many other fit and proper Persons to appear and act as Barristers, Advocates, Proctors, Attorneys, and Solicitors as may be necessary, according to such general Rules and Qualifications as the said Court shall, for that Purpose, make and establish." In consequence, therefore, Irish practitioners were entitled to automatic admission in New South Wales, a privilege to which they were not automatically entitled in England.

Throughout the period considered in this thesis the profession of the law in Ireland (as it was in England) was a profession divided between, on the one hand, barristers, and, on the other hand, attorneys, solicitors and proctors (depending upon the Court by which they were admitted and the nature of their practice). In nineteenth century Australia that division in the legal profession existed in New South Wales, at least from 5 September 1829,[10] and in Victoria (where in theory, but not in practice, the profession was amalgamated). In the smaller colonies, however, especially in Tasmania, South Australia and Western Australia, there was no such separation, and a practitioner was usually admitted as a "barrister, attorney, solicitor and proctor".

[10] J. M. Bennett (ed.), *A History of the New South Wales Bar* (Sydney, 1969), pp 43-51.

Englishmen were already well established in the colonial legal profession before any Irish barristers arrived. The first barristers admitted in the colony, in July 1824, had all qualified in England, and it was not until the arrival of Roger Therry five years later that a barrister qualified in Ireland was admitted to the local Bar. Of the 35 barristers admitted before Thomas Callaghan (on 13 February 1840) only nine had qualified in Ireland, and of those at least two (James Croke and Redmond Barry) were by then practising in the Port Phillip District.[11] This preponderance of Englishmen in an already well established legal profession added to the challenges facing newly arrived Irish lawyers and provided a further encouragement towards assisting one another.

Irish Women and the Law

All the lawyers referred to in this thesis, whether or not of Irish background, were men. Women did not enter the legal profession in Australia until towards the end of the first quarter of the twentieth century. Thereafter, and especially in the latter part of that century and into the twenty-first century, Australian women (many of Irish ancestry) have become lawyers in ever increasing numbers, in some States now constituting a majority of the practitioners and a significant part of the Judiciary.

Nevertheless, at least one Irish woman held magisterial office in the early twentieth century. That was Anne Beatson née Purcell, an early female Justice of the Peace in Queensland. Born in County Clare in Ireland in May 1849, Anne had arrived in Brisbane with her parents in 1853. As a married woman she settled in Maryborough in November 1886. When appointed a Justice of the Peace on 20 February 1932, at the age of 82, Mrs Beatson had the distinction of being the first female JP in that town, and almost certainly the first Irish woman JP in Queensland.[12] She was a forerunner of many women who have

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[11] *The New South Wales Bar 1824-1900: A Chronological Roll* (compiled by the Honourable Mr Justice Waddy, R.F.D.) (archive.nswbar.asn.au/docs/about/history/c19thbarristers.pdf); Geoff Lindsay (ed.), *No Mere Mouthpiece: Servants of All, Yet of None* (Sydney, 2002), p 342.

[12] The first woman Justice of the Peace in Queensland was Miss Matilda Hennessy of Mackay, probably of Irish ancestry, who had been appointed in 1918 (*Sydney Morning Herald*, Friday, 3 May 1918, p 8; *Courier-Mail* (Brisbane), Thursday, 4 January 1934, p 15).

subsequently held judicial office in Queensland and in other States throughout the twentieth and twenty-first centuries.

"What Kindness have I received from Irishmen"

When the young Irish barrister Thomas Callaghan, who had arrived in Sydney in February 1840, found himself physically unwell and in temporary financial embarrassment early in the following year, he sought help from another Irishman at the Sydney Bar, William Alexander Purefoy. Their acquaintance apparently was professional rather than personal. Despite Callaghan being a Catholic and Purefoy, the son of a Church of Ireland clergyman, being a Protestant, assistance was immediately forthcoming from the latter (who was to become Callaghan's colleague when, twenty years later, they were among the early appointees to the District Court of New South Wales). Callaghan concluded his record of the occasion with the words, "What kindness I have received from Irishmen, even from comparative strangers".[13]

Callaghan's experience was just one instance of Irishmen helping each other in the Australian colonies, despite differences of religion. The vast majority of Irish immigrants to Australia were Catholic, but many of the Irish professional men, especially lawyers, were Protestant. However, when it came to advancing the interests of their fellow countrymen, considerations of nationality often outweighed those of religion. Purefoy was six years older than Callaghan and also a graduate of Trinity (BA 1830). He was three years Callaghan's senior at the Irish Bar, having been called in 1835. Purefoy's professional career followed, to an extent, a path similar to that of Callaghan. After practising in Ireland he had arrived in Sydney in 1839 (in consequence of what Callaghan described as "his own sorrows [in Ireland]

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[13] *Callaghan's Diary*, p 39, Friday, January 8th, 1841. Callaghan himself also manifested a spirit of generosity. Of the £50 lent to him by Purefoy, Callaghan on the same day discharged a debt of £5 which he owed to Robert Cruden Gordon, a Sydney merchant who had been kind to Callaghan from the day of his arrival and had subsequently provided him with financial accommodation. Upon learning that Gordon's own financial affairs "were in a terrible state and that he scarcely knew what to do", Callaghan thereupon lent him £25 (*ibid.*). Gordon's affairs apparently did not improve, and he was declared bankrupt in 1843.

... with a kind, a frank and an open heart"[14]) and was thereupon admitted to the local Bar on 16 September 1839.[15] However, Purefoy appears soon to have become professionally and, more unfortunately, financially associated with two solicitors of low repute, George Glanville and Stephen Lambton ("two low ruffians", according to Callaghan[16]). Like Callaghan, Purefoy was ambitious for professional preferment, which ultimately they each achieved. At the outset, however, of the two it was Purefoy who did the better.

The colony's small legal profession, of which Callaghan became a member a few days after his arrival in Sydney, included a number of Irishmen who had commenced legal practice, either at the Bar or as attorneys, in their native land, before coming to New South Wales. Callaghan, although a Catholic, in his early years at the New South Wales Bar considerably benefited from his acquaintance, both professional and social, with members of the Protestant Chambers family, especially Charles Henry Chambers. Chambers has been described as "the first voluntary representative of a long line of Irish lawyers to take up practice in Australia".[17] He was a Belfast Protestant, admitted to the King's Inns in 1813[18] and served articles of clerkship to his father, David Chambers, and in New South Wales was admitted as an attorney and solicitor by the Supreme Court of Civil Jurisdiction (created under the Letters Patent of 4 February 1814, known as the Second Charter of Justice). Subsequently, at his encouragement, Chambers was joined in Sydney by his parents and two of his brothers, David and Hugh John, each also being admitted as a solicitors (although the father, the elder David Chambers, does not appear to have practised his profession in Sydney).[19] This was an early example of the concept which has come to be known as "chain migration", by which a newly arrived immigrant encourages other members of his family or close friends to leave their homeland and join him in his new country.

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[14] *Callaghan's Diary*, p 67, Thursday, May 6th 1841.

[15] *Tegg's New South Wales Pocket Almanac and Remembrancer for MDCCCXLII* (Sydney, 1842).

[16] *Callaghan's Diary*, p 67, Thursday, May 6th 1841.

[17] J. M. Bennett, *A History of Solicitors in New South Wales* (Sydney, 1984), pp 36-37.

[18] Edward Keane *et al.* (eds.), *King's Inns Admission Papers 1607-1867* (Dublin, 1982), p 82.

[19] Bennett, *op. cit.*, n 17, p 37.

Not only was Callaghan briefed professionally by Charles (although, like all young barristers, he experienced tardiness on the part of the solicitor in paying his fees[20]), but he was also the frequent recipient of hospitality *chez* Chambers. However, after recording in his diary that Mrs Charles Chambers was very kind to him, Callaghan, only four days later, somewhat inconsistently, criticised her as being "in fact a vulgar woman and too fond of splashing so that she gives them [the other legal wives] an opportunity for attacking her".[21] Like many rather innocent young men (he was aged only twenty-four at the time), Callaghan was inclined to be somewhat judgmental, especially in matters of morals (in particular, of "sensual indulgence"), and he considered the elder Chambers to have been "dissipated", describing him as being "a sharp little man and probably good natured too, but he has a vulgar mind".[22] Two years later he still maintained a poor opinion of the elder Chambers and his wife ("the old Chambers"), recording --- after enjoying their hospitality --- "The old man is nearly doting: the old woman is prim but chatty".[23] It is apparent that a matrimonial connection between Callaghan and Charles's daughter Margaret Elizabeth Chambers (almost ten years Callaghan's junior) would have been welcomed by the Chambers family, although not by Callaghan himself.[24] Callaghan considered that the entirety of briefs directed to the Junior Bar by Charles Chambers and his professional partner William Thurlow would have come to him, "had he chosen to act basely and flirt with Miss Chambers"; but that he would be able to do without their professional support on such terms.[25]

The rather straitlaced Callaghan was quite scandalised, and very surprised, when at a dinner party given by Charles Chambers the host, after the ladies had withdrawn, "proposed an indecent toast with perfect composure and apparently with an ease and fluency acquired only by habit." He was concerned that the daughter "might perhaps inherit [the father's]

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[20] *Callaghan's Diary*, p 12, Wednesday, March 11th 1840.

[21] Callaghan's Diary, p 7, Friday, February 21st 1840; p 8, Tuesday, February 25th 1840.

[22] *Callaghan's Diary*, p 8, Tuesday, February 25th 1840.

[23] *Callaghan's Diary*, p 116, Friday, February 18th 1842 (for Wednesday, 16th 1842).

[24] *Callaghan's Diary*, p 20, Thursday, May 28th 1840; p 22, Saturday, July 4th 1840. Callaghan in 1848 married Eliza, daughter of Samuel Frederick Milford, the Master in Equity of the Supreme Court of New South Wales (who was later to be a Judge of that Court).

[25] *Callaghan's Diary*, p 54, Saturday, March 27th 1841.

impurity",[26] this being a further reason why Callaghan chose not to pursue a suit for the daughter of the house. Callaghan was also critical of David Chambers, one of Charles's younger brothers, who had arrived in Sydney in 1830, and in 1834-1835 briefly held the office of Crown Solicitor, before resuming private practice as an attorney. After criticising David's state of sobriety at a dinner party and describing him as "a wretched bigot", Callaghan acknowledged being professionally and socially indebted to him, saying, "How hospitable he has been to me! With respect to his house and to his office."[27]

Despite Callaghan's description of him as a bigot, the Protestant David Chambers was not deterred from marrying the Catholic Maria [or Mary] Theresa Dowling, who had travelled to Sydney with her brother the Reverend Christopher Vincent Dowling, the Catholic chaplain in the colony. Less than eight months after her arrival on 17 September 1831, Chambers and Miss Dowling were married on 8 May 1832 by the Reverend Richard Hill at St James's Church, King Street, Sydney, that Church of England ceremony being immediately followed by a Catholic ceremony conducted by the redoubtable Catholic priest, the Reverend John Joseph Therry.[28] In the Australian colonies mixed marriages between Catholics and Protestants, especially in the professional classes, were not uncommon. There was a similar inter-denominational replication when it came to the baptisms of the children of David Chambers's elder brother, Charles Henry Chambers, who in 1839 ultimately converted to Catholicism, the religion of his wife Lucinda.[29]

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[26] *Callaghan's Diary*, p 125, 10 May 1842.

[27] *Callaghan's Diary*, p 28, September 19th 1840. Saturday. David Chambers was very active in the Anglican Parish of St Peter's, Cooks River, and was one of the trustees of the land upon which the church was erected (*Sydney Herald*, 19 April, 1838). David's residence at Newtown was named "Leitrim", presumably in acknowledgement of his Irish origins (St Peters Cooks River History Group, "A Fresh Look at 19th Century St Peters", https://stpeterscooksriverhistory.wordpress.com/, 6 January 2009).

[28] *Sydney Herald,* 14 May 1832. Interestingly, the burial record of Mrs Maria Chambers, who died in Melbourne in 1859, discloses her religious denomination as Protestant (Marjorie Morgan, *The Old Melbourne Cemetery 1837-1922* (Oakleigh, Victoria, 1982), p 231.

[29] Colin Fowler, "An Early Catholic Household at Pyrmont: The Family of Sydney's First Town Clerk", *Journal of the Australian Catholic Historical Society*, Volume 38, 2017, p 6 at p 7.

Upon his arrival in the colony, and after establishing himself in lodgings at 6 Wentworth Place, Sydney, Callaghan's first visitor (after his scapegrace brother, Standish[30]) was none other than the Chief Justice of New South Wales, Sir James Dowling, who, although born in London, was proud of his Irish ancestry and regarded himself, and was regarded by his family and all others, as an Irishman.[31] Callaghan was the recipient of many kindnesses, both professional and social, from Dowling, to whom, nevertheless, he makes in his diary a number of disparaging and critical references, frequently referring to the Chief Justice as "Old Blowhard". Callaghan did, however, acknowledge Dowling's kindness towards him. He recorded that at a meeting of the Bar, when Dowling came in unexpectedly, the barristers were all laughing and sneering at him behind his back, and continued, "He in some degree deserves it, for in many respects he is a nasty old man, although he has been kind to me."[32] Dowling adopted a somewhat paternal attitude towards the younger barristers in Sydney, on one occasion at a ball at Government House welcoming Callaghan to the Governor and Lady Gipps as "one of his children in law", seemingly to Callaghan's embarrassment.[33] Despite his sympathetic encouragement of newly arrived young barristers, Dowling nevertheless privately admitted, as to the Bar, that "we have some dumb Dollies here ... especially the Irish men".[34]

Many years later the assistance of another Irish born Chief Justice of New South Wales, Sir Frederick Darley, was solicited by the Premier, Sir Henry Parkes, on behalf of Hugh Chambers, who by then was probably aged in his seventies and had fallen upon hard times. Parkes had apparently hoped that Darley could provide some form of official appointment for Chambers. Darley was sympathetic and responded that, as the case was one of a "Brother professional", he would willingly assist Chambers if it lay in his power to do so, but that "The

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[30] Standish Callaghan, who was several years older than Thomas, had migrated to Australia some time earlier. According to Alfred E. Stephen, "The Diary of Thomas Callaghan, B.A., District Court Judge in New South Wales", Part I, (1948) *Royal Australian Historical Society Journal and Proceedings*, Vol. XXXIV, Part V, p 261 at p 263, Standish had arrived in Australia "about a year" before Thomas, but no authority is cited for that statement. From as early as August 1838 Standish Callaghan had held various minor official appointments in Newcastle (Chapter 2, text to n 77).

[31] Chapter 2, text to notes 56-61.

[32] *Callaghan's Diary*, p 36, Friday, January 1st 1841. Dowling at the time was aged just 52.

[33] *Callaghan's Diary*, p 83, Tuesday, June 29th 1841.

[34] Sir James Dowling to James Sheen Dowling, 30 March 1843 Dowling Family Papers (National Library MS 3485), quoted in J. M. Bennett, *Sir James Dowling, Second Chief Justice of New South Wales 1837-1844* (Leichhardt, NSW, 2001) p 143, n 65.

Chief Justice has absolutely nothing in his gift". However, if Parkes were getting up a subscription to support Chambers, Darley would "gladly add my mite".[35] This was by no means an isolated instance of one Irishman of the Law being prepared to help another in his time of need.

Also on the very day of Callaghan's arrival in the colony he made the acquaintance of two other Irish lawyers, with each of whom he was to have a significant professional relationship. They were John Hubert Plunkett, the Attorney-General, and Roger Therry, the Commissioner of the Court of Requests, who was to act as Attorney-General while Plunkett was on leave in 1841-1843. To each Callaghan had letters of introduction, and from each he received a cordial reception, Plunkett, the more friendly, inviting him to dine the following day. As well as kind advice and encouragement, Plunkett gave Callaghan practical assistance, the Attorney-General offering the use of his library whenever the young barrister wished, and also the use of his pony.[36] Less than a week later Plunkett moved Callaghan's admission to the Bar, before Chief Justice Dowling.[37]

The assistance and co-operation of Irishmen existed not only on a personal and a professional level, but also on occasion in official relationships. Plunkett and Therry were Catholics; Sir Richard Bourke, the Governor, was a Protestant. Nevertheless, as will emerge, each of the former had an excellent relationship with Bourke. It was at the suggestion of Plunkett, and with the support of Bourke, that a special session of the Legislative Council in June 1836 enacted 7 *Will*. IV, No. 3 (commonly known as the *Church Act* of 1836), which essentially granted State Aid to religion in New South Wales. Both the Governor and his Attorney-General were desirous of establishing in the colony a system of general eduction based on the Irish National System, a system with which both Bourke, an Irish landowner, and Plunkett were familiar. This system made provision for both Protestants and Catholics to be accommodated in the one school, where they were to receive together their ordinary secular instruction; in addition, each group was to receive separately a special denominational

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[35] Darley to Parkes, 25 March 1891, Parkes Correspondence, Mitchell Library A 881, Volume 11, p 23.

[36] *Callaghan's Diary*, p 4, Thursday, February 13th 1840.

[37] *Ibid.*

instruction given by its pastor. The introduction of such a system was first suggested by Bourke to the Colonial Office in 1833.[38] Despite approval from Downing Street and enactment of the necessary local legislation, the proposal encountered such opposition in the Colony that it was not until 11 years after Bourke's departure that in 1848 a Board of National Education was established, with Plunkett as its first chairman.[39]

In the relationship between Bourke and Plunkett it should not be overlooked that each came from a similar family background, the upper-middle class landed gentry. Neither should it be overlooked that Bourke was not without some experience in the law, having been admitted to the King's Inns in Trinity Term 1796,[40] as well as sitting as a Justice of the Peace for County Limerick both before and after his Governorship of New South Wales.[41] In the Colony Bourke held strong views on the appointment and jurisdiction of full-time paid magistrates, his experiences in Ireland leading him to prefer that the administration of justice

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[38] Bourke to Stanley, 30 September 1833, *HRA*, Series I, Volume XVII, p 230.

[39] Glenelg to Bourke, 30 November 1835, *HRA*, Series I, Volume XVII, p 201; Bourke to Glenelg, 8 August 1836, *op. cit.*, p 466. The background and history of the Irish National Education system (the architect and leading proponent for which was the Irish politician Sir Thomas Wyse, MP) is considered in James Johnston Auchmuty, *Irish Education: A Historical Survey* (Dublin, 1937), Chapter IV (pp 68-123), "Sir Thomas Wyse and Irish National Education". Auchmuty concludes, "[T]hus Wyse was the practical progenitor of the system in New South Wales devised by Bourke and Plunkett." (p 82). But even in Ireland the introduction of the system gave rise to accusations of bigotry and sectarianism. In 1836 the *Sydney Herald* quoted a statement in the Irish *Record* made earlier in that year that "It is now evident that the schools are filled with Papists" (*Sydney Herald*, 15 September 1836, p 2). See Ronald Fogarty, *Catholic Education in Australia 1806-1850*, 2 volumes (Melbourne, 1959), Volume I, pp 27-28; David Kemp, *The Land of Dreams: How Australians Won Their Freedom 1788-1860* (Melbourne, 2018), p 179.

[40] Edward Keane *et. al.* (eds.), *King's Inns Admission Papers 1607-1867* (Dublin, 1982), p 45. Before embarking upon his military career in 1798, Bourke received his tertiary education at the University of Oxford, entering Oriel College in October 1793. He left that college in 1794 and entered Exeter College in 1796. It is not now possible to know for what period Bourke studied law in Dublin. However, it cannot have been for long. He was a commoner at Oriel from only October 1793 (when he was aged 16) until the following year. He entered Exeter in 1796 and graduated BA in February 1798. When he was admitted to the King's Inns in mid-1796 Bourke was already enrolled at Exeter, and would have been required to be in residence throughout the Oxford terms. To have completed the requisite three years at Oxford before graduating in early 1798, there would have been little time left to Bourke to study law at the King's Inns. It is likely that he did so only during the Long Vacation between Trinity Term and Michaelmas Term in 1796.

[41] From 1815 to 1825, when he was no longer on active service in the Army; again, during the interlude between his service in the Cape of Good Hope (which ended in September 1828) and his appointment to New South Wales in late 1831; and after his final retirement from official duties at the end of 1837, Bourke resided at his country seat of Thornfield in County Limerick, where his busy and active participation in local affairs included regularly sitting as a Justice of the Peace for that county (Hazel King, *Richard Bourke* (Melbourne, 1971), pp 125, 249; *Thom's Irish Almanac and Official Directory* (Dublin, 1848), p 491).

at its lowest level should be the responsibility of benches of part-time honorary magistrates. But he recognised the possibility of abuse where a single honorary magistrate (usually a landowner, with assigned convict servants) would hear "complaints of masters against their assigned servants, and vice versa", such charges constituting nine-tenths of the magisterial business of the colony.[42]

From the inception of the colony the administration of justice at its lowest level was largely carried out by unpaid Justices of the Peace. However, beginning in the 1820s, paid full-time magistrates (usually designated Police Magistrates) were being appointed, both in Sydney and in regional districts.[43] Some of those magistrates were Irish; hardly any were lawyers. One Irish Police Magistrate, however, is deserving of notice. James Henry Crummer, born at Athlone, was an Army officer who had served at Waterloo. Accompanied by his family Crummer arrived in Sydney with the 28th Regiment in October 1835. Although without any legal qualifications, he was immediately appointed a Justice of the Peace, and as Assistant Police Magistrate and commander of the Iron Gang at Newcastle, which offices he retained after his retirement from the Army in January 1840. When four years later a number of Police Magistracies, including that of Newcastle, were abolished, Crummer continued to perform all his previous duties without pay, at considerable financial sacrifice to himself and his large family. It was only in 1849 that Crummer was again appointed to a paid position, as Police Magistrate at Maitland, followed by a final appointment at Port Macquarie. Crummer manifested many typical Irish characteristics. Described in his youth as "a lively, kind-hearted Irishman", according to his biographer, Crummer's "integrity, impartiality and urbanity ... inspired great affection in Newcastle", yet "he was unable to relate his ideals of compassion and conciliation to real situations." There was no official recognition for his service for five years without remuneration, to the great benefit of the local populace in Newcastle.[44]

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[42] Bourke to Goderich, 3 November 1832, *HRA*, Series I, Vol. XVI, pp 787-788.

[43] John Kennedy McLaughlin, "The Magistracy in New South Wales, 1788 -1850" (unpublished LL M Thesis, University of Sydney, August 1973), especially Chapters 10, 13.

[44] E. J. Lea-Scarlett, "Crummer, James Henry (1792-1867)", *ADB*, Volume 1, p 264.

The relationship between Bourke and Therry, was even closer (at least on Therry's part) than that between Bourke and Plunkett. Therry, ambitious for his own advancement, nevertheless had an unbounded admiration and personal affection for Bourke. It was through Therry's initiative that the statue of Bourke, the first public statue erected in Australia, was commissioned and constructed. The statue, now standing outside the State Library of New South Wales in Sydney, was funded by public subscription organised by Therry, who was the author of the adulatory inscription appearing upon its plinth.[45] It is possible that the close official and personal relationships between the Irish Governor and his two chief legal advisers, both Irish, aroused resentment among non-Irish members of the local administration, which revealed itself after Bourke's departure. According to Mr Justice William Westbrooke Burton (as recorded by Callaghan), Therry had excellent claims to the office of Solicitor-General, when Plunkett, the previous occupant, was elevated to be Attorney-General, but Bourke "would have had great difficulty in giving it to his friend Roger Therry on account of his being with Plunkett a Roman Catholic." Accordingly, the lesser office was not filled.[46]

Bourke, a Protestant, was a considerate and responsible landlord to the tenants on his Irish estate, almost all of whom were Catholics. Both in Ireland and in New South Wales he was totally lacking in religious prejudice, as evidenced by his support of State Aid for all religious denominations, and for an education system which would allow for regular religious instruction of pupils. But, unwittingly, Bourke may thereby have contributed to the religious prejudice and bigotry (and the consequent anti-Irish prejudice) which increasingly manifested itself after his departure from the colony. The Governor dated that religious ill-feeling from the time when the Anglican Bishop William Grant Broughton publicly expressed his opposition to the *Education Act.* Bourke reported to the Secretary of State,

> 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 had hitherto prevailed between Protestants and Catholics, appeared to be hazarded.[47]

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[45] That inscription is set forth at Appendix C.

[46] *Callaghan's Diary*, p 119, Saturday, March 26th 1842.

[47] Bourke to Glenelg, 8 August 1836, *HRA*, Series I, Volume XVIII, p 468.

Nevertheless, especially after Bourke's departure in late 1837, prejudice of some degree against Irishmen continued in the Australian colonies throughout most of the nineteenth century, being inflamed by sectarianism as the century advanced. In Victoria during the period when, consequent upon the discovery of gold, the population of the colony was vastly increasing, many of the newcomers were of Irish birth. The prejudice against them was directed not merely to the labouring classes, but also to members of the professions and of the colonial administration (in which many senior officers were Irishmen).

Another instance of Irish lawyers helping one another was Plunkett's assistance in advancing the professional career of Thomas Callaghan. But the Attorney-General must have had a genuine belief in Callaghan's legal ability. Otherwise he would not have arranged for the young barrister to fill in for Therry's appearances for the Crown, while the latter was attending a meeting of the Legislative Council ("I owe this to Mr Plunkett among my many obligations to him"[48]). More than a year previously Callaghan, in acknowledging Plunkett's kindness, recorded, "No one could have been more kind than he was to me."[49] A fortnight later the Attorney-General confided to Callaghan that the young barrister

> was the only person for whom he had asked the Governor for any favour ..., and that he thought that I should get the next vacant appointment at the Bar, ... and that that evening he would write to Parker [Henry Watson Parker, the private secretary to Governor Gipps] to remind him of my name in case any opportunity occurred for which I should be eligible.[50]

It was through Plunkett's influence that Callaghan was ultimately appointed Commissioner of the Court of Claims, when that office fell vacant as a consequence of Callaghan's fellow barrister and fellow Irishman, William Hustler, being appointed Sheriff in October 1841.[51] Plunkett had earlier recommended Callaghan for appointment as Deputy

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[48] *Callaghan's Diary*, p 133, Monday, 11 July 1842. Therry was acting Attorney-General in 1841-1842, during the absence of Plunkett on leave to the United Kingdom.

[49] *Callaghan's Diary*, p 49, Tuesday, March 9th 1841.

[50] *Callaghan's Diary*, p 53, Monday, 22nd March 1841. By the phrase "appointment at the Bar" Callaghan presumably means that the appointment under contemplation by Plunkett was one which would be available to a member of the Bar.

[51] *Callaghan's Diary*, p 99, Tuesday, October 26th 1841.

Sheriff and Chairman of Quarter Sessions at Port Phillip (when those offices were relinquished by Samuel Raymond, another Irish lawyer, who had arrived in the colony in 1837), but Callaghan at that stage evinced little interest in leaving Sydney.[52] Later, it was largely through Plunkett's influence that from 1841 Callaghan acted as a temporary Crown Prosecutor, an appointment that was made permanent in 1845.[53]

Although he was to become the recipient of many kindnesses from Therry, Callaghan at the outset was critical of him and more so of his wife. He described Therry as "a vulgar shallow person", saying, with a degree of accuracy, "I do not think that he is a man of more than ordinary intellect, he is certainly by no means a man of talent, yet he is laborious and pushing, having also an admirable opinion of himself." Mrs Therry was the subject of even stronger criticism. Having described her as an "empty dowd", Callaghan continued, "she has no heart at least of such warmth; and she has no head except perhaps for shortsighted cunning. However, she has great influence over her husband".[54] But within a few months Callaghan had revised that harsh opinion, saying that Mrs Therry had been very kind to him.[55] There was little constancy in Callaghan's opinions, favourable or unfavourable, of Mrs Therry or her husband.[56]

William Hustler, another young Irish barrister, only a couple of years older than Callaghan, had arrived in the colony in 1839, and had thereupon been admitted to the Colonial Bar. The two had frequent professional and social contact, and Hustler is often referred to in Callaghan's diary (sometimes by the name "Jack", since his colleagues at the Bar sneeringly called him "Jack Brag"[57]). However, the relationship between the two of them was somewhat ambivalent. There was, at least on Callaghan's part, a considerable degree of

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[52] *Callaghan's Diary*, p 49, March 9th 1841.

[53] *Callaghan's Diary*, pp 197, 199, August 20th 1845 (for Saturday, 7 September 1844; for January 1845).

[54] *Callaghan's Diary*, p 5, Monday, February 17th 1840.

[55] *Callaghan's Diary*, p 20, Thursday, May 28th 1840; Saturday, September 19th 1840.

[56] Although Callaghan in his Diary frequently refers to Therry, it is somewhat curious that Therry's own memoirs make no reference whatever to Callaghan (Sir Roger Therry, *Reminiscences of Thirty Years' Residence in New South Wales and Victoria* (London, 1863) (facsimile edition, Sydney, 1974)).

[57] *Callaghan's Diary*, p 28, Saturday, September 19th 1840.

professional rivalry (for example, regarding briefs for the assessment of damages delivered by the firm of Chambers & Thurlow for a particular sitting of the Supreme Court: Callaghan received one brief, whilst Hustler received 10 or 12).[58] Callaghan then attempted to justify that implied criticism of both the other barrister and the solicitor by saying, "I do not in the least envy him, but I do not owe them much: very little more than I owe any other attorney here, some of whom however have been rather kind to me."[59]

Callaghan was not reluctant to confide to his diary some very candid comments which were critical of Hustler, who at an early stage in their acquaintance, he described as "an indiscreet, an ignorant, a vain, and a heartless unprincipled fellow".[60] At one stage, when relations between them were rather cool, Callaghan declined a dinner invitation from another colleague at the Bar, John Bayley Darvall, on the ground that Hustler would be a fellow guest. Upon Darvall inquiring whether Hustler was an enemy of his or was on bad terms with him, Callaghan responded that he "did not suppose he was exactly an enemy of mine and that I was not on bad, but only on peculiar, terms with him".[61] These two young barristers were each ambitious for professional success and for official preferment. Within a few years they began to receive official appointments, although at the outset those were relatively minor ones.

The financial defalcations and consequent suicide ("in a fit of temporary insanity") on 12 October 1841 of the Irish born Sheriff of New South Wales, Thomas Macquoid (who held that office from June 1828 until his death), necessitated fresh official appointments to be made. Both Hustler and Callaghan found themselves beneficiaries. Temporary appointment as Sheriff was immediately offered by the Governor, Sir George Gipps, successively to two Police Magistrates in Sydney, Charles Windeyer and John Ryan Brenan, each of whom declined it "on the ground of the extreme responsibility and risk of the office".[62] (Brenan was an Irish born attorney who, acquainted with Governor Bourke, had arrived in Sydney in June

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[58] *Callaghan's Diary*, p 46, Wednesday, February 17th 1841.

[59] *Ibid*.

[60] *Callaghan's Diary*, p 10, Thursday, March 5th 1840.

[61] *Callaghan's Diary*, pp 80-81, Wednesday, June 16th 1841.

[62] Gipps to Russell, 31 October 1841, *HRA*, Series I, Volume XXI, p 571.

1834, and who then held, not entirely without controversy, various official appointments, including that of coroner. His son, John O'Neill Brenan, was Sheriff of New South Wales from 1854 to 1860.[63]) Some months later John Ryan Brenan informed Callaghan that, after he had refused the appointment, the Governor said to him that he did not know what to do "for that they were so well paid the leading men of the Bar would not take the place, and then amongst the rest of the Bar he could only find young inexperienced men in whom he could place no confidence!!" [64]

Upon the recommendation of the Chief Justice, Gipps then appointed Hustler , "to the surprise and astonishment of everyone",[65] to fill the vacancy until a permanent appointment could be made. Hustler was to receive the same salary as his predecessor --- "£1000 a year, without fees, or other allowances, except 40s per diem for travelling expenses when absent from Sydney on duty". While acting as Sheriff Hustler would be precluded from practising as a barrister.[66] However, the Secretary of State for the Colonies did not confirm Hustler in the office, as in this instance Lord Stanley chose to exercise his personal right of patronage. In October 1842 His Lordship appointed Adolphus William Young, formerly a Police Magistrate in Sydney and subsequently an attorney in private practice, to be Sheriff of New South Wales.[67] Hustler died in June 1845, aged only 32.

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[63] "Brenan, John Ryan (1798?-1868)", *ADB*, Volume 1, p 149.

[64] *Callaghan's Diary*, p 121, Thursday, April 7th 1842.

[65] *Callaghan's Diary*, p 99, Tuesday, October 26th 1841. Three months earlier Callaghan had described Hustler as being, professionally, "a most ignorant jackass, but a most audacious one" (*Callaghan's Diary* p 87, Wednesday, July 14th 1841).

[66] Gipps to Stanley, 31 October 1841, No. 1, Papers printed by Order of the Legislative Council.

[67] Gipps to Stanley, 31 October 1841, No. 211, CO 201/312 (AJCP PRO 335), p 278, minutes. The Permanent Under-Secretary of State, James Stephen, minuted, at p 278, "On the question of Patronage raised in this Despatch, I assume that Colonel Wilbraham will ascertain Lord Stanley's intentions." The Colonel Wilbraham referred to in this minute was Colonel the Honourable Edward Bootle-Wilbraham, Lord Stanley's private secretary (3 September 1841 - 23 December 1845): J. C. Sainty (ed.), *Office-Holders in Modern Britain*, Volume 6, *Colonial Office Officials 1794-1870* (London, 1976), pp 36-51, CO 701/11; http://www.british-history.ac.uk/office-holders/vol6/pp36-51 [accessed 4 March 2016]). The Colonel was also His Lordship's brother-in-law (both he and Lady Stanley (née Emma Caroline Bootle-Wilbraham) being children of Edward Bootle-Wilbraham, the first Baron Skelmersdale). As to Patronage, see Chapter 2, text at notes 38f. Young was a member of a landed family in Berkshire (Edward Walford, *The County Families of the United Kingdom* (London, 1860), p 712). After resigning as Sheriff in November 1849, he returned to England, where later he was elected to the House of Commons (A. F. Pike, "Young, Adolphus William (1814-1885)", *ADB*, Volume 2, p 633).

A week after Macquoid's death Callaghan was on 19 October 1841 appointed to Hustler's former position as Commissioner in the Court of Claims (constituted under the local statute 4 Will. IV, No 9 (1833) "to hear and determine upon Claims to Grants of Land"), receiving £250 a year, and having a right of private practice, although, somewhat curiously, William Valleck, Principal Under Secretary, more than forty years later and after Callaghan's death, stated that Callaghan received no salary in that office, but was "paid by fees".[68]

Callaghan was the author of the publication commonly known as *Callaghan's Acts* (*Acts of Parliament enacted for, and applied to, the Colony with Notes and Indices* (Sydney, W. J. Row, Government Printer, 1844-1845)). This compilation received the "entire approval" of Governor Gipps, and a copy (together with a letter from Callaghan to the Secretary of State, and "some testimonials in favour of his Work") was, at Callaghan's request, forwarded by the Governor to the Secretary of State,[69] and for which Lord Stanley requested Gipps to convey his thanks.[70] The testimonials included a letter from Alfred Stephen, by then the Chief Justice of New South Wales, "and extracts from the colonial journals approving of my work".[71] It has been stated by Judge Holt that for this publication Callaghan was awarded a bronze medal at the Great Exhibition of 1851.[72] However, Holt does not cite any authority for this assertion,

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[68] Evidence of William Valleck, Principal Under Secretary, *Votes and Proceedings of Legislative Assembly, New South Wales*, 1865, Volume 2, p 887.

[69] Gipps to Stanley, 13 January 1845 (Governor's Despatches, January - May 1845 (Mitchell Library A1236), pp 243-244).

[70] Stanley to Gipps, 10 June 1845, CO 201/355 (AJCP Reel 363).

[71] *Callaghan's Diary*, p 199, August 20th 1845 (for January 1845).

[72] H. T. E. Holt, manuscript of a work entitled *The Lives and Times of the Judges of the District Court of New South Wales 1859-1959* (Mitchell Library MSS 3695), p 47; H. T. E. Holt, *A Court Rises* (North Sydney, NSW, 1975), p 25.

and neither Callaghan nor his publication is included in the list of those to whom medals were awarded at the Exhibition.[73]

Callaghan, who had intermittently held temporary appointments as a Crown Prosecutor from 1841, was appointed permanently to that office on 25 January 1845, retaining the right of private practice at the Bar. Later in 1845 Callaghan was also appointed a Justice of the Peace for Sydney, being sworn in as such on 11 August 1845.[74] He continued as a Crown Prosecutor until on 11 February 1857 he was appointed Chairman of Quarter Sessions. When first appointed Crown Prosecutor Callaghan's salary was £600 a year.[75] From 1 January 1853 he received the "gold increase" of £175 (paid to all public officials in the Colony, in consequence of the discovery of gold), thus bringing his annual salary to £775, until it returned to the former figure of £600 on 1 January 1857. As Chairman of Quarter Sessions Callaghan received £800 a year. When District Courts were established in New South Wales, pursuant to the *District Courts Act* of 1858, Callaghan was one of the first three Judges appointed to that Court on 22 December 1858, being designated for the Southern District. His salary was £1000 a year.[76] By mid-nineteenth century standards these salaries received by Callaghan were not insignificant, especially as, until his judicial appointment, Callaghan as Crown Prosecutor enjoyed the right of private practice at the Bar.

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[73] Leslie Lewis Allen, *Recipients of Official Crystal Palace Medals awarded by Her Majesty's Commissioners at the Great Exhibition of 1851 and the South Kensington Exhibition of 1862*, 2 volumes (London, 2012), Volume 1: 1851. Since the Great Exhibition was essentially devoted to works of industry of all nations, but also included some examples of natural resources (such as the Koh-i-Noor diamond), it would have been remarkable had a literary publication, let alone a compilation of legislative enactments, been exhibited, and even more remarkable for such a work to have been awarded a medal. All medals awarded were fabricated from bronze (*op. cit.*, heading, "1851 Great Exhibition Official Medals"). Holt's statement regarding the award of such a medal to Callaghan is repeated by Alex C. Castles, "Irish Connections with Australian law", *The Australian Law Journal*, Volume 66, 1992, p 532, where the author states, at p 535, "At the 1851 London Exhibition, Thomas Callaghan was awarded a bronze medal and deservedly so for his own special contribution to legal publishing in Australia in the previous decade." Holt is the authority cited by Castles for that statement (H. T. E. Holt, "Callaghan, Thomas (1815-1853)", *ADB* Volume 1, p 195). It is likely that Holt is here merely repeating the statement to that effect made in J. Henniker Heaton, *Australian Dictionary of Dates and Men of the Time* (Sydney, 1879), p 31. See Chapter 9, text to n 5.

[74] *Atlas* (Sydney), Saturday, 16 August 1845, p 453.

[75] Of that salary the Governor remarked at the time, "but, as he [the Crown Prosecutor] receives no travelling allowances, and has to attend Quarter Sessions throughout the Colony, he is not in my opinion overpaid" (Gipps to Stanley, 6 January 1845 (Governor's Despatches, January - May 1845 (Mitchell Library A1236), p 414)).

[76] *Loc. cit.*, n 68.

William Purefoy and Norfolk Island

Meanwhile, William Purefoy was also achieving professional advancement, probably greater than that of Callaghan. According to Holt, Purefoy soon established a lucrative practice, particularly in equity and in the criminal jurisdiction. Among notable trials in which Purefoy appeared was *R v. Jones and ors*. on 19 October 1842. That trial arose out of a mutiny by a number of convicts on a Government vessel while anchored at Norfolk Island in June of that year. In the fracas one soldier and five convicts were killed, and another soldier was badly injured. Subsequently, six of the surviving convicts were put on trial for the capital charge of assaulting the injured soldier with intent to murder, and for piracy (also a capital offence). The trial was conducted in Sydney before Chief Justice Dowling and a jury. Attorney-General Plunkett and Roger Therry prosecuted, and Purefoy and Archibald Michie (named in newspaper reports as Mechie)[77] divided the representation of the six accused between them. Despite the jury retiring for only five minutes before returning a verdict of guilty against all the accused (all being then sentenced to death),[78] Purefoy's professional reputation had been, in Callaghan's view, enhanced by the trial, which received considerable publicity in the press.[79] During the course of his summing up Dowling delivered a eulogium in respect to the legal team for the six accused, Purefoy, Michie and their instructing solicitor, George Allen, all acting without fee. Those complimentary words of the Chief Justice were repeated and emphasised in an editorial published by the *Sydney Morning Herald*, stating that "the unpaid counsel for the prisoners, Messrs. Purefoy and Michie [and also their solicitor,

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[77] Michie, an English barrister, arrived in Sydney in 1841 and was admitted to the local Bar. Subsequently he removed to Melbourne, where he acquired a very substantial practice. After Responsible Government he held office as Attorney-General, and in 1863 he became Victoria's first Queen's Counsel. While Agent-General for Victoria in London, Michie was appointed KCMG in 1878 (H. L. Hall, "Michie, Sir Archibald (1813-1899)", *ADB,* Volume 5, p 246).

[78] *Sydney Gazette*, Thursday, 20 October 1842, 2; *Sydney Morning Herald,* Thursday, 20 October 1842, pp 2-3, Friday, 21 October, pp 2-3; Saturday, 22 October 1842, p 2. The jury recommended one of the accused to mercy. Four of the six were subsequently hanged. The trial, which was concluded within a single day, had aroused enormous public interest, and had been attended by vast crowds, as was recognised by Plunkett in his closing address (*Sydney Morning Herald*, Thursday, 20 October 1842, p 2).

[79] *Callaghan's Diary*, p 151, January 6th 1843. Callaghan there referred to Purefoy's defence as being "greatly extolled in the *Herald* [that is, the *Sydney Morning Herald*] of the day."

George Allen[80]] merited the high praise bestowed upon them by His Honor the Chief Justice."[81]

Purefoy, aged only in his early thirties, was appointed to preside over criminal trials on Norfolk Island in November 1843, and again, in September 1844, before that territory was transferred from New South Wales to Van Diemen's Land.[82] Those appointments were made pursuant to the Imperial statute 4 and 5 *Will*. IV, *c*. 65 (1834), being an Act for *The More Effectual Administration of Justice at Norfolk Island*, which established a new criminal court for the Island, with full powers over convicts, and which consisted of a barrister and five military or naval officers.[83] Callaghan accepted that the 1843 appointment, which Plunkett had "very properly" proposed should be made according to seniority at the Bar, "thus ... came fairly to Purefoy."[84] However, throughout August and September 1842 there had been a suggestion, initiated by Therry, that Callaghan should be appointed Judge on Norfolk Island. That proposal came to nothing, and Callaghan considered that "Therry [had] behaved very unkindly and disingenuously to me about the Norfolk Island business. After asking my permission to mention my name to the Governor he might at least have told me whether he did so and how it was refused or neglected".[85] A fortnight later William a'Beckett, the Solicitor-General, told Callaghan that the Governor, without consulting the Law Officers, had decided against making any appointment to Norfolk Island. Since Therry, as Acting Attorney-General at the time, would have expected to be consulted, it was not without some satisfaction that Callaghan recorded, "with the consequence that Therry was, to some degree, as much slighted as I myself was in the negotiation".[86]

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[80] Allen was the first solicitor to have received his legal training in the Colony, and was the founder of one of the oldest legal firms in Australia (Norman Cowper and Vivienne Parsons, "Allen, George (1800-1877)", *ADB*, Volume 1, p 5).

[81] *Sydney Morning Herald*, Friday, 21 October 1842, p 2.

[82] *Sydney Morning Herald*, 12 December 1843, p 2, 17 October 1844, p 2.

[83] Alex C. Castles, *An Australian Legal History* (Sydney, 1982), p 160, n 44. This court may be compared to the Court of Criminal Jurisdiction for New South Wales constituted by the *New South Wales Act* of 1787 (27 *Geo.* III, *c.* 2), consisting of the Judge-Advocate and "six officers of His Majesty's forces by sea and land".

[84] *Callaghan's Diary*, p 185, Sunday, November 19th 1843.

[85] *Callaghan's Diary*, p 140, Monday, August 29th 1842.

[86] *Callaghan's Diary*, p 141, Sunday, 11th September 1842.

On 3 April 1848, Purefoy was appointed, during the absence on leave of Charles Windeyer,[87] the incumbent of that office, to act as "Commissioner for hearing and reporting on claims of Land",[88] a position which had previously been held by Callaghan, and, earlier, by Hustler. In the following year the Chief Justice (after consulting his colleagues) appointed Purefoy to be President of the Court established for Trial for Disputed Elections, pursuant to the provisions of section 36 of 6 *Vict*., No. 16 (commonly called the *Electoral Act* of 1843).[89]

From 1856, Purefoy held the office of Chief Commissioner of Insolvent Estates, until his appointment as a District Court Judge on 25 July 1861. He was succeeded in his previous office by Alfred McFarland, another Irish lawyer, who was himself subsequently to become a District Court Judge. (McFarland's interesting judicial career, both in Western Australia and in New South Wales, will be considered later in this thesis.) Purefoy's occupancy of judicial office was not without occasions of controversy. In 1859 as Chief Commissioner of Insolvent Estates Purefoy, after a sympathetic hearing, granted a contested application for discharge sought by the bankrupt Henry Parkes, a future Premier of the Colony. That decision was subsequently reversed by the Chief Justice, Sir Alfred Stephen, upon appeal brought by a hostile creditor. Purefoy's decision, and his reasons, received criticism in the press, the *Sydney Morning Herald,* having stated that the judgment "has shocked and alarmed reflecting men" and described Purefoy as having "laid down principles so monstrous", continued,

> it is appalling to find such conduct vindicated by a Judge of the Insolvent Court, opposed as it is to that vital principle in monetary affairs, namely --- that documents shall be what they purport to be. "In England", said a wit "insolvents are whitewashed; in New South Wales they are Purefoyed".[90]

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[87] In early 1848 Windeyer, one of the first salaried magistrates in the Colony and the progenitor of a famous Australian legal family, retired from office as the Senior Police Magistrate (J. B. Windeyer, "Windeyer, Charles (1780-1855)", *ADB*, Volume 1, p 614; Sir Victor Windeyer, *Charles Windeyer, 1780-1855 and Some Events of His Time* (Sydney, 1977), especially at pp 50-53).

[88] *New South Wales Government Gazette*, No. 37, Friday, April 7 1848, p 457.

[89] Letter of Appointment, 16 May 1849, Alfred Stephen to Colonial Secretary, New South Wales Parliament Petitions and Correspondence (Mitchell Library A 286), p 220.

[90] *Sydney Morning Herald*, 10 June 1859, p 4; see also *Empire* (Sydney), 17 June 1859. As to the judgment of Stephen, *Sydney Morning Herald*, 15 September 1859, p 2.

Doubtless, the pun in the final sentence would have received even greater emphasis and appreciation when delivered vocally in the Irish accent of the Chief Commissioner.

When a District Court Judge, presiding at Newcastle, Purefoy was involved in a somewhat unusual exchange with a lawyer in a civil claim. In the absence of his client, the defendant, and after an unsuccessful application for an adjournment, the lawyer (referred to in the newspaper report as a barrister, Mr Thomson, but probably Richard Windeyer Thompson, a solicitor, with practices at Newcastle and Maitland) said that he should take no further part in the proceedings. The hearing then continued *ex parte*. While the plaintiff was giving his evidence the Judge suddenly remarked that Thom[p]son was taking notes (which was quite unexceptionable conduct), but that the Judge would not prevent him from doing so. Thom[p]son denied the Judge had such power, an assertion which the Judge questioned, adding gratuitously, "you had better not try that on". This unnecessary, and misconceived, interruption by the Judge concluded with Thom[p]son very properly saying, "With great respect, Your Honor, I must beg leave to assert that you have no power to prevent me or anybody else taking notes in any case."[91] It is apparent that Callaghan's opinions expressed eighteen years earlier regarding the professional ability of his colleague ("Really he knows very little law and is singularly injudicious at times";[92] "What a want of judgment there is, in *Purefoy*!"[93]) were well founded, and that Purefoy had hardly improved in the interim.

Callaghan's opinions regarding Purefoy were consistent with the comments of an impartial observer of the trials conducted by him, with a military jury, on Norfolk Island in November 1843. A letter of Dr James Aquinas Reid, the assistant surgeon on Norfolk Island, to a friend in Sydney, describes Purefoy, the Judge; his Crown Prosecutor, Francis Fisher; and the military jury in the following critical and unflattering terms,

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[91] *Newcastle Chronicle and Hunter River District News* (Newcastle), Saturday, 31 August 1861, p 2.

[92] *Callaghan's Diary*, p 72, Thursday, May 20th 1841. Only a week earlier Callaghan and Purefoy were appearing in a criminal trial for two co-accused. Callaghan recorded an incident of a nature experienced by many Counsel in similar circumstances down the ages, "Purefoy was with me and in this case I would far rather have been alone. He was near convicting our clients by his cross-examination. *I* would not have asked a second question in the case. However, our clients escaped in spite of us." (*Callaghan's Diary*, p. 69, Tuesday, May 11th 1841. (The emphasis in the third sentence appears in the original document.)).

[93] *Callaghan's Diary*, p 85, Tuesday, July 6th 1841. (The emphasis appears in the original document.)

Unexpectedly a commission was sent down to try sundry capital charges, which had been lying over for some time. A man with a hooknose & a bobwig, ycleped [called] for the nonce, "a judge", and a porpoise with a carbuncle nose hight [*sic*] "Crownprosecutor", were accompanied by 4 officers of H.M. 80th Regt of foot. The posse arrived on Saturday and on the following Tuesday the first case, one of murder, was to be tried. On the night of *Monday*, I sat studying about 1 or 2 AM - when a loud rap was heard at my door - a servant called me to one of the officers quarters - & when there, I found the whole *jury* assembled - one on the floor, another full length on sofa - another vomiting - another fighting, & my *patient* bleeding from a cut on temple & speechlessly drunk. Yet these *gentlemen* were to try a fellow being for his life, within 10 hours of such a scene as I have described ... The criminal was a very bad character - in the legal phrase. Yet did I do my utmost to save his life, & have the proud consolation of having done so. You will see the trial in the papers, "Francis McManus for stabbing the guard, Mr Wholagan, or as he is known here "Mr Howl-again". My evidence contradicts, in direct, that of the other two surgeons - & had the prisoner been provided with counsel, would have brought him clear from the bar. But of all the mockeries of justice, which it has been my misfortune to witness this was the most complete and most painful one. The prosecutor - Fisher - is a superannuated debauchee - the judge, Purefoy - an absolute tyro - the prisoner had no counsel to defend him - the jury consisted of ensigns & lieutenants, whose brains, at no time bright, were additionally obnubilated by their boundless potations - & object as the prisoner would to any of them, he had no redress - his objection would not be entertained - Talk of British justice after that! It belongs to the things that *were*! I have incurred the odium of many members of our community for having spoken so freely on this occasion - If you knew the story of the unfortunate youth, it would make your heart bleed - ...
Four men have been left for execution - whether the sentence will be carried into effect or not, will depend upon the caprice of that most capricious

> monstrosity the *law* - and the humour, good or bad, of His Excellency Sir George Gipps - Knight - may the Devil make his bed! - ...[94]

Despite his generosity, both financial and professional, towards Callaghan, Purefoy was not immune from criticisms which Callaghan confided to his diary. Shortly after his arrival in Sydney Callaghan was advised by Hustler, "for my own sake not to have any familiar intercourse with Purefoy". However, Callaghan, already doubting the reliance which should be placed upon the comments of Hustler regarding their colleagues, considered that he should exercise caution and proposed to consult the Attorney-General ("I must take care about this: I will speak to Plunkett"[95]). Callaghan also criticised Purefoy on social grounds (saying that he "*never* will be a gentleman in manners or address"[96]) and even on sartorial grounds ("Purefoy was most foolishly dressed: what a goose *to himself* he is!!";[97] "He was decked out in a light blue old-fashioned false silk waistcoat. He has no idea of propriety."[98]). But later he was more tolerant of his colleague, Callaghan recognising both the professional and the financial assistance given him by Purefoy ("But he was the first *stranger* at this Bar who gave me his hand when I came to it: he has rendered me a service that I ought to esteem the greatest as it is

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[94] James Aquinas Reid to Henry Curzon Allport, 23 November 1843, Mitchell Library Ar 26/1-9, (Reel No. CY3933), Document 9. (The words appearing in italics in the foregoing quotation are underlined in the original document.) Fisher had previously been the Crown Solicitor of New South Wales (1835-1839). The dissatisfaction of Governor Gipps (communicated by him to the Secretary of State) with Fisher's "habitual dilatoriness" in that office resulted in Fisher's resignation in November 1839. But despite Fisher's incompetence, Gipps in 1840 appointed him one of three commissioners to inquire into land claims in New Zealand, an inquiry which occupied two years (Commission, 30 September 1840, CO 201/299 (PRO 327), p 358); and then Crown Prosecutor upon each of the two commissions over which Purefoy presided on Norfolk Island, in 1843, and again in 1844 (J. M. Bennett, *A History of Solicitors in New South Wales* (Sydney, 1984) (E. J. Minchin, Chapter 16, "Crown Solicitors", pp 309-325), at pp 313-314). Gipps sought to justify to the Colonial Office his appointment of Fisher to the New Zealand Commission (Gipps to Russell, 9 October 1840, No. 152, Separate, pp 371-373, CO 201/300; Gipps to Russell, 5 November 1840, No. 175, p 22, CO 201/300.) Callaghan, who had toyed with the idea of obtaining an appointment in New Zealand (*Callaghan's Diary*, p 23, Saturday, 26th July 1840), even held hopes of being appointed to the position which ultimately went to Fisher (*Callaghan's Diary*, p 23, Tuesday, July 14th 1840). Subsequently Callaghan was advised by Plunkett "*not* to go to New Zealand as it was too rough and too new a country" (*Callaghan's Diary*, p 49, Tuesday, March 9th 1841 (the emphasis appears in the original document)), advice which he probably welcomed, as he had already been told, at secondhand, that New Zealand was "a wretched place" (*Callaghan's Diary*, p 36, Friday, 1 January 1841).

[95] *Callaghan's Diary*, p 10, Thursday, 5 March 1840.

[96] *Callaghan's Diary*, p 93, Tuesday, August 10th 1841.

[97] *Callaghan's Diary*, p 65, Monday, May 3rd 1841. (The emphases in this and in the preceding quotation appear in the original document.)

[98] *Callaghan's Diary,* p 134, 13-16 July 1842.

esteemed by others and he has been uniformly kind and confiding to me";[99] "If ever I can return any of his kindness I hope that I may not lose the opportunity";[100] "He is a strange character, full of humours and eccentricities and vulgarities, but with a great deal of genuine Irish good nature."[101]).

Callaghan came to his Irish colleague's defence when, at a meeting of the Bar in March 1841, there arose the important question (important, it seems, in the minds of the barristers present) of whether barristers should dine in the presence of attorneys while on circuit (of which purported impropriety apparently Purefoy had been guilty). Purefoy said that, there being only the one dining room, he could not avoid it. Richard Windeyer, adopting an extremely punctilious and not very practical approach, said that Purefoy would better have preserved his honour if he had eaten bread and cheese in his bedchamber. When Callaghan asked Windeyer what could one do if an attorney came and sat down to the table, Windeyer (who presumably placed little store on culinary pleasures) said that he would jump up as if a convict came to the table.[102]

As in his comments concerning, for example, Dowling and Therry, Callaghan blew hot and cold regarding Purefoy. Proud of being an Irishman and loyal to his fellow countrymen, especially his Irish colleagues in distant New South Wales, Callaghan, when he received professional help from Purefoy in a case in which he was briefed by Chambers, said that "Purefoy ... has been very good natured to me. Perhaps I may be able to render him a service yet. Well, after all, as there is *no* country before Ireland, so there is *no* man before an Irishman."[103]

Kindness Reciprocated

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[99] *Callaghan's Diary*, p 67, Thursday, May 6th 1841. (The emphasis appears in the original document.)

[100] *Callaghan's Diary*, p 88, Monday, July 19th 1841.

[101] *Callaghan's Diary*, p 192, Wednesday, April 10th 1844.

[102] *Callaghan's Diary*, p 55, Monday, March 29th 1841.

[103] *Callaghan's Diary*, pp 19-20, Saturday, May 9th 1840. (The emphases appear in the original document.)

Callaghan died on 28 November 1863 at Braidwood, as a result of injuries sustained when kicked by a horse which he had just purchased. At the time he was in financial difficulties, and his estate was sequestrated. His widow Eliza (daughter of Mr Justice Samuel Frederick Milford, of the Supreme Court of New South Wales), whom he had married in 1848, and their three young children found themselves in straitened circumstances. Callaghan died almost five months before the enactment of the *Superannuation Act* of 1864 (27 *Vict*., No. 11) on 22 April 1864. Had the provisions of that statute been in force at the time of Callaghan's death, his widow would have been entitled to a gratuity of one month's salary for each year of her husband's official service in the Colony (as Crown Prosecutor, Chairman of Quarter Sessions and Judge). Without that statutory entitlement, Mrs Callaghan was obliged to petition the Government for such a gratuity. The outcome was favourable to the widow.[104] A Select Committee of the Legislative Assembly, appointed on 18 May 1865, considered her petition and received evidence over several days in June 1865. The Committee calculated such gratuity, at the rate of salary which Callaghan had been receiving for the last five years before his death [as a District Court Judge], in an amount of £1833-6-8. Its report concluded,

> Considering, then the long services of the late Judge Callaghan, and the circumstances in which, in consequence of his untimely and unexpected death, the Petitioner has been left, your Committee beg earnestly to recommend the Petitioner's case to the favourable consideration of the Government.[105]

The kindness which during his lifetime, especially during his early years in New South Wales, Callaghan had received from other Irish lawyers, was reflected in an instance of kindness to his family from another Irish lawyer after his untimely death. Doubtless, the financial problems of the family were alleviated when Mr Justice Peter Faucett employed, in turn, each of Callaghan's two sons, Thomas and Frederick, as his Associate. Faucett, a

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[104] Although Judges of the Supreme Court and certain other office holders were, by section 10, expressly excluded from the provisions of the Act, the Select Committee was presented with opinions of the Attorney-General, John Bayley Darvall, and his predecessor, James Martin (another Irish born lawyer, and a future Premier and subsequently the fourth Chief Justice of New South Wales), to the effect that that exclusion did not apply to Judges of the District Court, and that those Judges did come within the operation of the Act (*op. cit.*, n 68, p 891).

[105] *Op. cit.*, n 68, pp 879f, at p 884.

Catholic, was another Irish lawyer, who, having arrived in Sydney in 1852 and achieving professional and political success, was appointed a Judge of the Supreme Court in 1865.[106]

Several years after Faucett resigned from the Supreme Court on account of ill health, his former colleague on the Court, Sir William Montagu Manning, suggested to the then Premier, Sir Henry Parkes, that, on account of his long service on the Court (more than 22 years) and his merit, Faucett was deserving of a knighthood, especially as all Faucett's former colleagues on the Court by then had received that honour. Perhaps Parkes's hostility towards Irishmen and Catholics (Faucett was both) may have been a reason why Manning's confidential approach to the Premier did not meet with success.[107] This was despite the fact that only three years earlier, upon Faucett's departure from the Court, Parkes as Premier had graciously recommended his appointment to the Legislative Council. In accepting the Premier's offer, Faucett wrote that he would be "quite willing ... to devote some portion of my time to the public interests."[108]

Friends at the Bar

Callaghan and the other early colonial barristers enjoyed what has long been known as the *camaraderie* of the Bar. That friendship among colleagues, who frequently were each other's opponents in hard fought cases in court, was not limited to the Irish barristers. Briefs were not infrequently passed to Callaghan by such fellow barristers as Edward Broadhurst, Francis Moore and Alfred Cheeke, each an English barrister. Each of these recently arrived young barristers became friends, often having meals together. As their friendship developed,

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[106] W. B. Perrignon, "Faucett, Peter (1813-1894), *ADB*, Volume 4, p 157. Interestingly, it was Faucett, as a member of the Legislative Assembly, who had chaired the Select Committee which reported favourably upon Mrs Callaghan's petition (*op. cit.*, n 68, pp 879f).

[107] Sir William Montagu Manning to Sir Henry Parkes, 30 July 1891, Parkes Correspondence, Mitchell Library A894, Volume 24, pp 80-81. As to Parkes's hostility towards Irishmen and Catholics, see text to n 175, *infra*. However, as has already been noticed (text to n 35, *supra*), there was at least one exception to the hostility of Parkes against Irishmen, that being in the case of Hugh Chambers, who, although Irish, was not Catholic.

[108] Peter Faucett to Sir Henry Parkes, 16 February 1888, Parkes Correspondence, Mitchell Library A884, Volume 14, p 71.

Callaghan from November 1842 began to refer familiarly to Broadhurst ("the smartest of them all though he is no genius after all"[109]) as "Broady".[110]

The social intercourse among barristers included Bar dinners. Callaghan records how he attended such a dinner at Petty's Hotel only a few months after his arrival in Sydney, where he was called upon to respond to the toast to "the Bar of Ireland" and "Lady Gipps". But the twenty-five year old newcomer was too diffident, and too ill-prepared, to accept the calls. However, he resolved that he would be prepared in future, if he were required to speak in public on such occasions.[111] The Bar organised a public dinner on 2 March 1841, to farewell its leader, Attorney-General Plunkett, before he left Sydney later that month for extended leave in the United Kingdom, and presented him with a piece of silver plate on that occasion. Arrangements for that function and the presentation required informal meetings of the barristers.[112]

In both England and Ireland it was the custom of barristers, when appearing at court sittings on circuit, to constitute themselves into a group, known as the Bar Mess, regularly partaking of dinner and subsequent conviviality together, and often staying at the same hotel. That custom was followed in New South Wales, Callaghan recording the Bar Mess in Maitland when both the Quarter Sessions and the Supreme Court were sitting in that town.[113] Frequently the Judge on circuit participated in those occasions when the barristers dined

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[109] Callaghan's Diary, p 15, Wednesday, March 25th 1840.

[110] For example, *Callaghan's Diary*, pp 149-150, Sunday, November 20th 1842; p 173, Friday, April 21st 1843; pp 175-176, Friday, April 28th 1843; p 177, Saturday, 6th May 1843; p 178, Saturday, May 20th 1843; p 179, Sunday, May 21st 1843; p 185, 12 September 1843.

[111] *Callaghan's Diary*, p 21, Sunday, May 31st 1840.

[112] *Callaghan's Diary*, p 36, Friday, January 1st 1841; p 45, Saturday, 13 February 1841. A week later Plunkett invited Callaghan to view the presentation piece --- a lidded *entrée* dish --- the latter recording, "He was proud of the plate, and no wonder. It cost something upwards of £250" (*Callaghan's Diary*, p 49, Tuesday, March 9th 1841). The dinner in the hall of the Sydney College (the predecessor of the University of Sydney), now part of Sydney Grammar School, was attended by 70 or 80 persons, including the Governor (*Australian* (Sydney), 4 March 1841, p 2; *Callaghan's Diary*, p 47, Tuesday, 2 March 1841). The presentation piece is illustrated and described in J. B. Hawkins, *19th Century Australian Silver* (Suffolk, UK, 1990), Volume 1, p 99. (This argentine gift is described by Professor Molony, somewhat inaccurately, as "a cup", with Plunkett's motto *Festina lente*, engraved upon it (Molony, *op. cit.*, n 4, p 37)).

[113] *Callaghan's Diary*, p 118, Saturday, March 26th 1842.

together, presiding at the meal. That practice was encouraged somewhat later in the century, by the Irish Chief Justice of New South Wales, Sir Frederick Darley, a firm supporter of *camaraderie* within the legal profession. Recalling such convivial occasions, Wilfred Blacket, KC wrote,

> His [Darley's] dinners on Circuit were the delight of the Bar, for he was an exceptional host, although no one present might smoke under pain of death. Most Irish gentlemen do shine at the top end of a dinner table.[114]

In court, however, levity rarely manifested itself in Darley's judicial demeanour or pronouncements. But on one occasion, when called upon to construe two apparently inconsistent provisions in the same statute, the Irish Chief Justice observed, "Surely it must have been a countryman of mine who penned ... that section."[115]

Although at that period the Sydney barristers had no formal professional body equivalent to the Bar Associations established in the twentieth century, it was not unusual for them to meet to discuss matters of common professional concern. For example, in April 1840 Callaghan attended a meeting of ten barristers, called at the request of Hustler, to consider various complaints (referred to by Callaghan as "charges") of a professional (and also of a social) nature, made against Hustler by the recently arrived Robert Gore, another Irish barrister. The upshot was that the meeting passed a unanimous resolution "declaring [Hustler's] explanation satisfactory to the Bar." Callaghan concluded, "So there the matter rests for the present: it is in any way a bad business for Hustler."[116] Those complaints, despite Callaghan's pessimistic opinion of their effect upon Hustler's professional reputation, do not appear to have stood in the way when, a year and a half later, Hustler, upon the

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[114] Wilfred Blacket, *May It Please Your Honour* (Sydney, 1927), p 95.

[115] J. M. Bennett, *Sir Frederick Darley, Sixth Chief Justice of New South Wales 1886-1910* (Leichhardt, NSW, 2016), p 200 (citing Darley to Oliver, 28 September 1904, Alexander Oliver Papers, Sydney University Archives). The date appearing in this citation requires some explanation, as Oliver died on 2 June 1904. Enquiries made of Dr Bennett by the present author (October 2019) reveal that at the time of Dr Bennett's researches the extensive Alexander Oliver Papers in the University of Sydney Archives were uncatalogued; further that the handwriting of Darley was not always legible. Perhaps the date 28 September 1904 may have resulted from this latter fact.

[116] *Callaghan's Diary*, pp 17-18, Friday, April 10th 1840.

recommendation of Chief Justice Dowling, was temporarily appointed by Governor Gipps to the well paid office of Sheriff of New South Wales.

A year later, in March 1841, there was another meeting of the Bar, held in Therry's official "office" (he was acting Attorney-General at the time, Plunkett being on leave), where the matters discussed were essentially questions of professional etiquette and relations between barristers and solicitors, especially concerning fees. Callaghan sided with his fellow Irishman Purefoy on a matter of etiquette,[117] whilst regarding fees the three English barristers, Windeyer, William Foster and Broadhurst, joined forces "to grab everything they can", being opposed by the Irish Hustler, "on the part of the juniors" (who, presumably, included also Purefoy and Callaghan himself). Callaghan recorded that after the meeting adjourned to the following Friday, Foster and Windeyer walked home together.[118] At its adjournment the meeting essentially discussed fees, and the making of some distinction between the seniors and the juniors of the Bar. At that time there were no Queen's Counsel in Australia, so technically all the members of the colonial Bar were Junior Counsel. It was a typical meeting of barristers --- "after a good deal of talk ... a committee was nominated [to consider] making any division of the Bar ... and the meeting separated, nothing further being done!!!"[119]

Accent and Idioms of Irish Lawyers

The accent and idioms of their homeland characterised the speech of Irish lawyers in Australia, who, it should be borne in mind, came from the upper-middle classes. An example for the use of such idioms is George John Crawford, an early Judge in South Australia. The son of a distinguished Protestant cleric in the Diocese of Armagh, and a Doctor of Laws from Trinity, Crawford practised at the Irish Bar (the Connaught Circuit) for almost ten years before accepting appointment in 1850 as second Judge of the Supreme Court of South

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[117] *Callaghan's Diary*, p 55, Friday, April 2nd, 1841.

[118] *Ibid*.

[119] *Callaghan's Diary*, p 56, Friday, April 2nd 1841.

Australia, at a salary of £800 a year. The judicial career of Mr Justice Crawford is considered in Chapter 6 of this Thesis ("South Australia: An Exception").

Shortly after Crawford's arrival in Adelaide he and his senior judicial colleague Charles Cooper (subsequently to be appointed the first Chief Justice of South Australia) attended a reception, in the form of a *déjeuner à la fourchette*, arranged for them by members of the local legal profession (24 practitioners being in attendance) on 8 July 1850. Cooper in the course of a somewhat peculiar speech --- his criticism of several of his hosts being not entirely appropriate to a guest on such a social occasion --- said that he now had a big brother, referring to Crawford, on the bench with him. Crawford, in the course of a much more lighthearted speech, used a number of Irish idioms ("did not care a diseased potato for anything or anybody"; "by Jakers"; "he would pull it [his judicial gown] over the shoulders of the spalpeen, and kick one half of him out of Court, and the other half of him to the Devil"). After a very convivial meal (described in the media as a "breakfast"), the company dispersed at 5 pm, the two judges being observed "to depart arm in arm, either from affection or from the need of mutual support".[120]

The strong Irish accent in the speech of Purefoy in New South Wales has already been noticed.[121]

Comparisons and Contrasts

Although several solicitors (including Charles Henry Chambers) had been admitted to practice in the colony under the Letters Patent of 4 February 1814 (the Second Charter of Justice), Callaghan and the other Irish lawyers noticed earlier in this chapter were admitted pursuant to the provisions of the Letters Patent of 12 October 1823 (the Third Charter of Justice, issued consequent upon the Act 4 *Geo.* IV, *c.* 96 (known as the *New South Wales Act*),

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[120] *South Australian Gazette* (Adelaide), 11 July 1850; *South Australian Register* (Adelaide), 2, 9 July 1850; *Adelaide Times* (Adelaide), 4, 9 July 1850; quoted in [R. M. Hague], *Mr Justice Crawford, Judge of the Supreme Court of South Australia* (Adelaide, 1957), pp 5-7.

[121] Text to note 90, *supra*.

under which, as has already been observed, Irish practitioners were entitled to automatic admission in New South Wales.

The arrival of Irish lawyers, especially Irish barristers, had practical consequences for the administration of justice in the Australian colonies. Any differences in the law in Australia from the law in England or Ireland were not differences of legal principles, but resulted from statutory enactments of the local Legislature and subordinate legislation made thereunder. The principles and methods of the English Common Law (the Judge-made law dating from the later Middle Ages, common to the entire Kingdom) which applied in England and Ireland (but not in Scotland) had equal application in Australia.

But there were practical differences between Ireland and England in how those principles were applied throughout the nineteenth century. In some instances the Irish lawyers in Australia maintained the traditions and practices of their homeland, whilst in other instances they accepted the arrangements which the English practitioners had already established in the colonies. As to procedure in litigation, it has been said that in Ireland technicalities were never so rife as in England.[122] However, in New South Wales Chief Justice Francis Forbes attempted to simplify civil procedure in the Supreme Court, and to dispense with many of the English procedural technicalities. That approach seems to have been shared by his colleague James Dowling. In 1831 Dowling stated that the Judges "have been compelled to lay down principles, and adopt resolutions, which would perhaps startle a lawyer in Westminster Hall, but which they have been driven to resort to in order to meet the exigencies of [colonial] society."[123] As one writer has observed, the similarity between the Supreme Court of New South Wales and the Courts at Westminster was during the term of Forbes as Chief Justice at its weakest point in the whole of the nineteenth century. Within a generation the initial spirit of innovation manifested by Forbes was smothered by the influx of

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[122] Ralph M. Hague, *Hague's History of the Law in South Australia 1837-1867*, 2 volumes, (Adelaide, 2005), Volume I, p 180. In his novels Charles Dickens, with biting satire, drew attention to costly anachronistic procedures which in nineteenth century England often served to deny substantial justice to litigants. In New South Wales Chief Justice Forbes, by introducing new Rules of Court, sought to simplify civil procedure in the Supreme Court, and to overcome problems of the nature recognised by Dickens. (Castles, *op. cit.*, n 83, pp 188-189.)

[123] *R. v. Farrell* (1831) Legge 5 at 18.

English and Irish lawyers; a conformity to the practices of the English Courts continued to gather strength as the century progressed.[124]

In criminal matters in England it was usual for a member of the private Bar to be retained on an *ad hoc* basis to prosecute an accused upon indictment (unless the Attorney-General or the Solicitor-General chose to prosecute in person). In Ireland, however, all prosecutions were conducted by specially appointed Crown Counsel (two being appointed for each County), who retained their right of private practice.[125] The Irish arrangement was adopted in the Australian Colonies, and, as has already been noticed earlier in this chapter, appointment as a Crown Prosecutor was greatly sought after by members of the Bar. Such an appointment gave to the barrister an assured and continuing source of professional work, and a certainty that his fees would, ultimately, be paid.

The highly desired, and lucrative, office of Crown Prosecutor in New South Wales was established consequent upon the provisions of sections 5 and 17 of the statute 9 *Geo*. IV, *c.* 83 (known as the *Australian Courts Act* of 1828), and, in respect to Courts of Quarter Sessions, was restated as follows in section 10 of the *Administration of Justice Act* of 1840 (4 *Vict., c*. 22),

> ... it shall be lawful for the said Governor to appoint any officer or officers by whom and in whose name all crimes misdemeanors and offences cognizable in the several Courts of General and Quarter Sessions ... may be prosecuted ....

The first Crown Prosecutor in New South Wales who did not concurrently hold some other official position was George Kenyon Holden, a solicitor (and formerly private secretary to Governor Bourke), who was appointed on 1 October 1837, at a salary of £600 a year, with right of private practice. That appointment being received with disfavour both in Sydney (especially from barristers) and at Whitehall,[126] Governor Sir George Gipps considered dispensing with the position entirely. In its place he proposed using clerks from the Crown

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[124] Bennett, *A History of the Supreme Court of New South Wales* (Sydney, 1974), pp 32-33.

[125] Maurice Healy, *The Old Munster Circuit: A Book of Memories and Traditions* (London, 1939), p 100.

[126] J. M. Bennett, *A History of Solicitors in New South Wales* (Sydney, 1984), p 74.

Law Office to conduct prosecutions in the Quarter Sessions, except in those few cases where the Attorney-General was of the view that private counsel should be employed, in which cases a brief fee of one guinea [one pound, one shilling] was to be paid.[127] This totally impractical proposal of the Governor was ridiculed by Attorney-General Plunkett, whose view prevailed, and the office of Crown Prosecutor continued in existence.

Another difference between the custom in England and Ireland and that followed in Australia was the manner in which Judges were addressed in court. At the time of the establishment of the Australian Colonies (and even to the present day), the Judges of the superior Courts at Westminster were addressed as "My Lord" and "Your Lordship".[128] But that mode of address was never adopted in Australia. The first Chief Justice of the Supreme Court of New South Wales, Francis Forbes, born in Bermuda and a practitioner in the West Indies before his appointment as Chief Justice of Newfoundland, eschewed such aristocratic practices. He was content to be addressed as "Your Honour", the form of address followed in the West Indies. For example, Forbes referred to his early mentor in the law, Daniel Leonard, the Chief Justice of Bermuda, as "His Honor the Chief Justice".[129] That form of address for Judges of all Australian Courts has continued to the present day.

In the late 1840s, when there was talk in the colonies of colonial Judges being addressed as "My Lord", the following interesting exchange took place in the Supreme Court of South Australia concerning the appropriate form of address of the Judge. One member of the profession inquired of Mr Acting Justice Mann (Mr Justice Cooper being on leave at the time, Charles Mann, the Master of the Supreme Court, was appointed Acting Judge in his absence),

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[127] C. H. Currey, *Chapters on the Legal History of New South Wales, 1788-1863* (LL D thesis, University of Sydney, Sydney, 1929), Chapter 13, pp 217-218, cited in Mark Tedeschi, "History of the New South Wales Crown Prosecutors 1830-1901", being Chapter 8 in Geoff Lindsay and Carol Webster (eds.), *No Mere Mouthpiece* (Chatswood, NSW, 2002), p 98.

[128] Until the abolition of the Court of Chancery in 1875, the form of address for the Master of the Rolls and the Vice-Chancellors was "Your Honour" (B. H. McPherson, "Judicial Honorifics", (2008) 82 *The Australian Law Journal*, 614 at 618. The author adequately disposes of any impression that "Your Honour " is a less exalted mode of address than "My Lord" (*op. cit.*, p 619, n 39)).

[129] Memorial of Francis Forbes (jr), 19 April 1809, CO 40/25, folio 47. Throughout the nineteenth century the spelling "Honor" was preferred to "Honour".

in what way he would wish the Bar to address him --- as "Your Worship, Your Honor, or Your Lordship?" Mann laughed and said he preferred the old style of "Your Honor".[130]

In Victoria there appears to have been a degree of uncertainty as to the mode of address for a Judge of the County Court (established in 1852, pursuant to the local statute 16 *Vict*., No. 11). An early appointee to that Court, Judge Arthur Nicholas Wrixon (whose strong Irish accent and speech were on occasion the subject of comment[131]), is said to have been asked by Sir Redmond Barry, while the latter was acting Governor of Victoria, how he wished to be addressed. Barry, a stickler for the observance of official and judicial (if not of matrimonial or sexual) proprieties, sent his inquiry on a large sheet of foolscap, with a large signature and a large seal. Wrixon responded to his fellow countryman on a larger sheet of foolscap, with a larger signature and a larger seal, writing, "I have the honour to inform Your Excellency that I am sometimes addressed as 'Your Worship'; sometimes as 'Your Lordship' and I even recollect on one occasion being addressed as 'Your Riverince'."[132] Barry's reaction to this manifestation of his fellow countryman's sense of humour is not known.

Robes and uniforms worn in various professions and occupations (the Church, the law, academia, the armed Services) have often been matters of contention and disagreement down the ages, and few more so than the wearing of the wig, judicial or barristerial, in court proceedings.[133] In England throughout the period which this Thesis is considering both the judiciary and the barristers wore wigs in court. Although he had qualified for the Bar in London (but had never practised there, only in his native Bermuda), Francis Forbes in his court attire dispensed with the judicial wig, since (according to his wife) "he never wore the wig as a symbol of his judicial rank, since he considered it unsuited to the conditions of a

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[130] *Southern Australian,* 29 May 1849, quoted in Hague, *op. cit*., n 122 Volume II, p 745.

[131] Chapter 7, text to n 36.

[132] Sir Arthur Dean, *A Multitude of Counsellors* (Melbourne, 1968), p 147.

[133] Sir Bernard Sugerman, "The Wearing of the Wig", *The Australian Law Journal*, Volume 47 (January 1973), p 39; Sir Victor Windeyer, "Of Robes and Gowns and Other Things", *The Australian Law Journal*, Volume 48 (August 1974), p 394.

young community".[134] Indeed, well before coming to New South Wales, Forbes had discarded the wig when he was Chief Justice of Newfoundland; it was not worn there by Bench or Bar.[135] Forbes's later colleague, and subsequent successor, on the New South Wales Supreme Court, the Irish James Dowling stepped ashore in Sydney on 25 November 1828, arrayed in full judicial attire, including a wig, to be greeted by an artillery salute and the robed, but bareheaded, Forbes.[136] The precise meaning to be attributed to the first part of Dowling's enduring description of the Chief Justice as having a "roundhead, republican look" probably refers to the fact that Forbes's balding head was not adorned with a wig; but it is unclear how Dowling was able to discern the Chief Justice's political views, if any, from his appearance.[137] Forbes subsequently said that he had always supported the wearing of the wig and gown in cold climates, but that the wig was particularly intolerable in a crowded courtroom in Sydney's hotter months. Nevertheless, he undertook to wear it at all sittings after March 1828, "and it will be a great consolation, when I find my brains boiling under it in summer, to know that I am performing my duty, and silencing a great scandal."[138] A wig has been part of

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[134] George Forbes (ed.), *The Memoirs of Lady Forbes. Edited by her Grandson George Forbes* (typescript and printed material, undated), (Dixson Library of the State Library of New South Wales, MS 108), p 28.

[135] The Hon. Bora Laskin, *The British Tradition in Canadian Law* (London, 1969), p 31; J. M. Bennett, *Sir Francis Forbes, First Chief Justice of New South Wales 1823-1837* (Leichhardt, NSW, 2001), p 102.

[136] Lady Forbes wrote of Dowling's arrival, "Mr. Justice Dowling wore his wig and robes, and made an imposing figure" and that, despite the absence of a wig, her husband's "robes were handsome, and consisted of a black silk gown with an ermine collar, and lace ruffles, with a broad crimson sash, as worn by the Judges in Scotland" (Bennett, *loc. cit.*, n 135).

[137] "Narrative of Proceedings Prior and Subsequent to the Appointment of James Dowling, Esq., to the Office of Judge of the Supreme Court of New South Wales", identified as "Dowling' Journal" (Mitchell Library A 485), pp 63-65, where Dowling also said that Forbes "wore his gown and bands, but no wig." See, also, C. H. Currey, *Sir Francis Forbes* (Sydney, 1968), p 5; Bennett, *op. cit.*, n 136, pp 102-103; Bennett, *op. cit.*, n 34, pp 13-14; Sir Victor Windeyer, *op. cit.*, n 133, p 394 at p 402. The oil painting of Forbes hanging in the Banco Court in the Law Courts Building in Sydney and the oil painting of him reproduced in Bennett, *Sir Francis Forbes*, opposite p 80, each depicts Forbes wearing judicial robes, but without a wig. The false "republican" tag, from Forbes's Newfoundland days, has been satisfactorily refuted by both Currey (*loc. cit.*) and Bennett (Bennett, *Sir Francis Forbes*, n 135, pp 30, 40, 74-75).

[138] Forbes to Wilmot-Horton, 7 March 1828 (J. M. Bennett (ed.), *Some Papers of Sir Francis Forbes* (Sydney, 1998), § 61 at 185).

the normal court attire of all subsequent Chief Justices and Judges of the Supreme Court of New South Wales.[139]

Charles Cooper, the sole Judge of the Supreme Court of South Australia from his arrival in the colony in March 1839, was not accustomed to wearing a wig in court, limiting the court dress for both himself and barristers to a black gown, white neckcloth and white neckbands. Indeed, when in May 1846 two English barristers appeared before him in wigs and gowns, the bald-headed Cooper said,

> If anyone is justified in wearing a wig, it is myself; for in summer time I am tormented with the flies settling on my bare head. But I fear that, if I were to adopt it, I should be still more fatigued than I am already by the long sittings which I frequently have to endure.[140]

One of the local newspapers, recording the event, commented that since the wig had been dispensed with by Cooper, the conduct of those two barristers in wearing it was "hardly perhaps in the best taste".[141] Nevertheless, several months later those same two barristers, joined by a third, appeared before Cooper wearing wigs. The Judge, observing that fact, "took occasion to express his disapproval of a practice which tended to make an improper distinction between Gentlemen who were English Barristers and those who were not". In disclaiming any such intention, one of the culprits assured the Judge that he had rather meant the wearing of his wig as a mark of respect to the Court. The three barristers then retired, "and in a few minutes returned wigless".[142] It will be appreciated that at that time the legal profession in South Australia was not a divided profession, and that most of the practitioners were attorneys (some of whom had originally been admitted in England or Ireland), and that, as such, they were not entitled to wear any professional robes when appearing in court in

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[139] In the late 20th and early 21st centuries the judicial wig was dispensed with by Judges of Appeal, when hearing civil matters, by certain other New South Wales Courts and by most, if not all, Commonwealth Courts.

[140] Ralph M. Hague, *op. cit.*, n 122, Volume II, p 743; *South Australian Register*, 13 August 1850; Alex C. Castles and Michael C. Harris, *Lawmakers and Wayward Whigs* (Adelaide, 1987), pp 74-75, 205; Thomas Bradley, "Innocent Diversions: Australian Legal Fashion", *Queensland Legal Yearbook 2014* (ed. John McKenna and Alice-Anne Boylan) (Brisbane, 2015), p 60 at p 68.

[141] *South Australian Register*, Wednesday, 27 May 1846, p 3.

[142] *South Australian Register*, Wednesday, 2 September 1846, p 3.

England --- a fact which Cooper in his remonstrance against the three English barristers clearly understood.

During the course of the foregoing exchange with Counsel regarding the wearing of a wig in court, Cooper said, "As regards respect to the Court, there is an established dress worn both by me and all the gentlemen of the Bar, which everyone can procure - a black gown, white neckcloth, and white bands."[143] That attire, at least for the Bar, was given formal effect by Rules of Court made by Cooper in 1850, prescribing "The costume of the gentlemen attending the Court as Barristers shall be as heretofore --- a black cloth [*sic*]" --- presumably a black cloth gown --- "and waistcoat, a white neck-cloth, and banns [*sic*]."[144]

However, Mr Justice Crawford (to whom reference has already been made earlier in this chapter) did wear a wig in court, as was the custom in his native Ireland. In August 1850, shortly after his arrival in Adelaide, Crawford presided over the Criminal Sessions, being the first sittings of the Supreme Court in the recently constructed new Court House. As was reported in the *South Australian Register*, "His Honour appeared in the wig judicial, which certainly added to his dignity, while it in no degree distracted from the comeliness of his appearance."[145] According to Hague, this was the first occasion on which a Judge wore a wig in the Supreme Court of South Australia. It was not long before Cooper, the senior Judge, adopted the practice of his junior colleague. At the Banco sittings later in the same month, Cooper also appeared in the "wig judicial",[146] and Hague records that "from that time the appendage has formed a standard part of the attire of South Australian judges."[147]

In Western Australia the black cap donned by Chief Justice Wrenfordsley for passing sentence of death provided a degree of mirth for one observer, despite such reaction being

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[143] *Adelaide Observer*, 5 September 1846, quoted in Hague, *op. cit.*, n 122, Volume II, p 743.

[144] Ralph M. Hague, *op. cit.*, n 122, Volume II, p 743.

[145] *South Australian Register*, Tuesday, 13 August 1850, p 3.

[146] *Adelaide Observer,* Saturday, 31 August 1850, p 3.

[147] [R. M. Hague], *Mr. Justice Crawford, Judge of the Supreme Court of South Australia 1850 - 1852* (Adelaide, 1957), p 15.

inappropriate to the gravity of the occasion. Alfred James Hillman recorded in his personal diary,

> This old Judge [he was aged about 56 at the time] assumes the black cap when passing sentence of death; it is a thing like a small black sofa cushion with little tassels at the corner and looks very comical perched on top of his wig.[148]

Alfred James Hillman was not alone in his low opinion of this Irishman (who, when subsequently appointed an Acting Judge of the Supreme Court of Victoria in 1888, was described by one of the leaders of the Victorian Bar as a "journeyman judge, who went about with robes in his carpet bag"[149]). When news arrived in Perth that Wrenfordsley was to become Chief Justice of Fiji, the diarist recorded, "there will not be much grief over his departure unless it be amongst his creditors."[150]

Differences and Similarities

In Ireland barristers did not maintain professional chambers. They conducted their practices from the Library in the Four Courts, where they interviewed clients and prepared their cases. In England, however, barristers conducted their practices from individual rooms in corporate chambers located in the Inns of Court, where a degree of collegiality was maintained among the members of each Inn. In the Australian colonies the barristers practised from individual chambers, often in geographical propinquity.[151]

There were visual differences and similarities between the practical arrangements for proceedings in court. It has already been observed[152] that the Supreme Court Building in Melbourne has certain visual similarities to the Four Courts in Dublin, but that the suggested

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[148] *Hillman Diaries*, p 621, Tuesday, 10 January 1882.

[149] Sir Arthur Dean, *op. cit.*, n 133, p 113; J. L. Forde, *The Story of the Bar of Victoria* (Melbourne, n.d.), p 300.

[150] *Hillman Diaries*, p 749, Tuesday, 31 October 1882.

[151] J. M. Bennett (ed.), *op. cit*, n 10, pp 197f.

[152] Chapter 1, n 59.

attribution of those similarities to Chief Justice Stawell (he being familiar with the latter and being responsible for the construction of the former) cannot be established. In Ireland it was the custom for attorneys (who at that time had no right of audience in superior courts) to sit facing Counsel whom they were instructing and with their backs to the Judge. That became, and remains, the accepted practice in the courtrooms in Victoria, but not in the other Australian colonies (later, States), where, as in England, the instructing attorneys are seated behind their Counsel, and face the Judge.[153]

Barristers from England and Ireland, when appearing before the superior courts in the Australian colonies continued to wear the same court attire (including wigs, even before the bareheaded Chief Justice Forbes) as they had worn in their homeland. However, there developed one small, but unexplained, difference. When Queen's Counsel came to be appointed in Australia (Plunkett being the first Australian so appointed, in 1856), in Victoria their silken gowns differed from those in the other colonies and, indeed, from those in their homelands. Throughout the eighteenth century it was usual for a small bag (known as a "wig bag" or "powder bag"), for the containment of the lengthy wig tails, to hang from the back collar of the silken gown, in order to protect that costly robe from any stains or disfigurement caused by the pomade and hair powder which were lavishly applied to the wig and its lengthy tails. Pomade and hair powder ceased to be used at the end of the eighteenth century, and the wig tails were shortened. But for reasons that have remained obscure and unexplained, that little bag, in vestigial form, and in the shape of a rosette (being a square piece of black silk decorated with a bow on each corner, each bow carrying several layers of ruffled silk pinned with a button in the centre), attached to the back of the gown by a silk ribbon, came to be part of the court attire of a Queen's Counsel in Victoria. That practice has continued to the present time in Victoria, but has never been part of Queen's Counsel's attire in the rest of Australia or in England. The popular belief that the Victorian Silk's rosette is Irish in origin has no substance or factual basis. Irish Senior Counsel wear a plain silk gown (unadorned by a

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[153] Peter Heery, QC, "Conference Confabulations --- ABA London and Dublin 1987", *Victorian Bar News*, No. 62, Spring 1987, p 21 ("The Irish Bar and Australia").

rosette or any similar appendage at the back), like those in the rest of Australia and in England.[154]

St Patrick's Day

From the earliest days of British settlement in Australia the public celebration of the feast day of Ireland's patron saint, on 17 March, was allowed by the colonial authorities. At its outset it was neither a separatist nor a religious occasion, but one in which all Irishmen (and often non-Irishmen) might join, be they Protestant or Catholic. In Sydney it often took the form of a dinner or a ball, attended by the leading citizens, and sometimes being graced by the presence of the Governor.[155] For example, at the St Patrick's Day Ball in 1838 Sir George Gipps and Lady Gipps were in attendance, His Excellency responding to the chief toast of the evening.[156] That was probably the same ball which almost sixty years later Tom Archer recalled attending as a fifteen year old, newly arrived in Sydney. Tom was neither Irish nor Catholic, being from an upper-middle class Scottish family, but the ball was obviously a social occasion for the entire Sydney community.[157] Two years previously the Irish Chief Justice, Sir James Dowling, a Protestant, attended a grand ball organised by the Sons of St Patrick in the new Court House at Darlinghurst. Despite having "no great passion for crowded

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[154]Victoria Law Foundation, *Wigs and Robes: A lasting tradition*, (Melbourne, 2009), www.victorialawfoundation.org.au/sites/default/files/.../Wigs_and_Robes, p 8; P. H. N. Opas, "The Silk's Rosette", *Victorian Bar News*, No. 66, Spring 1988, p 12; Bennett, *loc. cit.*, n 135; Bennett (ed.), *op. cit.*, n 10, pp 242-243; Sugerman, *loc. cit.*, n 133; Windeyer, *loc. cit.*, n 133.

[155] Patrick O'Farrell, "St. Patrick's Day in Australia", *Journal of the Royal Australian Historical Society*, Volume 81, Part 1, June 1995, p 1, at p 7.

[156] *Australian*, Tuesday, 20 March 1838, pp 2-3.

[157] T. Archer, *Recollections of a Rambling Life* (Yokohama, Japan, 1897), p 25. Perhaps Archer's memory of the occasion, after almost sixty years and a life which included sheep farming and exploration in New South Wales and Queensland, gold mining in California and two terms as Queensland's Agent-General in London, was not entirely accurate. He recorded that he "had been at a large public ball on St. Patrick's Day in the new Court House on Surrey [*sic*] Hills, then a far-away suburb of Sydney". It is difficult to identify the location of the ball which the young Tom attended.

parties", he chaperoned his daughters to the event, "as Mama could not go out".[158] Other forms of entertainment associated with the celebration of St Patrick's Day were pigeon shooting and pony racing.[159]

The legal profession, and especially its Irish members, was well represented at the St Patrick's Day celebrations. Irish practitioners were often involved in the arrangements for these functions. Roger Therry was the vice-president and Plunkett was one of the stewards at the 1835 dinner, which was attended by "upwards of 100 gentlemen, including most of the principal persons in the Colony." Mr Justice Burton, who was neither Irish nor Catholic, proposed the toast to the Governor, to which Plunkett responded. In the course of that response Plunkett said that he "had every expectation that the Bar would ere long receive an accession of strength by the emigration of 'talented young men' from Ireland."[160] Plunkett's prediction was fulfilled by the arrival within the next five years of William Hustler, Edward Jones Brewster (who shortly removed to Melbourne) and Thomas Callaghan.

Often the celebration of St Patrick's Day was the cause for an unofficial holiday, courts sometimes not sitting on 17 March, that practice continuing in some courts, especially in Victoria, until well into the twentieth century.[161] In 1839 the feast day itself fell upon a Sunday, and the Supreme Court in Sydney did not sit on the Monday or on the Tuesday morning. In consequence, the *Australian* published the following critical editorial,

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[158] Sir James Dowling to James Sheen Dowling, 28 March 1840, Dowling Correspondence, Volume 2, 1840-1899, Mitchell Library A486. As to the "New Court House close to the new gaol" (*ibid.*), see J. M. Bennett, *op. cit.*, n 124, pp 23f.

[159] *Australian*, Thursday, 19 March 1840, p 2.

[160] *Australian*, Friday, 20 March 1835 p 2. Three years later Therry and Plunkett were listed among the stewards and other organisers of the St Patrick's Festival (*Australian*, publication A, 9 March 1838, p 2).

[161] For several years, in 1900, 1901 and 1902, St Patrick's Day was officially proclaimed a holiday in New South Wales, originally in deference to Queen Victoria, who wished to acknowledge how well the Irish Brigade had fought in the Transvaal. The practice ceased after 1902, in consequence of opposition "from the commercial sector which claimed there were too many holidays, and also from the militant Protestants who said that the Catholics were unduly favoured as no Protestant saints were similarly honoured" (Richard Broome, *Treasure in Earthen Vessels. Protestant Christianity in New South Wales Society 1900-1914* (St Lucia, Queensland, 1980), p 109, quoted in O'Farrell, *op. cit.*, n 155, p 11), the identity of any such "Protestant saints" not being disclosed.

> The Supreme Court was adjourned yesterday, until *one o'clock* to-day, for the purpose of accommodating those Gentlemen of the Bar who were invited to the St. Patrick's Ball. We think that with the Special Jury paper in arrear, Mr. Justice Willis might have had some consideration for the interests of the public, before he promulgated such an order.[162]

A generation later the courts in Melbourne still did not sit on St Patrick's Day, and that custom was still arousing a degree of disapprobation. For example, John Pascoe Fawkner, a long serving member of the Legislative Council of Victoria, who had been one of the earliest pioneers at Port Phillip, in 1865 recorded in his diary for that day, "No Court. St Patrick's Day. Irish taste rules here --- Irish Judges, Irish Attorney-general, Irish Barristers, Irish Clerks of Court ... and Irish Holy days."[163] At least in the 1860s, in New South Wales the day was treated as an official holiday, the *Sydney Morning Herald* stating, in 1861,

> St. Patrick's Day: --- We understand there will be a general holiday observed by the Government offices, and also by the banks on Monday next, being St. Patrick's day.[164]

Although the day was celebrated in Sydney "with dignity at the highest levels of society" and in Melbourne, at least in 1842, "by a well-to-do mixture of Catholic and Protestant gentry, who sought to use the occasion to proclaim their Irishness and their imperial loyalty, and their social respectability",[165] nevertheless, that had not always been so. One visitor recorded of the Colony in 1826,

> Sobriety, however, by no means ranks among the conspicuous virtues of our general population; --- many, very many, of our dear citizens, keeping up devoutly the religious festival of St Patrick from year's end to year's end ..."[166]

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[162] A*ustralian*, Tuesday, 19 March 1839, p 2. The emphasis appears in the original publication.

[163] Quoted in C. P. Billot, *The Life and Times of John Pascoe Fawkner* (Melbourne, 1985), p 300.

[164] *Sydney Morning Herald*, Friday, 15 March 1861, p 5.

[165] O'Farrell, *op. cit.*, n 155, pp 7-8.

[166] P. Cunningham, *Two Years in New South Wales; A Series of Letters, Comprising Sketches of the Actual State of Society in that Colony; of its Peculiar Advantages to Emigrants; its Topography, Natural History &c &c* (London, 1827), Vol. I, pp 52-58, 60-63; quoted in Frank Crowley, *A Documentary History of Australia*, 5 volumes (Melbourne, 1980), Volume 1, *Colonial Australia 1788-1840*, p 354, "Sydney in 1826", at p 356.

Seven years later a Sydney visitor to Bathurst left a similar picture of the enthusiasm, and protraction, with which the Irish Catholics in that town celebrated the feast of their Patron Saint, "They have been keeping St Patrick's Day since the 12th inst., and not ended it yet."[167] The somewhat lighthearted, and detailed, report of an assault charge in Brisbane, resulting from over indulgence in alcohol on St Patrick's Day in 1851, is significant for the fact that only a single instance of unruly behaviour appears to have been unusual in the celebration of the feast day in that city. The *Moreton Bay Courier* observed that "The festal day of Erin's patron saint passed off in Brisbane with remarkable quietness, the only broken head that came under our observation having been that of James Macalister, who appealed to the Magistrate at the Police Office on Wednesday last, by charging one William Hyland with assaulting him."[168]

The St Patrick's Day dinners did not always receive universal approbation. As late as 1854 the celebration of St Patrick's Day was often recognised as an excuse for excessive drinking, and this was denounced, by the *Freeman's Journal*. In an editorial that publication stated,

> [W]e must discountenance those "drinking associations" called "public dinners" ... It is not dining but *drinking* that is the chief attraction to and at such places. If we wish to honour the land of our birth and to elevate the character and condition of Irishmen in these distant regions, *we* must teach them *how* to be sober both by word and example; then we may claim to be true friends to Ireland and benefactors to our fellow countrymen.[169]

Although the enthusiastic consumption of alcohol was an outstanding and visible element in most of the celebrations of St Patrick's Day, yet, somewhat uncharacteristically, in the 1840s the day became a manifestation in support of temperance. The St Patrick's Total Abstinence Society, a predominantly Catholic organisation, joined forces with the Sydney Total Abstinence Society, a Protestant organisation, to hold on St Patrick's Day an annual

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[167] Edward McCabe to John Joseph Therry, 27 March 1833, Therry Papers (quoted in James Waldersee, *Catholic Society in New South Wales 1788-1860* (Sydney, 1974), p 197).

[168] *Moreton Bay Courier* (Brisbane), Saturday, 22 March 1851, p 3.

[169] *Freeman's Journal* (Sydney), Saturday, 11 March 1854, p 8. The emphasis appears in the original publication.

procession through the streets of Sydney as a public demonstration in favour of abstinence. However, following sectarian rioting in the streets of Melbourne in 1846 during the Twelfth of July celebrations (commemorating the defeat of the Catholic King James II by his Protestant nephew and son-in-law William of Orange at the Battle of the Boyne in July 1690), the Legislative Council passed the *Party Processions Act* of 1846 (10 *Vict*., No. 1) which banned political and religious processions. The Irish-born and Catholic Attorney-General, John Hubert Plunkett, considered that the St Patrick's Day march breached that Act and threatened prosecution. Reluctantly, the temperance societies discontinued their St Patrick's Day parade, and the alcoholic component of the celebrations was able to continue unimpeded.[170]

In the issue of the *Freeman's Journal* of 11 March 1854 one correspondent, identifying himself only as "An Irishman", but obviously a supporter of Irish nationalism and an opponent of the British Government and its local representation, denounced the forthcoming St Patrick's Day dinner, but not on the ground of drunkenness. He questioned whether the speeches would make "any reference to Irish attachment to the Faith, to Pius IX", saying ,"the suffering of the Irish Exiles will find no sympathetic echo from those who will meet at the Exchange Hotel. On the contrary it will be such as becomes the pensioned slaves of the state and as such disregarded by every independent man." The correspondent concluded his diatribe by calling

> upon every Irishman who loves his country, who has any faith in her nationality, and who despises and detests sycophancy under whatever guise it may appear, to shun such a meeting as they would the deadly Upas or the Cholera Hospital, the virus being in each instance equally infectious.[171]

One wonders whether the correspondent in his denunciation had in mind the St Patrick's Day dinner of the preceding year. On that occasion the chair was occupied by the Mayor of Sydney, Daniel Egan, a staunch Catholic, the toast to "Our Father Land" was responded to by John Ryan Brenan (an Irish born lawyer, who was at the time one of the three Police

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[170] Jeff Kildea, "Celebrating St Patrick's Day in nineteenth-century Sydney" (Dictionary of Sydney, 2012, https://dictionaryofsydney.org, accessed 6 October 2017).

[171] *Freeman's Journal*, Saturday, 11 March 1854, p 1.

Magistrates in Sydney), whilst the toast to "The Judges and Bar of New South Wales" was responded to by the Irish-born Attorney-General, John Hubert Plunkett, both speeches being received by enthusiastic applause and acclamation. After the health of the Mayor had been drunk, Egan retired. But thereafter "the festival was prolonged until a late hour in the evening." The report in the *Freeman's Journal* concluded, somewhat ambiguously, "The company separated under the influence of that charity which the festivities of the evening were well calculated to promote."[172] The organising committee for the 1854 dinner included the Irish born medical practitioner Henry Grattan Douglass and the Irish born barrister Peter Faucett. That committee resolved that the dinner should be chaired by Plunkett.[173] Presumably, "An Irishman" would have assigned them all, together with Egan and Brenan, to his category of "pensioned slaves of the state".

A few years later, in 1861, upwards of 200 gentlemen attended the St Patrick's Day Banquet in Sydney, held in Clark's Assembly Rooms in Elizabeth Street, the ladies being segregated into the upper gallery (the newspaper report not disclosing whether they also participated in the meal). At this protracted occasion, extending from 7 pm to 1 am, the Irish born Speaker of the Legislative Assembly, Terence Aubrey Murray, who presided, and Daniel Deniehy, the brilliant but ill-fated Irish writer, solicitor and politician, who was the vice-chairman, were among at least nine members of the Legislature in attendance. Those included the future Premier, Henry Parkes, who was certainly not a friend either to Irishmen or to Catholics, and was described by John Bede Polding, the Catholic Archbishop of Sydney, as "a determined unscrupulous enemy to Catholics and to Irishmen".[174] Perhaps the devious Parkes saw some political advantage in his presence at the function. Perhaps, also, his hatred was greater towards Irish Catholics rather than towards Irish Protestants. (For example, in his later years Parkes met in London and corresponded in amicable terms with the celebrated

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[172] *Freeman's Journal,* Thursday, 24 March 1853, p 9.

[173] *Freeman's Journal*, Saturday, 4 March, 1854, p 11.

[174] J. B. Polding to H. G. Gregory, 23 October 1867, Downside Archives, O 221, quoted in Henry Norbert Birt, O.S.B, *Benedictine Pioneers in Australia*, 2 volumes (London, 1911), Volume II, p 332). The following year Polding referred to Parkes as having "a deep hatred of all that is Catholic", and, although at that time not Premier, as having the supreme power in New South Wales, such power "being the heaviest curse that could befall this country" (Polding to Gregory, 22 April 1868, Downside Archives, O 254, quoted in Birt, *op. cit.*, Volume II, p 337).

historian and social philosopher, W. E. H. Lecky, who was Irish, but Protestant.[175]) To Murray's toast to "The Patriots of Ireland", Deniehy responded in a lengthy and scarcely audible speech. However, Deniehy's eloquence improved as the evening progressed, the final toast of the dinner (to "The Health of the Chairman"), being proposed by Deniehy in graceful terms and being drunk to great applause. Murray replied by calling upon a toast to Deniehy, "one of the most polished scholars this colony has ever produced", which was also drunk amid great applause.[176]

It was not only in Sydney that St Patrick's Day was celebrated by an annual banquet. Such was the custom in Brisbane also, where, as in Sydney, leaders of the community, whether Irish or not, were frequently in attendance. For example, in 1869 the Premier (and future Chief Justice) of Queensland, Charles Lilley, neither Irish nor Catholic, was in attendance, and responded to the toast to "the Ministry, coupled with the name of the Premier, the Hon. C. Lilley". In the course of a speech in which he praised the Irish both in Australia and in their homeland, Lilley recognised that "this was not the first time he had been associated with Irishmen in a celebration of this kind", and said that he "was determined ... to be equally fair and true to Irishmen as they had been to him."[177]

In 1859 the Saint's Day was the occasion for a public dinner at Yass, which was probably the largest event held in that small southern New South Wales town since it was settled about 20 years earlier. The *Yass Courier*, the local weekly newspaper, whose proprietor was the Protestant Scot, James John Brown, devoted almost the entirety of page 2 (the first news page in the publication) to reporting the occasion and providing a verbatim account of

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[175] Lecky to Parkes, 31 December 1883, Parkes Correspondence, Mitchell Library A9, Volume 21, p 15; Lecky to Parkes, 28 December 1889, Parkes Correspondence, A891, Volume 21, pp 284-286; 27 May 1895. Lecky was one of the "gentlemen who have shown me more or less attention" whom Parkes invited to his farewell dinner at the Empire Club before departing London for Australia in July 1884. Other guests at that dinner, at which Parkes mingled the political and literary worlds, included Lord Houghton (Richard Monckton Milnes), Leonard Courtney, MP (then a junior minister in Gladstone's government), Robert Browning and Bret Harte (Isabella Murray, Diary, for 6 June 1884, Murray Papers, Mitchell Library 2421, quoted in A. W. Martin, *Henry Parkes* (Melbourne, 1980), p 340).

[176] *Sydney Morning Herald*, Tuesday, 19 March 1861, p 5.

[177] *Brisbane Courier*, 23 March 1869, p 3.

all the speeches delivered there.[178] Brown, whose editorials frequently emphasised the need for harmony and co-operation between people of different denominations, was a member of the organising committee, which included not only Irish-born Catholics but also Irish-born Protestants (such as Nicholas Besnard).[179]

The function, whose organising committee consisted of 23 gentlemen, Irish and non-Irish, Catholic and Protestant, was held in a large marquee in the courthouse grounds. Each of the 200 men present had paid 30 shillings, a not inconsiderable sum, to attend the dinner. In accordance with the custom of those times, the ladies who were present, numbering more than 100, did not participate in the meal itself, but arrived at about 8 pm, for the toasts and speeches, after the food had been consumed. They did not sit with their menfolk, but were segregated into a special "draperied gallery" located at the side of the top table. Many toasts were proposed, drunk and responded to, accompanied by appropriate band music. In responding to "The land we live in" (proposed by an Irish-born squatter), the pioneer solicitor in the district, George Cemetiere Allman, who was the Australian-born son of an Irish Protestant father, said to the accompaniment of loud cheers,

> I do not think it is claiming too much for Australia to say that in scarcely any other country under the sun could such a meeting as this --- composed as it is of every class and opinion, both political and otherwise --- have occurred, and been so free, as this has happily been, of anything like prejudice or ill-feeling of any sort ... No matter what his present position in society may be, he may reasonably aspire to the highest offices in the country, if qualified for them by ability and integrity.[180]

Doubtless Allman and most of his listeners, especially those born in Ireland, could apply those words to the experiences of themselves and their families. In an ecumenical spirit, one of the two Catholic priests in attendance, Father Birmingham, paid tribute to such Irishmen as the Duke of Wellington, Governor Bourke, John Hubert Plunkett, Roger Therry and Terence Aubrey Murray (the local Member of the Legislative Assembly, who, detained by

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[178] *Yass Courier* (Yass, New South Wales), Saturday, 19 March 1859, p 2.

[179] Robert Lehane, *Irish Gold* (Charnwood, ACT, 2002), p 39.

[180] *Yass Courier*, Saturday, 19 March 1859, p 2.

official and personal duties in Sydney, had sent his apologies). Not to be outdone, Father Birmingham's clerical colleague, Father McAlroy, heaped even greater praise upon Bourke and Plunkett, the one a Protestant, the other a Catholic ("To the exertions of these great and good men may be attributed the general good feeling, peace, and harmony, for which this colony has been remarkable all over the earth's surface"), and with well founded optimism continued, "I cherish fond and brilliant hopes of young Australia." It was not until after 10 pm that the formal toasts and speeches were exhausted, but thereafter many other speeches and toasts were presented and responded to. That St Patrick's Day celebration in Yass was an outstanding example of the day being an occasion for social gathering of local settlers, of different religions and callings, most of whom had been born in the British Isles, but all of whom were determined to make Australia their true home, free from the religious bigotry and social distinctions so frequently encountered in the lands of their birth.

The celebration of St Patrick's Day also provided an opportunity for Irish born persons of celebrity to express and publicise their views on topics of current concern. Shortly after his arrival in Australia in early 1856 Charles Gavan Duffy, three days before the Irish Saint's Day, delivered a public speech in Sydney (before proceeding to Melbourne, where he ultimately settled, becoming in due time Premier of Victoria and being honoured by a knighthood). He spoke of the new Constitution which had only recently come into operation and had brought Responsible Government to New South Wales. In the course of that speech Gavan Duffy percipiently advocated and looked forward to a federation in Australia, "recommending a cordial union among all the Australian colonies, as inhabited by men of the same race, the same interests, and the same destiny".[181]

Gavan Duffy was not alone in in his views regarding a federation of the Australian Colonies. At about the same time an observant English visitor to Victoria wrote, "The question of a *Federal Colonial Government* must shortly force itself into notice", pointing out that such matters as defence, postal services, railways and navigation of the Murray River, "cannot be dealt with by any one of the colonies, but must be considered as a comprehensive

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[181] *Freeman's Journal*, Saturday, 15 March 1856. Among the signatories to the invitation to that dinner were Henry Parkes, MLC and Peter Faucett, Barrister-at-Law (*Freeman's Journal*, Saturday, 9 February 1856, p 4).

scheme for the whole of them." [182] However, at that time the Australian colonies were not particularly interested in the idea of a federation, the initiative for which came from Whitehall, especially from the third Earl Grey while Secretary of State for the Colonies. The appointment of Sir Charles FitzRoy, the Governor of New South Wales, as Governor-General of the Australian colonies in 1851 was intended to be a manifestation of that official policy in favour of such a federation.[183]

Over 300 guests attended the 1860 St Patrick's Day Banquet in Sydney, held at the Royal Exchange on Monday, 19 March, Plunkett in the chair being supported by the Mayor of Sydney, the Irish James Murphy, and by the Welsh-born Dr Richard Lewis Jenkins, MLA for Gwydir. In proposing the toast to the Fatherland, Plunkett took the opportunity of making the following observations upon the then current situation in Ireland, comparing that country with New South Wales,

> There was obviously much hope for Ireland, even in the face of the *Encumbered Estates Act*, for Ireland still remained in the hands of Irishmen ... Would that that unhappy country were as free as the land in which they now lived. Would that she had her own Parliament. [Cheers.] If she had the management and the mismanagement of her own affairs as this colony had, what a glorious thing it would be or her. [Cheers and laughter.][184]

In the course of his response to Plunkett's toast to Civil and Religious Liberty, Dr Jenkins (who was neither Irish nor Catholic) said that "there was no country in the world where civil and religious liberty so largely prevailed [as in New South Wales]".[185]

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[182] Robert Caldwell, *The Gold Era of Victoria: being The Present and Future of the Colony in its Commercial, Statistical, and Social Aspects* (London, 1855), pp 55-56.

[183] John M. Ward, *Australia's First Governor-General Sir Charles FitzRoy 1851-1855* (University of Sydney, 1953), pp 3-5; John Kennedy McLaughlin, "Sir Charles Augustus FitzRoy", Chapter 10 in David Clune and Ken Turner (eds.), *The Governors of New South Wales 1788-2010* (Leichhardt, NSW, 2009), p 203 at pp 217-219.

[184] *Freeman's Journal*, Wednesday, 21 March 1860, p 2; *Empire* (Sydney), Tuesday, 20 March 1860, p 5.

[185] *Freeman's Journal*, *loc. cit.*, n 184.

As the nineteenth century advanced, the celebration of St Patrick's Day ceased to be essentially, if not exclusively, a secular occasion for the recognition of Irishness in the Australian colonies. Professor O'Farrell has observed that the Catholic Church's gradual intrusion into determining the character of the day by organising public religious activities was unwelcome to many Irish in the colony. However, by the end of the nineteenth century, especially in Sydney, under the Irish-born Cardinal Patrick Moran, and, until well into the twentieth century, in Melbourne under Archbishop Daniel Mannix, also Irish-born, St Patrick's Day had become almost exclusively a religious occasion, for the public manifestation of Catholicism in those cities.[186]

Under the patronage of Cardinal Moran, not only the nature and character of the celebration changed, but also the state of sobriety of its participants. William Redmond, an Irish member of the House of Commons and a leading supporter of Home Rule for Ireland, during a lengthy visit to Australia in 1905, attended the celebration of St Patrick's Day in Sydney. Redmond (who had been called to the Irish Bar in 1891, but never practised) recorded his gratification that of the 20,000 persons (mostly of Irish extraction) present at the occasion presided over by Cardinal Moran at the Showground at Moore Park, he did not see a single one under the influence of drink, and that he did not believe that there was a single drunken man present.[187] Redmond's observations were in considerable contrast to those occasions denounced by the *Freeman's Journal* half a century earlier.[188]

The celebration of St Patrick's Day in Australia, originally a secular celebration of Irishness which, as the nineteenth century advanced, assumed an increasingly religious character, may be compared with the day's celebration in three cities in North America in the latter part of the nineteenth century. In each of St John's, Newfoundland, with a majority Catholic population; Halifax, Nova Scotia, with a large minority Catholic population; and

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[186] O'Farrell, *op. cit.*, n 155, p 9.

[187] William Redmond, M.P., *Through The New Commonwealth* (Dublin, 1906), pp 114, 118.

[188] See text to n 169.

Portland, Maine, with a small Catholic population, the celebration of the patronal day from the outset took a form essentially religious rather than nationalistic.[189]

The practice of annually recognising in a public manner Ireland's Patron Saint was one of the contributions of the Irish population in the Australian colonies, especially of the members of the legal profession, who, as has been observed, regularly performed an important role in organising and participating in the annual St Patrick's Day dinners.

Conclusions

Irish lawyers arriving in Australia in the 1830s and 1840s found themselves unpopular in an environment which was somewhat hostile to their race, and sometimes (if they were Catholic) to their religion. They were regarded as outsiders, almost as interlopers, by the already well established English practitioners. Perforce, they often had to look after each other professionally, and at times materially, regardless of whether they were Catholic or Protestant. Yet, from being cast in the role of underdogs, Irish lawyers by the end of the nineteenth century had substantially integrated with the rest of the Colonial legal profession, and many had achieved significant success in their careers.

The next chapter will consider relations between Irish lawyers and another ethnic group whose members were also underdogs (often so regarded, quite literally, by many white settlers) and subject to oppression --- the Indigenous population.

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[189] Patrick Mannion, "The Irish Diaspora in Comparative Perspective: St John's, Newfoundland, Halifax, Nova Scotia, and Portland, Maine 1880-1923" (PhD thesis, Graduate Department of History, University of Toronto, 2013), Chapter 2.3, pp 127f.

CHAPTER 5

IRISH LAWYERS AND THE INDIGENOUS POPULATION

Purpose of this Chapter --- British Settlement in Australia --- Oaths and Interpreters --- Equality before the Law --- Representation in Court --- Myall Creek --- Right to Vote --- Conclusions

Introduction

It is appropriate at the outset to state explicitly what this chapter seeks to do, and, equally importantly, what this chapter does not propose to do.

The purpose of this chapter is to consider the attitudes of Irish lawyers towards, and their contact and interaction with, the indigenous population in Australia throughout the nineteenth century. In doing so, the facts and the research establishing those facts will be stated and conclusions will be drawn from those facts. Those facts will be considered, not with the benefit of hindsight or in the light of current sociological and political opinions, but in the context of nineteenth century British settlement in Australia, and the attitudes and contact of those settlers, especially Irish lawyers, towards and with the Aborigines. Those attitudes and the nature and extent of that contact did not remain constant and unchanging throughout the century or throughout the various Australian colonies.

Consideration will be given to the official directives from the British Government regarding relations with the indigenous population, within the legal framework of the original settlement, and to the administration of justice when it impinged upon Aborigines. In particular, the Chapter will discuss such matters as the taking of sworn evidence from Aborigines and the necessity for interpreters, the provision of legal aid for Aborigines accused of criminal offences, and whether or not British justice should be invoked in the case of the killing of one Aborigine by another. Irish lawyers were concerned, sometimes very closely, in

all the foregoing matters. Sometimes they were acting in their official capacity, as Judges or Crown Prosecutors, at other times as private practitioners acting, frequently pro bono, for Aboriginal clients charged with criminal offences. Often their conduct manifested benevolence and compassion towards the indigenous population. In considering the official policy of equality before the law, notice will be taken of such outrages against Aborigines as the Myall Creek massacre and the perseverance of the Irish Attorney-General Plunkett in bringing the white perpetrators to justice.

It is not the purpose of this chapter to embark upon a general consideration of the treatment of Aborigines, be it by Governments or by individuals, judged by present-day attitudes and standards. It certainly is not intended to be a vehicle for a critical discussion of such topics as dispossession, *terra nullius*, native title, or the judicial decisions in *Mabo*[1] or *Wik*[2] --- let alone a consideration of such matters as apologies, or standards and quality of present-day social welfare or education for Aborigines, or the attitudes of twenty-first century Australians and their Governments to the indigenous peoples of the continent. All these topics are later twentieth and early twenty-first century constructions, and thus would be anachronistic in this Thesis. They are entirely outside the scope of this Thesis.

The Irish lawyers who are the subject of the thesis were acting within their own historical context, and often without knowledge or information regarding events and circumstances which have subsequently come to light, often a century or so later.

British Settlement

It is hardly surprising that Irish lawyers in the course of their professional lives in Australia came into contact with the indigenous population. Cases involving Aborigines were almost always criminal charges. Sometimes the prosecutor was an Irish lawyer. Not infrequently the accused was defended by an Irish lawyer. Sometimes that lawyer appeared

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[1] *Mabo v. Queensland (No. 2)* ((1992) 175 CLR 1).

[2] *Wik Peoples v. Queensland* ((1996) 187 CLR 1).

in an official capacity, as Standing Counsel for Aborigines, but otherwise he acted pro bono. As already observed, this chapter will discuss the professional relations and contact between those Irish lawyers and the Aborigines. It is appropriate, therefore, to consider the official policies of the administration, both at Whitehall and locally, towards the original inhabitants of Australia. Also, it should be recognised that those policies and attitudes and the nature of relations between Colonial officials and the indigenous population did not remain static, but varied greatly throughout the nineteenth century. In this regard there were differences between the colonies and also between locations, such as Sydney, Hobart and Melbourne, where there were few Aborigines, and regional areas with quite large numbers of Aborigines. Further, there was often stark divergence between, on the one hand, the official policy of the local administration regarding Aborigines, and, on the other hand, the way in which that policy was implemented and the attitudes and conduct manifested towards Aborigines by settlers, especially those who had arrived in Australia as convicts.

The country in which Thomas Callaghan and other Irish lawyers found themselves had been settled by the British Government in the latter part of the eighteenth century. However, the arrival of the First Fleet on the shores of New South Wales was not merely the inception of a penal settlement garrisoned by members of the armed Services. It was also the commencement of a free settlement, for the civil administration of which the British Government had already made adequate legal provision, even though that administration took a secondary place for many years.[3] Arthur Phillip, the Governor, was vested with authority extending far beyond that necessary or usual to the mere commandant of a penal establishment, for he was also to be the Governor of a Colony, and, as such, the head of a civil administration.[4] The new colony was in form and character quite different from any other

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[3] The chief constitutional instruments upon which the foundations of the settlement were based were:
Commissions issued to Arthur Phillip (Commission dated 12 October 1786, *HRA*, Series I, Volume I, p 1; Commission dated 2 April 1787, *HRA*, Series I, Volume I, p 2)
Letters Patent dated 2 April 1787, *HRA*, Series IV, Volume I, p 6
Instructions to Governor Phillip dated 25 April 1787, *HRA*, Series I, Volume I, p 9
Act 27 *Geo*. III, *c*. 2 (1787), *HRA*, Series IV, Volume I, p 3
(As Sir Victor Windeyer has pointed out, the document reproduced at *HRA*, Series I, Volume 1, p 2 is not the actual commission itself, but the warrant for the issue of that commission: Sir Victor Windeyer, " 'A Birthright and an Inheritance': The Establishment of the Rule of Law in Australia", *Tasmanian University Law Review* (1962), Volume I, p 635 at p 644.)

[4] Windeyer, *op. cit.*, n 3, p 635.

colony that had ever owed allegiance to the British Crown. As a colony New South Wales was *sui generis*. It certainly could not be classified as either conquered or ceded; by the British authorities in London, it was (as Sir Victor Windeyer has observed[5]), literally, settled. Yet it was a settled colony in which the majority of the settlers were convicts. They had not become, nor, for at least a period of their inhabitancy, did they remain, settlers of their own free will.[6]

The foregoing administrative and legal framework for the governing of New South Wales did not ignore the fact that at the time of the British settlement the continent was inhabited by Aboriginal natives. That population did not have a system of laws or courts in the sense in which those phrases were then understood by the British administrators and politicians in Whitehall and Westminster, and by lawyers both in Britain and in New South Wales. Phillip's Instructions made express provision for the welfare of and the good relations with that native population. He was directed

> to endeavour by every possible means to open an intercourse with the natives, and to conciliate their affections, enjoining all our subjects to live in amity and kindness with them. And if any of our subjects shall wantonly destroy them, or give them any unnecessary interruption in the exercise of their several occupations, it is our will and pleasure that you do cause such offenders to be brought to punishment according to the degree of the offence. You will endeavour to procure an account of the numbers inhabiting the neighbourhood of the intended settlement, and report your opinion to one of our Secretaries of State in what manner our intercourse with these people may be turned to the advantage of this colony.[7]

Less than six months after the establishment of the settlement at Sydney Cove, Phillip was able to report as follows to the Secretary of State regarding the manner in which the Governor had been able to comply with the foregoing part of his Instructions,

> the natives have ever been treated with the greatest of humanity and attention, and every precaution that was possible has been taken to prevent them

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[5] Windeyer *op. cit.*, n 3, at p 638.

[6] Windeyer, *op. cit.*, n 3, at p 649, n 33.

[7] Instructions to Governor Phillip dated 25 April 1787, *HRA*, Series I, Volume I, p 1 at pp 13-14.

> receiving any insults; and when I shall have time to mix more with them every means shall be used to reconcile them to live amongst us, and to teach them the advantages they will reap from cultivating the land, which will enable them to support themselves at this season of the year, when fish are so scarce that many of them perish with hunger, at least, I have strong reason to suppose that to be the case. Their number in the neighbourhood of this settlement, that is within ten miles to the northward and ten miles to the southward, I reckon at fifteen hundred.[8]

Despite the existence of what could be regarded as recognisable customary laws and practices which had regulated Aboriginal tribal life for centuries, it came to be acknowledged, at least as a matter of legal theory, that the Aboriginal peoples were entitled to the rights of British subjects as well as the obligations which also came with that status. However, the burdens for the Aborigines and their way of life tended to far outweigh the advantages which some of the Colonial officials believed might follow from the application of such legal theory.[9]

Oaths and Interpreters

It was inevitable that practical problems would arise. One was the vexed question regarding the testimony of Aborigines in court proceedings. In the early years of the settlement it was considered that, since (in the view of the local courts and lawyers) the Aborigines "have not that sense of religion, which authorises the taking of an oath in any form", the consequence was "a very frequent denial of Justice to them."[10] Nevertheless, the authorities both at Westminster and in Sydney recognised the problem and sought to find a solution. As late as 1845 the Secretary of State was expressing his regret

> that no provision has been made by the Local Legislature, under the authority of the Act of the Imperial Parliament passed for that purpose, to enable the

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[8] Phillip to Sydney, 10 July 1788, *HRA*, Series I, Volume I, p 64 at p 65.

[9] Alex C. Castles, *An Australian Legal History* (Sydney, 1982), pp 515-516.

[10] Attorney-General Bannister to Under-Secretary Horton, 16 August 1824, *HRA*, Series IV, Volume I, p 554.

> Natives to give unsworn testimony. I should wish you to use your endeavours to obtain the enactment of such a Law.[11]

In the same despatch Lord Stanley also expressed his regret upon learning that "no favourable alteration is shewn in the circumstances of the Aborigines"; and his Lordship also referred to "cases in which the British Law has been enforced against Natives for offences which in their eyes would appear but venial", and requested that he receive from Governor Gipps "some report on the subject".[12]

Saxe Bannister, the first Attorney-General of New South Wales, recognised the injustices which flowed from the strict application of English law and procedures to criminal charges brought against Aborigines. In a work published after he had retired from office Bannister, who was very favourably disposed towards the Aboriginal population in Australia, wrote,

> The English rules of evidence, the absence of interpreters, and the ill-conduct of the people (both settlers and convicts, with special exceptions) render it exceedingly difficult to cause the law to be put in force against murderers and other heinous wrong-doers towards the natives; and when, by any concurrence of favourable circumstances, conviction has been obtained, the government has sympathized too much with the oppressing class, and too little with the oppressed, to have its course.[13]

However, where an Aborigine who could not speak or understand English was charged with a criminal offence, the matter would not proceed to trial unless the services of an interpreter could be procured to interpret the proceedings for the accused.[14]

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[11] Stanley to Gipps, 31 August 1845, No. 103, CO 201/355 (AJCP Reel 363), p 791.

[12] Stanley to Gipps, 31 August 1845, No. 103, CO 201/355 (AJCP Reel 363), pp 790, 791-792.

[13] S. Bannister, *Humane Policy; or Justice to the Aborigines of New Settlements* (London, 1830), p ccxl [240].

[14] For example, *R. v. Binge Mhulto* (1829), in T. D. Castle and Bruce Kercher (eds.), *Dowling's Select Cases 1828 to 1844* (Sydney, 2005), p 1; *R. v. Boatman or Jackass* (1832), *op. cit.*, p 6.

Equality Before the Law

Another question which occupied the attention of the Supreme Court of New South Wales was whether an Aborigine was amenable to British law for killing one of his own countrymen.[15] In the course of a carefully reasoned judgment (with which Mr Justice Dowling, delivering a separate judgment, was in agreement) the Chief Justice, Francis Forbes, said,

> I believe it has been the practice of courts of this country, since the Colony was settled, never to interfere with or enter into the quarrels that have taken place between or amongst the natives themselves. This I look to as matter of history, for I believe no instance is to be found on record in which the acts or conduct of the Aborigines amongst themselves have been submitted to the consideration of our courts of justice. It has been the policy of the Judges, and I assume of the government, in like manner with other colonies, not to enter into or interfere with any cause of dispute or quarrel between the Aboriginal natives. In all transactions between the British settler and the natives, the laws of the mother country have been carried into execution. Aggressions by British subjects, upon the natives, as well as those committed by the latter upon the former, have been punished by the laws of England where the execution of those laws have been found practicable. This has been found expedient for the mutual protection of both sorts of people; but I am not aware that British laws have been applied to the Aboriginal natives in transactions solely between themselves, whether of contract, tort, or crime. Indeed, it appears to me that it is a wise principle to abstain in this Colony, as has been done in the North American British colonies, with the institutions of the natives which, upon experience, will be found to rest upon principles of natural justice.[16]

The prisoner was therefore discharged.

The view expressed by Forbes in that judgment did not receive universal acceptance. In July 1841 at Port Phillip an Aborigine named Bonjon fatally shot another Aborigine named Yammowing. On 16 September of that year Bonjon was tried before the difficult and contrary Resident Judge, John Walpole Willis, who did not consider himself bound by the decision in

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[15] *R v. Dirty Dick* (1829), in Castle and Kercher, *op. cit.*, n 14, p 2 (also referred to as *R. v. Ballard* [1829] NSWSC 26).

[16] *R. v. Dirty Dick* (1829) in Castle and Kercher, *op. cit.*, n 14, pp 2-3. This decision, in the light of the later (and seemingly contrary) decision of the same two judges in *R. v. Murrell* (1836) 1 Legge 72, is discussed in B. H. McPherson, *The Reception of English Law Abroad* (Brisbane, 2007), pp 200-201.

R. v. Ballard. The question of the Court's jurisdiction in such circumstances was argued in full by two Irish born lawyers, James Croke, the Crown Prosecutor, and Redmond Barry, the Standing Counsel for the Aborigines, whom Willis had invited to represent Bonjon. Willis did not make a definitive ruling on that question of jurisdiction, but his preliminary observations during the legal submissions of Counsel resulted in the withdrawal of the charge and Bonjon being released. One historian who has considered this case in detail, in observing that *Bonjon* is not well remembered, concludes that *Bonjon* ought to be recognised as a landmark in Australian jurisprudence. Its careful demolition of the *terra nullius* fallacy, and its acknowledgement that the indigenous people were entitled to govern themselves by their own laws and customs, which by law survived colonization, were articulated 150 years before the High Court reached very similar conclusions in *Mabo v. Queensland (No. 2)*.[17] And yet the case is not well remembered. The High Court's decision in *Mabo* overlooked *Bonjon* completely (perhaps not surprisingly, since it was concerned with rights to land, rather than criminal law). In a footnote to his judgment in a later case concerning pastoral leases, *Wik Peoples v. Queensland*, Gummow J, referring, *en passant*, to Bonjon, observed that the applicability of criminal law to Aboriginal people was "taken in Australia to have been settled by *R. v. Murrell*".[18]

Dr Richard Robert Madden, the Irish born Colonial Secretary of Western Australia in the late 1840s, likewise did not accept the correctness of the conclusion in *Ballard.* At the end of his term of office Madden (who, although without formal qualifications as a lawyer, had occupied judicial positions in the West Indies[19]) reported with approval to the Secretary of

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[17] *Mabo v. Queensland (No. 2)* (1992) 175 CLR 1.

[18] *Wik Peoples v. Queensland* (1996) 187 CLR 1 at 181, n (667). See Max Bonnell, *I Like A Clamour: John Walpole Willis, Colonial Judge, Reconsidered* (Leichhardt, NSW, 2017), p 174.

[19] Thomas More Madden (ed.), *Memoirs (Chiefly Autobiographical) from 1798 to 1886 of Richard Robert Madden, M.D., F.R.C.S.* (London, 1891); J. Woods, "Madden, Richard Robert (1798-1886)", *Dictionary of Irish Biography*, Volume 6, p 216; J. M. Rigg, rev. Lynn Milne, "Madden, Richard Robert (1798-1886)", *Oxford Dictionary of National Biography*, Volume 36, p 72; Gera Burton, "Liberty's Call: Richard Robert Madden's Voice in the Anti-Slavery Movement 1833-1842", *Irish Migration Studies in Latin America*, 5:3 (November 2007), pp 199-206. Madden, who had encouraged the plans of the Catholic Bishop of Perth, John Brady, for missionary work among the Aborigines, was instrumental in despatching two Aboriginal boys to Rome to train as priests: *Memoirs*, *supra*, p 231; Bob Reece, "The Colonial Career of Richard Robert Madden: The West Indies, West Africa, and Western Australia", *The Australian Journal of Irish Studies*, Vol. 4: Special Issue: Proceedings of the Twelfth Irish-Australian Conference, Galway, June 2002, p 26.

State what he perceived to have been a change in official policy in that Colony. Madden was a man of deep compassion for all groups which had been subjected to oppression, being aware from personal experience of the situation of Catholics in Ireland before 1829, slaves and former slaves in the West Indies, the native population in the British colonies in West Africa and Aborigines in Western Australia. He was of the view that a killing, whether by one Aborigine of another, or by an Aborigine of a white settler, or by a white settler of an Aborigine, should be treated as murder. In implicitly rejecting the decision in *Ballard*, Madden wrote to Lord Stanley,

> The policy of allowing the natives to perpetrate murders with impunity within the settled districts when the victims of such outrages were natives not in the service of the Colonists was departed from --- and a respect for human life was taught by dealing with all murders as crimes that were independent of questions of color [*sic*] and privilege ... The murders of Natives by white men were discountenanced by the strenuous efforts made to bring a European charged with the murder of a Native woman to justice, and to prevent the scandal to some small extent given by an acquittal in that case from passing with impunity by renewed proceedings and a conviction on the new charge of assault. [20]

Similarly, Mr Justice Cooper, in the Supreme Court of South Australia (of which he was later to be the first Chief Justice), was also of an opinion contrary to that of Forbes. In his charge to a Grand Jury, concerning the amenability of Aborigines for offences committed among themselves, he said, "The law which declared the aborigines to be British subjects, for the purpose of giving them British protection, makes no distinction in crimes committed within or beyond their own race."[21] Cooper had also said, somewhat inconsistently, that he was of the view that Aborigines were subject to the sanctions of the criminal law only if they were aware of them.[22] Cooper's assertion that he had always been vigilant to ensure that Aborigines received justice at the hands of the colonial Courts and had Counsel assigned to defend them is corroborated by the statement appearing in the *Adelaide Times* that Cooper's judicial colleague, the Irish Mr Justice Crawford, had been told that the provision of Counsel

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[20] Madden to Stanley, undated (probably May 1849), p 7, R. R. Madden Papers, Royal Irish Academy, Dublin, MS.24.N.1 (hereinafter referred to as "Madden Papers").

[21] *Adelaide Observer*, Saturday, 17 May 1851, p 5.

[22] *South Australian Register*, 25 November 1846, p 2.

paid for by the Government was "customary in cases where the Aborigines were implicated", and that it was paid for "liberally".[23]

In Western Australia, even as late as the 1880s, it was usual for the jury in convicting one Aborigine of murdering another Aborigine to make a recommendation of mercy. As one observer recorded, "A native murder case was tried at the Sessions to-day, but being of the usual tribal murders "inter se" the jury as usual recommended the guilty party to mercy."[24]Yet it was not unknown for Aborigines themselves to seek the intervention of the white settlers in resolving disputes with their own people. For example, in 1833 in Western Australia the Irish lawyer George Fletcher Moore, who was the Commissioner (that is, the Judge) of the Civil Court and also the owner of a rural settlement outside Perth, wrote to his family in Ireland that "The natives have had some row among themselves, I suspect", one Yagan being denounced by one of his fellow countrymen as the perpetrator of "all the mischief" (that mischief being the killing of livestock belonging to Moore and another settler). Moore's informant requested that

> if the white people will go with him with a strong party, well armed, he will lead them within a short distance of Yagan, "so as to make sure of him". Now, whether they find Yagan encroaching on their privilege of plundering us, or on their grounds, or are really earnest about their desire to prevent mischief being

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[23] *Adelaide Times,* Thursday, 15 August 1850, p 3; J. M. Bennett, *Sir Charles Cooper, First Chief Justice of South Australia 1856-1861* (Leichhardt, NSW, 2002), pp 69-71; Gregory Dening Taylor, *"A Great and Glorious Reformation": Six Early South Australian Innovations* (Kent Town, SA, 2005), p 58. See, also, Chapter 6, text to n 63.

[24] *The Hillman Diaries 1877-1884. The personal diaries of Alfred James Hillman from 21st December 1877 to 24 April 1884 with a foreword by Bentley Hillman* (Privately printed by F. V. Bentley Hillman, Applecross, Western Australia, 1990) (hereinafter referred to as "*The Hillman Diaries*"), p 796, Monday, 8 October 1883.

> done to our flocks, it is one of those golden opportunities (if this be the truth) that seldom occur and which ought to be taken immediate advantage of.[25]

Yagan acquired a degree of celebrity around the Swan River settlement, both among his own people and among the colonists, before being outlawed, with a price (£30) on his head. He was shot dead by a young shepherd, intent on the government reward. But the perpetrator was himself killed almost immediately afterwards by other Aborigines in the same affray.[26]

The encounters between white settlers and Aborigines were not all one-sided. In eastern Australia, thousands of miles from the Swan River, Allan Macpherson in the late 1840s settled at Mount Abundance in the south-eastern part of what was to become the Colony of Queensland. He described the depredations experienced by him and his neighbours and their employees at the hands of the local Aboriginal population. White settlers were subjected to theft of possessions and large numbers of livestock. There were apparently unprovoked attacks by Aborigines, which culminated in the killing of at least five of Macpherson's employees (including one loyal employee who was himself an Aborigine), "some of the bodies mutilated in the most horrible manner".[27] Macpherson, with a degree of even-handedness, concluded that

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[25] George Fletcher Moore, Swan River, to his family in Ireland, 21 June 1833 (*The Millendon Memoirs: George Fletcher Moore's Western Australian Diaries and Letters, 1830-1841* (edited with an Introduction by J. M. R. Cameron) (Carlisle, Western Australia, 2006), p 248). The transcription of the original documents appearing in this publication is fuller and seems to be more accurate and more complete than that appearing in George Fletcher Moore, *Diary of Ten Years Eventful Life of an Early Settler in Western Australia* (London, 1884) (facsimile edition, with an introduction by C. T. Stannage (Nedlands, Western Australia, 1978)), 21st June, 1833, p 201. Moore, born in Donemana, County Tyrone and a devout adherent of the Church of Ireland, was not only a lawyer (Trinity College, Dublin, (BA, 1820) and called to the Irish Bar), but also an explorer of the Swan River and inland Western Australia. An early scholar of the languages of the local Aborigines, he was the author of a *Descriptive Vocabulary ...* (London, 1842): Alfred H. Chate, "Moore, George Fletcher (1798-1886)", *ADB* Volume 2, p 252; Alexandra Hasluck, "Yagan (d. 1833)", *ADB*, Volume 2, p 632; Cameron, *op. cit.*, *supra*, Introduction, p vii; Stannage, *op. cit.*, *supra,* Introduction (not paginated).

[26] *The Millendon Memoirs*, n 25, p 256, Friday, 12 July 1833. However, Alexandra Hasluck, *op. cit.*, n 25, states that the young shepherd, one William Keates, "was soon killed in another affray with Aboriginals". Another contemporary account of Yagan and his ultimate fate is given in Lieutenant R. Dale, *Descriptive Account of the Panoramic View, &c. of King George's Sound and the Adjacent Country* (London, 1834), pp 15-17.

[27] Allan Macpherson, *Mount Abundance: or The Experiences of a Pioneer Squatter in Australia Thirty Years Ago* (London, n.d.), pp 25-26, 33-49.

> they had certainly killed my men and Mr Blyth's [Blyth was another squatter in the district], and driven away vast numbers of sheep and cattle without any provocation on our part, but simply from the desire to plunder. We certainly only wanted that our sheep and cattle should eat some of the grass which was of no use to them; but then, on the other hand, they no doubt thought they had a better right to the land than we had.[28]

Macpherson's reference to the asserted right of the Aborigines to the land should be compared to the official view at Downing Street on that topic at the time of the establishment of the settlement in South Australia several years earlier. In 1835 Under-Secretary James Stephen in a minute to the Secretary of State for the Colonies referred to "due regard to the rights of the present proprietors of the soil or rulers of the country" --- that is, the Aborigines.[29] That the local indigenous population were both the rulers of the country and the present proprietors of the soil was recognised in the Letters Patent of 19 February 1836 by which South Australia was established, which provided that nothing contained therein

> can affect or be construed to affect the rights of any Aboriginal natives of the said province to the actual occupation or the enjoyment in their own Persons or in the persons of their descendants of any Lands therein now actually occupied or enjoyed by those Natives. [30]

Representation in Court

Despite such instances of violence and attacks by and upon settlers, and retaliation by the Aborigines, the Colonial authorities did not disregard their responsibilities towards the welfare of the indigenous population. In consequence of the Report in 1837 of a Select Committee of the House of Commons on Aborigines (British Settlements), officials designated Protectors of Aborigines were appointed in both Sydney and Port Phillip, and ultimately in the other Australian colonies.

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[28] Macpherson, *op. cit.*, n 27, p 37.

[29] Stephen to Glenelg, 10 December 1835, CO 13/3, minute. See Chapter 6, text to n 19.

[30] See Chapter 6, text to n 20.

Some barristers gave their services free of charge when Aborigines were involved in court proceedings (almost always criminal matters). The young practitioner Thomas Callaghan, obviously in low spirits and concerned for the state of the colony and the way in which its indigenous inhabitants were treated by some of the white settlers, wrote "of the state and wretchedness, of the villainy and selfishness, of the Colony and its upstart spendthrifts, and of the atrocities committed upon the blacks."[31] Only three months earlier Alfred Cheeke, soon to be Crown Prosecutor (and who, in due course, was to be Callaghan's colleague as one of the original Judges of the District Court of New South Wales and later to be a Judge of the Supreme Court), had been appointed as Counsel to the Aborigines. Callaghan was apprised of that fact at a dinner party *chez* Therry on Easter Sunday 1841, when Roger Therry, his host (who was celebrating his fortieth birthday), spoke of the "interest at home [that is, in Britain] in favour of the protection of the Aborigines, and then came out with an *abrupt* announcement of Cheeke's appointment as their counsel by the Governor's direction". Therry (who at the time was acting Attorney-General during the absence on leave of the Attorney-General, John Hubert Plunkett) was somewhat put out that he had not been consulted by Governor Gipps about the person to be appointed.[32] When Cheeke was appointed Crown Prosecutor in May 1841, it was rumoured that Callaghan himself (who, on at least one occasion, had appeared *pro bono* for an Aborigine charged with murder[33]) might succeed him as Counsel to the Aborigines.[34]

At the same period in Melbourne another young Irish barrister Redmond Barry was appointed Standing Counsel for the Aborigines (for which he received three guineas [£3-3-0] a brief), a position which he held until the end of the decade.[35] Not only did Barry regularly appear for Aborigines charged with criminal offences, but on at least one occasion he

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[31] J. M. Bennett (ed.), *Callaghan's Diary* (Sydney, 2005), Friday, July 9th 1841, p 85. As to Callaghan, see Chapter 4, *passim*.

[32] *Callaghan's Diary*, Sunday. Easter Sunday [9 April 1841] (the emphasis appears in the original document, as do the words "Sunday. Easter Sunday"), p 59; Monday, May 3rd 1841, p 65.

[33] *Callaghan's Diary*, Wednesday, August 12th 1840, p 24.

[34] *Callaghan's Diary,* Thursday, May 27th 1841, pp 74-75.

[35] Ann Galbally, *Redmond Barry: An Anglo-Irish Australian* (Melbourne, 1995), p 54.

prosecuted, but without success, three white men charged with the murder of an Aboriginal woman.[36] An English barrister, C. J. Baker, who visited Australia in 1841, subsequently provided an account of Sydney and Melbourne at that time. He described Barry's position as "standing counsel for the Aborigines of Australia Felix" as being "an appointment without salary by Government, who pay, however, a liberal fee with every brief and motion paper".[37] Perhaps in 1841 three guineas was a liberal fee. But it has also been stated of Barry's work for the Aborigines that "[h]e laboured as hard and as earnestly upon their cases, often capital matters, as he did upon his other briefs, though he rarely, if ever, received a fee for such services."[38]

A generation later Thomas Clarke Laurance, an Irishman who had practised as a solicitor in his homeland for three years before becoming a Wesleyan minister, arrived in Western Australia in late 1864. In that Colony Laurance was essentially an enthusiastic clergyman. However, after his admission to the Western Australian Bar in 1873 he acted *pro bono* for Aborigines, and others, who were charged with criminal offences and could not afford professional representation. The efforts of Laurance to help the Aborigines may be compared with those of another Christian missionary, John Brown Gribble, also to advance the welfare of the Aborigines in Western Australia. Gribble (a clergyman in, successively, the United Free Methodist Church, the Congregational Union of Victoria and the Church of England), with episcopal approval, opened a mission for Aborigines on the Gascoyne River in 1885. However, the opposition of local settlers who exploited native labour, and the publication in the following year of his pamphlet *Dark Deeds in a Sunny Land*, exposing the exploitation and the cruelties perpetrated against the Aborigines, created such a furore that Gribble was hounded out of Western Australia, and returned to New South Wales. Gribble's

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[36] Galbally, *op. cit.*, n 35, pp 54-56.

[37] C. J. Baker, *Sydney and Melbourne* (London, 1845), p 33. "Australia Felix" was an early name for most of the area which later became the Colony of Victoria.

[38] Peter Ryan, "Barry, Sir Redmond (1813-1880)", *ADB*, Volume 3, p 108 at p 109. It has already been observed that in South Australia, by the early 1850s, the provision of Counsel, paid for "liberally" by the Government, was customary in cases where Aborigines were implicated (text to n 23, *supra*).

tombstone at Waverley Cemetery in Sydney (where he died on 3 June 1893) described him as "the Blackfellows' Friend".[39]

Encounters between white settlers (often ex-convicts) and Aborigines on occasion resulted in violence or even death. Various outrages perpetrated both on and by Aborigines resulted in the Executive Council of New South Wales, in April 1838, concluding,

> 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.[40]

Such good intentions on the part of officialdom were usually directed towards the assimilation of the Aborigines with the white population. Even the humane and well disposed Governor Bourke had little understanding of the Aboriginal populace. In his speech at the offical proclamation of the town of Melbourne in September 1836 Bourke, through an interpreter, told the Aborigines present at the ceremony that, so long as they were peaceful and well behaved, he would be their friend. However, as Dr Hazel King has observed, "In his efforts to civilize the Aborigines Bourke displayed no better understanding of them than did anyone else at the time".[41]

Myall Creek

On 10 June 1838 a group of white stockmen (all convicts or ex-convicts) killed upwards of 30 Aboriginal men, women and children at Myall Creek near Bingara in northern New

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[39] "Gribble, John Brown (1847-1893)", *ADB*, Volume 4, p 299; Robin Barrington, "Who was "Big George"? An exploration and critique of Aboriginalist discourse with historical photographic and written texts" (PhD thesis, Curtin University, December 2015), p 89.

[40] Executive Council Appendix No. 8, Enclosures to Minute 24, 6 April 1838, pp 362-364 (New South Wales Archives 4/1445), quoted in John N. Molony, *An Architect of Freedom: John Hubert Plunkett in New South Wales 1832-1869* (Canberra, 1973), p 139.

[41] Hazel King, *Richard Bourke* (Melbourne, 1971), pp 188, 192.

South Wales.[42] After an official inquiry into this outrageous occurrence, "an act of coldblooded and deliberate atrocity",[43] the Irish born Attorney-General Plunkett caused eleven of the perpetrators to be charged with the murder of two specific adult victims, and personally conducted the prosecution, assisted by the Irish born barrister Roger Therry, at the trial before Chief Justice Dowling in November 1838. Lack of evidence (especially regarding the identification of victims) resulted in the jury, after retiring for only fifteen minutes, acquitting all the accused. However, Plunkett, determined that justice should be done, successfully applied to the Chief Justice for the prisoners to be remanded in custody, pending the preferment of further charges arising from the same incident.

At the second trial, in late November 1838 before Mr Justice Burton, with Plunkett again prosecuting, and again leading Therry, only seven of those originally charged were indicted, on charges of the murder of several specifically identified child victims. After legal argument, the trial before the jury took place on 29 November, and the prisoners were each convicted of five of the fifteen charges against them. On 5 December the three judges of the Supreme Court (Dowling, Burton and Stephen) considered, and rejected, the legal arguments advanced on behalf of the accused, and condemned each to be hanged, that sentence being shortly thereafter confirmed by the Executive Council, and carried into effect.[44]

The second trial was not an instance of Plunkett and Therry merely carrying out their official duties as prosecutors for the Crown. There could have been little official or professional criticism if Plunkett had accepted the outcome of the first trial and after the acquittals had allowed the matter to rest. But with characteristic Irish feeling for the victims and a determination to pursue the ends of justice, regardless of personal consequences to

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[42] This notorious incident and the consequent criminal trials have given rise to abundant literature, some of which is referred to in the Select Bibliography to this Thesis.

[43] Sir Roger Therry, *Reminiscences of Thirty Years' Residence in New South Wales and Victoria* (London, 1863) (facsimile edition, Sydney, 1974), p 283.

[44] John N. Molony, *op. cit.,* n 40, pp 140-147. A detailed description of the two trials and the legal arguments advanced therein is set forth in Mark Tedeschi, *Murder at Myall Creek* (Sydney, 2016), Chapter 11 (pp 148-156) and Chapter 12 (pp 157-184). Despite its title, this work is essentially a biography of Plunkett. In a similar situation in Western Australia, where a European settler was acquitted on a charge of murdering a native woman, he was tried, and convicted, on a fresh charge of assault (Madden to Stanley, undated (probably May 1849), p 7, Madden Papers; n 20 and text thereto, *supra*).

himself, Plunkett drew up fresh indictments. Then he had to sustain those indictments before the Full Court when they were challenged on the ground of *autrefois acquit*. Plunkett's conduct regarding these prosecutions was hardly surprising. His sense of compassion for the oppressed, in this instance the murdered Aborigines, resulted from personal experience. In Ireland, not only had he been closely associated with Daniel O'Connell in achieving the repeal of the Penal Laws in 1829, but in earlier times his own family, on account of their religion, had been dispossessed of their landed estates.

As a result of this case, which excited very great public interest both in the Colony and in England, Plunkett was subjected to a considerable degree of obloquy. However, the courageous Plunkett was not without his defenders. The *Sydney Gazette,* in two separate editorials, stated that he "deserve[d] the highest credit for the manner in which he has acquitted himself in this matter" and that "The Attorney-General has done his duty most manfully in this matter".[45] The well known writer Mrs Campbell Praed proclaimed, "All hail to thee, Plunkett! Had there been more like thee, the national conscience would have less cause for reproach."[46] Therry later wrote that Plunkett, "deserved well of the country, for the firmness and perseverance, with which, despite of the outcry raised against him, he brought to justice men who had dabbled in human blood, with such brutal ferocity, and to such a frightful extent."[47]

One of the jurors at the first trial, at which the accused were acquitted, was reported as having said,

> I look on the blacks as a set of monkies [*sic*], and the earlier they are exterminated from the face of the earth the better. I would never consent to hang a white man for a black one. I knew well they were guilty of the murder, but I, for one, would never see a white man suffer for shooting a black.[48]

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[45] *Sydney Gazette*, Tuesday, 4 December 1838, p 2; Thursday, 20 December 1838, p 2.

[46] Mrs Campbell Praed, *My Australian Girlhood* (London, 1902), pp 16-17.

[47] Therry, *op. cit.*, n 43, p 282.

[48] *Australian* (Sydney), Saturday, 8 December 1838, p 2.

The foreman of the jury in the second trial, in which the accused were convicted, was subsequently subjected to public abuse for returning such a verdict.[49] But public opinion was not unanimous. A correspondent to the *Australian,* writing under the *nom de plume* "An English Juryman", responded to the foregoing words attributed to the juror in the first trial,

> I leave you, sir, and the community to determine on the fitness of this white savage to perform the office of a juryman under any circumstance (much less such an one as that to which I have referred) or to discharge the moral and social duties in a christian and civilized way.[50]

Another female literary personality, the Irish born poet Eliza Hamilton Dunlop, who with her second husband and children had recently arrived in Sydney, expressed in verse her emotions of outrage for the Aborigines murdered at Myall Creek. Her poem "The Aboriginal Mother" was published in the *Australian* only a few days before the public execution of the perpetrators.[51] Eliza Dunlop continued to manifest a concern for the welfare of Aborigines and an interest in their folk-lore and languages, especially after the appointment in 1839 of her husband David Dunlop (also Irish born) as Police Magistrate and Protector of Aborigines at Wollombi and the Macdonald River. [52]

The Irish born journalist and newspaper proprietor Roderick Flanagan was one of the earliest of his contemporaries in Australia to consider with any degree of impartiality the tensions which by the 1830s had inevitably arisen between the Aborigines and the European settlers. His carefully researched history of the Australasian Colonies shows Flanagan,

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[49] *Sydney Gazette*, Tuesday, 1 December 1838, p 2.

[50] *Australian*, Saturday, 8 December 1838, p 2.

[51] *Australian*, 13 December 1838, p 4. That poem received wide publicity, and was subsequently set to music by Isaac Nathan.

[52] Niel Gunson, "Dunlop, Eliza Hamilton (1796-1880)", *ADB*, Volume 1, p 337; Anna Johnston, ""The Aboriginal Mother" Poetry and Politics", being Chapter 4 in Jane Lydon and Lyndall Ryan (eds.), *Remembering the Myall Creek Massacre* (Sydney, 2018), p 68. Eliza Dunlop's father Solomon Hamilton, a native of Newry in County Down, was called to the Irish Bar in 1777. Much of his professional career was spent in India, where he practised as an advocate (that is, a barrister) before the Supreme Court at Calcutta from the end of the eighteenth century until his death in 1820. He was not (as Gunson, *loc. cit.*, states) ever a judge in India (*A New Oriental Register, and East India Directory for 1802* (London, 1802), p 67; *The East-India Register and Directory for 1819*, second edition (London, 1819, p 125)). See Chapter 3, text to notes 79-81.

although without tertiary qualifications, to have been nevertheless a very sound historian.[53] In his posthumously published *The Aborigines of Australia* Flanagan devoted an entire chapter to the Myall Creek Massacre, which amply justifies its description by Professor J. M. Ward "as a restrained exercise in the use of evidence to prove guilt."[54] Flanagan set forth verbatim evidence adduced for the prosecution, "which suggests the frightful nature of the entire transaction, and fiendish spirit of the times", and concluded that

> It is a glorious consolation to know that even then the "voice of a brother's blood, which cried to heaven from the earth" did not cry in vain --- that even when such a fratricide was committed there, there was a power which could and dared avenge it. It is consoling, in fine, to know that this country has not now to atone for such an atrocious deed.[55]

That power was, of course, the Rule of Law, introduced into the Australian colonies from Britain, and its agent in this instance was the fearless Attorney-General, John Hubert Plunkett.

At the time, and for long thereafter, it was thought that this was the first occasion when white men had been convicted of the murder of Aborigines. However, eighteen years earlier two convicts had been charged with the murder of an Aboriginal native chief at Newcastle on 27 October 1820. At the trial of John Kirby and John Thompson in the Court of Criminal Jurisdiction before Judge-Advocate Wylde and a military jury on 14 December 1820, Thompson was acquitted, whilst Kirby was convicted, sentenced to death and subsequently executed.[56] Several years after the Myall Creek murders three Border Police troopers in the Port Phillip District were tried in Melbourne for the murder of an Aborigine, Jim Crow. In his opening address to the all-white jury (which later, without retiring, acquitted all the accused)

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[53] Roderick Flanagan, *The History of New South Wales, with an Account of Van Diemen's Land, New Zealand, Port Phillip, Moreton Bay and other Australasian Settlements*, 2 volumes (London, 1862).

[54] Roderick Flanagan, *The Aborigines of Australia* (Sydney, 1888), Chapter XV, pp 141-154; John M. Ward, "Flanagan, Roderick (1828-1862)", *ADB*, Volume 4, p 185 at p 186.

[55] Flanagan, *op. cit.*, n 54, pp 150-151.

[56] *R. v. Kirby and Thompson* [1820] NSWKR 11; [1820] NSWSupC 11; *Sydney Gazette*, 16 December 1820. The statement in Terry Smith, *Denny Day: The Life and Times of Australia's Greatest Lawman* (North Sydney, NSW, 2016), p 171, that "Before Myall Creek, only three white people had been convicted of murdering Aborigines, and none of the three had been executed" is not correct.

the Irish born Crown Prosecutor, James Croke, said "the aborigines were as much entitled to protection as any other portion of her Majesty's subjects, and that the homicide of an aboriginal must be prosecuted the same as any other person."[57]

On occasion it was the Colonial Office at Whitehall, rather than the local authorities in Australia, which manifested the greater solicitude in ensuring the equality of the Aborigines with the white settlers. For example, when in 1841 the Legislative Council of New South Wales enacted a Statute, No. 8 of 1841 ("to prohibit the Natives for having fire arms in their possession without the permission of a Magistrate"), the Secretary of State in notifying the disallowance of that Act observed to Governor Gipps,

> that to deprive them [the Aborigines] of arms, which they have become possessed of by legal means, would establish a wide and unfair distinction between them and their White brethren. Whatever evil might arise from their use would be far inferior to the utter alienation and suspicion that must arise from such a distinction. Continual Wars to take away fire-arms would be the result of attempts on the part of the Civil Powers to enforce such a Law.[58]

Several years later Earl Grey was strongly moved by a report from the Protector of Aborigines in South Australia that Aboriginal women had been prevented from tending sheep, in consequence of violence visited upon them by settlers. In a despatch to the Governor, Sir Henry Young, the Secretary of State wrote,

> It will be necessary that in every instance of crimes of this description which may be brought to the knowledge of the Govt., the most rigorous inquiry should be instituted with a view to the punishment of the offenders.[59]

In Western Australia in the late 1840s the enlightened and humane Richard Robert Madden (who was vigorously opposed to slavery and was experienced in the granting of

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[57] *Port Phillip Patriot* (Melbourne), 21 August 1845, quoted in Barry Patton, "Unequal Justice: Colonial Law and the Shooting of Jim Crow", *The Journal of Public Record Office of Victoria*, Issue No. 5, 2006.

[58] Russell to Gipps, 26 August 1841, *HRA*, Series I, Volume XXI, p 485.

[59] Grey to Young, 27 February 1849, Mitchell Library A 2312, p 38.

freedom to slaves in British Jamaica and Spanish Cuba) manifested a benevolent interest in the Aborigines of that colony and their culture. He even compiled a vocabulary of the language of those living in the environs of Perth (headed "Perth Tribe Dialect"), making observations of their ages, weight and height, with a description of their burial customs.[60] Indeed, Madden's decision to resign from the office of Colonial Secretary of Western Australia was precipitated by the enactment of local legislation effecting discrimination against Aborigines, in which he found himself in opposition to Governor Irwin and a majority of the members of the Legislative Council (of which Madden was an *ex officio* member). By the enactment in May 1849 of "An Ordinance to provide for the Summary Trial and Punishment of Aboriginal Native Offenders in certain cases" (12 *Vict*., No. 18), summary jurisdiction over Aborigines charged with serious criminal offences, other than murder, rape and arson, was given to magistrates (who mainly were unpaid Justices of the Peace, without qualifications in the Law), and for the first time the practice of flogging Aborigines as a general punishment was introduced into Western Australia.

The right of Aborigines to trial by jury in such cases, a right to which they, equally with white settlers, had previously been entitled, was taken from them. Madden, personally opposed to such discrimination, officially opposed that enactment in the Legislative Council. He cited his disagreement with the Governor on this matter as the reason for his resignation, which he tendered while on leave in Dublin in early 1850.[61] His request for a future colonial appointment elicited a dusty response from Benjamin Hawes, the Parliamentary Under-Secretary of State for the Colonies, "that Lord Grey would be very glad if an opportunity should occur of again employing your services, but that the vacancies at his Lordship's disposal are so exceedingly rare, and the Candidates for employment so numerous, that he cannot venture to hold out to you much prospect that he will be enabled to do so."[62] However, Madden's attitude towards the Aboriginal population of the colony and his desire to curtail

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[60] Madden Papers, documents identified as "Australian Aborigines Papers - Very Important". As to Madden's interest in the Aborigines and their welfare, see notes 19 and 20 and respective texts thereto, *supra*.

[61] Madden to Parliamentary Under-Secretary Hawes, 12 January 1850, Madden Papers.

[62] Under-Secretary Hawes to Madden, 1 March 1850, Madden Papers. Madden received neither any further colonial appointment nor any official recognition for his services in the West Indies, West Africa and Western Australia. The last 30 years of his working life were spent in Dublin as secretary of the Loan Fund Board.

instances of violence against its members did not go entirely unnoticed or unappreciated by at least some of the white settlers.[63]

Right to Vote

The equality before the law of Aborigines with white settlers was not limited to the administration of criminal justice. When universal male suffrage for parliamentary elections was introduced in some of the Australian colonies in the 1850s, male Aborigines received the right to vote, equally with all other men in the population.[64] (Women did not obtain that right until the beginning of the twentieth century.) This fact has largely been overlooked by later historians and commentators. As Roger Therry recognised, under the New South Wales *Electoral Act* of 1858 (22 *Vict*., No. 20),

> ... if he [an Aborigine] but reside six months in a district, [he] has an equal right to vote with the wealthiest and most intelligent commoner in the land .... We deal with this race as fellow-subjects even to the infliction of capital punishment, and make them as amenable to our laws in every respect as British-born subjects.
>
> No member of the pure aboriginal race, where the parents are both black natives, may have yet exercised the franchise; but the law recognises his right to exercise it. Several of the half-caste inhabitants of New South Wales, however --- that is, where one of the parents is an aboriginal native --- have been placed on the electoral roll under the manhood-suffrage system.[65]

It has been stated that by the 1890s the only colony where some Aborigines actually enrolled and voted was South Australia. Point McLeay was an Aboriginal settlement near the mouth of the Murray River in that colony. For the parliamentary election held in 1896 there

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[63] Rev. Mr King to Madden, 14 July [1847?], Madden Papers; Circular from Colonial Secretary, regarding violence to Aborigines, 12 July 1848, Madden Papers.

[64] South Australia was the first Colony to introduce universal male suffrage, in 1856, being swiftly followed by Victoria in 1857 and New South Wales in 1858. Tasmania received that right in 1896. Queensland and Western Australia had to wait until Federation, when those States achieved universal adult suffrage. See Pat Stretton and Christine Finnimore, *How South Australian Aborigines Lost the Vote: Some Side Effects of Federation* (Adelaide, 1991), p 2.

[65] Therry, *op. cit.*, n 43, p 459.

was a polling station at that settlement, where more that 100 persons were enrolled, of whom over 70 per cent cast their votes.[66] Throughout the colonial period neither enrolment nor voting was compulsory in Australia.

Conclusions

It is apparent that, in respect to the Australian Aborigines, the policy of the Colonial Office at Whitehall and the local Colonial administrations, as well as of the Judiciary and the legal profession, especially of Irish lawyers, whether or not occupying official positions, was one of strict equality under the law, as well as a degree of solicitude for the physical and material welfare of the indigenous population. Throughout much of the nineteenth century that view, however, did not prevail among the generality of the white population in Australia, especially the landowners and squatters and their employees, in the rural districts, most of whom seemed to regard the Aborigines as if they were not even part of the human race.

[66] Stretton and Finnimore, *loc. cit.*, n 64.

CHAPTER 6

SOUTH AUSTRALIA: AN EXCEPTION

The Wakefield system --- Mineral Wealth in the Colony --- Statistics --- Few Irish --- Few Lawyers --- Few Catholics --- The Governor (Sir Richard Graves MacDonnell) --- The Supreme Court Judge (George John Crawford) --- The Practising Lawyer, Politician and Father of Federation (Patrick McMahon Glynn) --- Preamble to the Constitution

In many ways the Colony, often called the Province, of South Australia was an exception in Australian development.[1] It had no taint of convict transportation. Nevertheless, to say that its inhabitants were all free settlers is somewhat misleading, since there was no restriction upon emancipists from the Eastern colonies settling in South Australia.[2] Unlike the other Australian colonies, South Australia was established not by governmental authority from Whitehall, but as a commercial enterprise by "a company mixed up of Utopian theorists, and ... selfish and mercenary adventurers".[3] According to its promoters, South Australia was to be an object lesson in the correct management of emigration and settlement.[4] The underlying principle in the Wakefield system of colonising was to combine capital and labour, the capitalist purchasing the land and the money paid for it being devoted to the introduction of men to work it.[5]

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[1] The nomenclature Province was often used until the end of the nineteenth century. Even the draft Constitution for the proposed Commonwealth which was adopted at the 1891 Federation Convention referred to the "Province of South Australia" (G. B. Barton (ed.), *The Draft Bill to Constitute the Commonwealth of Australia adopted by the Convention of 1891* (Sydney, 1891) (republished Sydney, 2000), Part III, Section 24).

[2] This topic is discussed in Paul Sendziuk, "No Convicts Here: Reconsidering South Australia's Foundation Myth", being Chapter 4 in Robert Foster and Paul Sendziuk (eds.), *Turning Points: Chapters in South Australian History* (Kent Town, South Australia, 2012), p 33 at pp 37-38.

[3] *Times* (London), 2 July 1834.

[4] Peter Burroughs, *Britain and Australia 1831-1855* (Oxford, 1967), p 169.

[5] William Harcus (ed.), *South Australia: Its History, Resources, and Productions* (Adelaide, published by Authority of the Government, 1876), Chapter XXI - Immigration, p 75.

In 1839 the Irish born Colonel Robert Torrens, FRS, the Chairman of the Colonization Commission (and the father of Sir Robert Torrens, later to be the author of the eponymous system of Real Property registration), published a pamphlet, proclaiming the advantages of the new Colony of South Australia as an appropriate destination for emigration from Ireland, in which he concluded that under the plan of colonization adopted in South Australia "self-interest and benevolence will be found to coincide".[6]

Although German immigrants fleeing religious persecution in their homeland often chose South Australia as their destination, voluntary Irish immigration to the Antipodes largely by-passed South Australia. The discovery of gold in New South Wales and Victoria in the early 1850s attracted many Irishmen to those colonies. Yet, in the previous decade when rich mineral deposits, especially of copper, tin and lead, were discovered in various parts of South Australia,[7] it was miners from Cornwall, already settled in that colony as farmers and pastoralists, who returned to base metal mining and were soon joined by other Cornish miners who had emigrated to the eastern colonies. The Cornish miners in South Australia in the 1840s were highly successful in extracting the ore and in making large profits for themselves.[8] The demand for skilled miners in the booming copper mines at Kapunda and Burra Burra in the 1840s coincided with --- and ultimately contributed to --- a downturn in the economy of Cornwall itself.[9]

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[6] Colonel [Robert] Torrens, F.R.S., Chairman of the Colonization Commission Appointed by Her Majesty, *Emigration from Ireland to South Australia* (Dublin, 1839), p 20.

[7] Shortly after his resignation as Secretary of State for the Colonies, Lord Stanley in a speech in the House of Lords on 3 March 1846 said, "Immense mineral wealth has been opened in South Australia" (quoted in Francis Dutton, *South Australia and its Mines* (London, 1846), p 254). At that time The Burra, 100 miles to the north of Adelaide, and the site of the Burra Burra Mine (the "Monster Mine", expected to be "the Eighth Wonder of the World"), with its population of 5000, was the seventh largest town in Australia, exceeded only by Sydney, Melbourne, Hobart, Adelaide, Launceston and Geelong (Ian Auhl, *The Story of the "Monster Mine": The Burra Burra Mine and its Townships 1845-1877* (Burra Burra, South Australia, 1986), pp 1, 73).

[8] Dutton, *op. cit.*, n 7, pp 269, 299.

[9] Philip J. Payton, *The Cornish Miner in Australia (Cousin Jack Down Under)* (Trewolsta, Kernow, Cornwall, UK, 1984), Chapter 1, especially pp 16, 26.

Francis Dutton, an early settler and a mining entrepreneur, who after Responsible Government held ministerial office,[10] in 1846 expressed surprise at the reluctance of those suffering destitution in Ireland to come to South Australia, where they would be "welcome to us in the colony, as the blessed dew which refreshes the earth ... [and] where plenty and independence will be their portion."[11] At that time most of the Catholics in South Australia had probably come from Ireland (as was the case in the other Australian colonies). Dutton recorded that in South Australia in February 1844 there were 1055 Catholics, out of a total population of 17,196. There was then only one Catholic church in the colony, located in South Adelaide, the average number of the congregation being 300.[12] Most of those Catholics were probably of Irish extraction.

There was no Government assisted migration from Ireland to South Australia until 1847, when, of a total migration of 3073 to the colony, only 7 per cent were Irish. That percentage increased greatly during the ensuing eight years, reaching 43 per cent in 1855, but the totals of migrants and the percentages from Ireland dropped dramatically in 1856 and 1857.[13] The 1871 census disclosed that 8 per cent (totalling 14,255) of the population were Irish born, compared to 25 per cent born in England, whilst 55 per cent were native born in South Australia itself.[14] Whilst a majority of those Irish settlers were almost certainly Catholic, the same census disclosed that Catholicism was the second largest religious denomination (the largest being the Church of England, 27.39 per cent of the population), with 28,668 adherents, accounting for 15.44 per cent of the population, just ahead of the Wesleyan Methodists, with 14.59 per cent of the population.[15] The Catholic population doubtless included a significant number of native born South Australians, probably of Irish parentage.

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[10] Dutton, a political radical, in the early 1850s advocated an elective upper house and opposed financial grants to religious bodies (George E. Loyau, *The Representative Men of South Australia* (Adelaide, 1883), p 95; Greg Taylor, *Sir Richard Hanson* (Leichhardt, NSW, 2013), pp 138-139.

[11] Dutton, *op. cit.* n 7, p 68.

[12] Dutton, *op. cit.*, n 7, pp 124, 135.

[13] Douglas Pike, *Paradise of Dissent: South Australia 1829-1857*, 2 ed. (Melbourne, 1967), p 517, Appendix A.

[14] Josiah Boothby, "Statistical Sketch of South Australia", in William Harcus, *op. cit.*, n 5, p 224.

[15] Boothby, *op. cit.*, n 14, p 229.

This chapter will consider the fact that in a colony which was so different from the eastern colonies, and having few Irish settlers, few lawyers and hardly any Irish lawyers, three Irish lawyers came to have a significant effect and influence upon the development of the colony, upon the local administration of justice, and upon the Federation movement.

Unlike the other Australian colonies, where free grants of land were made to settlers, there were no free grants in South Australia. The relatively high minimum price of £1 an acre received approbation in Adelaide, from Sir Henry Fox Young, the Governor,[16] and in Whitehall, from Thomas Frederick Elliot, the Assistant Under-Secretary of State. Elliot, with unrivalled experience regarding emigration to the Colonies, commented in February 1850 that "the operation of the price of £1 has been mainly instrumental in making South Australia one of the most perfectly constituted Societies which we have in any new Colony. The inhabitants themselves are well aware of and prize the advantage." Elliot favourably contrasted this situation with "the passions and prejudices of the adjacent Colonies, in which the earlier Settlers were enabled to possess themselves of lands on very different and much easier terms."[17] Ten years earlier Isaac Latimer, a journalist in Truro in Cornwall, was able to set at rest the concerns of his fellow Cornishmen contemplating emigration to South Australia regarding the perceived immorality of the Australian population, by pointing out that

> [T]he vice and demoralization of Australia has reference only to the penal settlements of New South Wales, Van Diemen's Land, and Norfolk Island ... The morality of the colony of South Australia is secured in every way that can be thought of ... [18]

Even in the relationship between the local administration and the indigenous population South Australia differed from the eastern colonies. While arrangements were in train for the

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[16] Young to Newcastle, 9 December 1853, CO 13/83.

[17] Minute by Elliot, 23 February 1850, on Angas to Grey, 21 February 1850, CO 13/71, folio 372. Earl Grey, agreeing with the views of Elliot, also stated that "when representative institutions are established, considering the advance these colonies have made in population, I do not think that the inhabitants can with propriety be refused the power of altering the existing law if they should think fit." (Minute by Earl Grey, 25 February 1850, *loc. cit.*, folio 374).

[18] Quoted in Payton, *op. cit.*, n 9, p 15.

establishment of the settlement James Stephen, the Permanent Under-Secretary at the Colonial Office, in a minute to the Secretary of State referred to "due regard to the rights of the present proprietors of the soil, or rulers of the country".[19] That assumption that the local indigenous population were both the rulers of the country and the present proprietors of the soil was recognised in the foundation document of South Australia, being the Letters Patent of 19 February 1836, which contained the following,

> provided always that nothing in these our Letters Patent contained can affect or be construed to affect the rights of any Aboriginal natives of the said province to the actual occupation or the enjoyment in their own Persons or in the Persons of their descendants of any Lands therein now actually occupied or enjoyed by those Natives.

That recognition has been strongly argued to be inconsistent with the concept of *terra nullius*, which was at that time, and subsequently, accepted in the eastern Colonies.[20]

Whilst Dutton, surprised at the lack of enthusiasm manifested by Irishmen for South Australia as a destination, approved of the German immigrants ("[u]nobtrusive in their manners, highly industrious, and of economical habits", who "now form a very independent and prosperous portion of the South Australian community"), nevertheless he considered them to be "slow, awkward, and dull of comprehension", and as labourers not to be compared with those from England, Scotland and Ireland. Those latter groups, however, suffered from the sad failing of addiction to drink, in contrast to the very law abiding (and, presumably, abstemious) Germans.[21] Irrespective of religious differences, the relatively few Irish settlers in South Australia established the St Patrick's Society, which was frankly national and not

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[19] Stephen to Glenelg, 10 December 1835 (cited as "Stephen to Gardner, 10 December 1835, AJCP, CO 13/3", in Henry Reynolds, "South Australia: Between Van Diemen's Land and New Zealand", being Chapter 3 in Robert Foster and Paul Sendziuk (eds.), *op. cit.*, n 2, p 24 at p 29). See Chapter 5, text to n 28.

[20] For a detailed discussion of the Letters Patent, see Shaun Berg, "A Fractured Landscape: The Effect on Aboriginal Title to Land by the Establishment of the Province of South Australia" in Shaun Berg (ed.), *Coming to Terms: Aboriginal Title in South Australia* (Adelaide, 2010), pp 1-24. See Chapter 5, text to n 29.

[21] Dutton, *op. cit.*, n 7, pp 132, 135, 137.

sectarian, having been formed "to cheer every voluntary exile of Erin" in the colony.[22] According to Professor Douglas Pike, the Society fulfilled its object so successfully that its inaugural dinner, in 1850, had to be ended with a threatened sword by the landlord of the premises where the dinner was held.[23]

In a colony where (apart from emancipists who had arrived from the Eastern colonies) all the settlers were free and all were, or had the potential to be, landholders, there was need for lawyers to attend to the conveyancing of land, especially before the introduction of the Torrens System of land titles in 1858. But even by the end of 1875 there were only 85 members of the legal profession in the colony.[24] Of the few Irish in South Australia in the nineteenth century, even fewer were of the professional classes, and very few were lawyers. There was no encouraging *camaraderie* of the kind which existed among the Irish lawyers in the eastern Colonies.

The circumstances which in the eastern colonies, particularly New South Wales and Victoria, enabled Irish immigrants, especially lawyers and politicians, to achieve success in professional and public careers did not exist in South Australia. In the eastern colonies transportation of Irish convicts and, subsequently, large-scale immigration of Government assisted free settlers from Ireland provided a substantial client-base for Irish professional men and, after Representative, and later Responsible, Government, significant electoral support for Irish politicians. It was understandable that those Irishmen would look to their fellow countrymen and to their co-religionists for the advancement of their material and economic circumstances. Such a population basis of Irish immigrants did not exist in South Australia, one reason being the absence of free land grants and the relatively high purchase price of land from the colonial Government. Among the small number of Irish settlers in South Australia there were very few professional men and hardly any aspiring politicians.

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[22] *South Australian Gazette and Mining Journal* (Adelaide), 25 April 1849. According to Professor Patrick O'Farrell, the Society "was full of Anglicans" (Patrick O'Farrell, *The Irish in Australia*, revised edition (Kensington, NSW, 1993), p 143).

[23] Pike, *op. cit.*, n 13, p 317, citing *South Australian Gazette and Mining Journal*, 3 May 1850.

[24] Boothby, *op.cit.*, n 14 p 240.

The discovery of gold in the early 1850s brought a tremendous influx of Irish immigration to New South Wales and Victoria. But very little gold was discovered in South Australia, to tempt miners or those seeking instant fortunes on the goldfields to go to there. Indeed, the departure of many of that colony's inhabitants to work on Victorian goldfields contributed to a temporary reduction in the business of the Supreme Court of South Australia. In reporting the death of Mr Justice Crawford in September 1852, Governor Young informed the Secretary of State that

> The decrease of business in the Supreme Court, consequent on the great withdrawal of population to the adjacent Gold fields of Victoria, renders it unnecessary, in my opinion, that the vacancy caused by Mr Crawford's death should be supplied immediately on the spot, and therefore I do not intend to make any provisional appointment; but by the time Her Majesty can appoint a Judge, his services will be required.[25]

Among the very few Irish lawyers who came to South Australia in the nineteenth century three achieved celebrity, demonstrated great individuality and advanced the colony's development --- one as a Governor of the Province, one as a Judge of the Supreme Court, and one as a practising lawyer, a politician and a Father of Federation.

The Governor

Richard Graves MacDonnell was born in Dublin in 1814, the eldest son of Dr Richard MacDonnell, Fellow and (from 1852) Provost of Trinity College, and was descended from ancient Irish lines. A graduate of Trinity (BA 1835, MA 1836, LL B 1845), he was called to the Irish Bar in 1838 and subsequently to the English Bar (Lincoln's Inn) in 1841.[26] After practising for a short period in London, MacDonnell was in 1843 appointed to be the first

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[25] CO 13/78, Young to Pakington, 25 September 1852, Mitchell Library A2313, p 182.

[26] *Dictionary of National Biography* (London, 1893), Volume XXV, p 58. However, his obituary in the *Times* states that McDonnell's admission to the English Bar was in 1840: *Times* (London), Tuesday, 8 February 1881, p 10.

Chief Justice of the Gambian Settlements,[27] where his expeditions were on occasion not without personal danger. The "adventurous and perilous experience" referred to in his obituary (the details whereof were not there given)[28] might have been the incident in 1848, when MacDonnell, as Governor of The Gambia, was interviewing a native ruler concerning a recent robbery in his domains, and "the Governor's party was set upon and roughly handled."[29]

Despite a not entirely harmonious relationship with the Lieutenant-Governor, Charles FitzGerald, also an Irishman (although a naval officer, not a lawyer), MacDonnell was on 1 October 1847 appointed to succeed FitzGerald as Governor (not as merely Lieutenant-Governor).[30] Although it has been asserted that while they were both in The Gambia FitzGerald "suspended his chief justice, Richard Graves MacDonnell", the various despatches from FitzGerald to the Colonial Office criticising MacDonnell and the discharge of his duties as Chief Justice do not allude to any such suspension.[31] MacDonnell remained in The Gambia until 1852, and held two further governorships, in the West Indies, before being appointed Governor of South Australia in 1855.

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[27] The correct designation of this dependency is "The Gambia" (rather than "Gambia"), recognising that it was the river itself (the Gambia River) and its banks, rather than any great stretch of territory, which belonged to and was valued by Great Britain. The correctness of this nomenclature is discussed by Sir Charles Lucas in Sir C. P. Lucas, *A Historical Geography of the British Colonies* (3 ed., revised to the end of 1912, by A. Berriedale Keith), 3 Volumes (Oxford, 1913), Vol. III: West Africa, Chapter IX, The Gambia, especially at p 266.

[28] *Times*, *loc. cit.*, n 26.

[29] J. M. Gray, *A History of The Gambia* (Cambridge, 1940), pp 373 (citing *Annual Report for 1849*), pp 385-386; C. C. Manhood, "MacDonnell, Sir Richard Graves (1814-1881)", *ADB*, Volume 5, p 148.

[30] F. K. Crowley, "FitzGerald, Charles (1791-1887)", *ADB*, Volume 1, p 381. FitzGerald, like MacDonnell, subsequently became Governor of one of the Australian Colonies, their respective appointments overlapping for a very short period, FitzGerald being Governor of Western Australia from August 1848 to July 1855, whilst MacDonnell was Governor of South Australia from June 1855 to March 1862.

[31] Crowley, *loc. cit.*, n 30; FitzGerald to Gladstone, 12 February 1845, 24 January 1846, 17 April 1846, 12 June 1846, CO 87/38. MacDonnell emerged the victor, Earl Grey subsequently informing him that "the fact of your having been selected to succeed Captain Fitzgerald [*sic*] in the Govt of the Gambia will of itself convey to you a sufficient assurance that his statements respecting you have left no unfavourable impression on my mind" (Grey to MacDonnell, 7 April 1848, CO 401/6, folios 285-286).

MacDonnell's period in South Australia, his appointment to which has been described as "a surprising choice"[32], coincided with the attainment of Responsible Government in that colony. The new Governor's firm and autocratic views and lack of diplomacy, especially concerning the form of the Legislature to be adopted under Responsible Government, created "disillusioned democrats, disappointed moderates and discontented officials".[33] The recently appointed Secretary of State, Henry Labouchere, expressed surprise at MacDonnell's views, minuting the Governor's despatch in which they were set forth:

> I confess that I do not know how to reconcile the course of policy pursued by Sir R. McDonnell with his high reputation for ability ...
> Nothing can well be more inconsistent with that position of "dignified neutrality" influencing by prudent advice & the foresight due to an independent and impartial position to which befits the Governor of a Colony, in which responsible Government is (by his own arrival) near at hand.[34]

The London correspondent of the *Adelaide Observer* on 3 March 1855, shortly before MacDonnell's arrival in South Australia, expressed the hope that the new Governor "may pursue a more conciliatory course in Australia than in the West Indies; and this may be the case when he finds he has to deal with a thriving and intellectual colony of Saxons, rather than a handful of Creoles, half-castes and Mulattoes."[35]

A better informed and more conciliatory approach, especially concerning his constitutional role and functions under Responsible Government, might have been expected of a Governor with MacDonell's legal and judicial background. (Although he had had a distinguished academic career at Trinity College, the honorary LL.D. conferred upon him by his alma mater in 1871, after his retirement from Vice-Regal office, was a tribute to his public

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[32] Manhood, *op. cit.*, n 29.

[33] Manhood, *op. cit.*, n 29. However, a contemporary author and early settler expressed a far less critical opinion of MacDonnell, stating that the Governor "exhibited much tact, judgment, and taste in inaugurating the work of the new constitution" (John Wrathall Bull, *Early Experiences of Life in South Australia, and an Extended Colonial History* (Adelaide, 1884), p 324).

[34] MacDonnell to Lord John Russell, 22 August 1855, CO 13/90, folios 209-222, minute by Labouchere, folio 226 (AJCP reel 793).

[35] *Adelaide Observer*, Tuesday, 22 May 1855, p 3.

services, rather than a recognition of his legal scholarship.[36]) Despite those personal views, MacDonnell, once Responsible Government had been attained, was confronted with few significant matters of a constitutional nature during his term of office.

Nevertheless, there was at least one rather surprising action by MacDonnell where he blithely disregarded the concept of the separation of powers. On 21 September 1860 he directed that the Chief Justice, Sir Charles Cooper, be sworn in as a member of the Executive Council of the colony. In reporting to the Secretary of State, the Governor attempted to justify this appointment by referring to the dormant commission under which the Chief Justice would assume the administration of the colony in the absence or incapacity of the Governor, and continued

> Although it is not desirable, and it is not hereby intended, that under the present constitution any but the responsible ministers for the time being should take an active part at meetings of the [Executive] Council as advisers of the Governor, I nevertheless felt it was proper that Sir Charles [Cooper] should be at least a member of that Council, over which he may at any moment be called to preside.[37]

The Secretary of State, by then the Duke of Newcastle, was not impressed by the Governor's attempted justification of this appointment, minuting the despatch,

> The Governor gives a very insufficient reason for this appointment which I think is ill advised. There can be no possible advantage in the Chief Justice being a member of the Executive Council *before* his dormant commission is brought into operation and there are many civil consequences which which may arise in a Colony like South Australia.[38]

Despite his view that the appointment was unnecessary, the Duke was not prepared to overturn it, recording that "I will answer this despatch by pointing out the objections but not

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[36] *Times*, *loc. cit.*, n 26.

[37] MacDonnell to Newcastle, 24 September 1860, CO 13/102, folio 425 (AJCP reel 800).

[38] *Loc. cit.*, n 37, folio 428. Indeed, the constitutional propriety of Cooper being required to act in the role of a legislative draftsman had been questioned in the Legislative Council some fourteen years earlier. One member, John Morphett said that "it was a most unconstitutional thing for him to do so" (*Adelaide Observer*, 11 July 1846, p 2).

refusing approval." [39] Had MacDonnell given a little thought beforehand, he should have realised that not only was the appointment unnecessary, but that the membership of the Chief Justice in the Executive Council (consisting of the Cabinet Ministers and the Governor), whether or not he actively participated in its deliberations, was a blatant breach of the separation of the Judiciary from the Executive Government of the colony. This precipitous conduct was surprising in one who had himself been a colonial Chief Justice. But it was in keeping with MacDonnell's Irish character.

Indeed, he was a typical Irishman in at least one other characteristic --- ever recognising and never overlooking any slight, actual or merely perceived. For example, at an early stage in the problems with Mr Justice Benjamin Boothby which were to beset MacDonnell's successor Sir Dominick Daly, MacDonnell reported to Downing Street an instance of Boothby's discourtesy to the Governor in continuing to ignore a formal request for information made by the Governor to the Judge. Sir Frederic Rogers, the Permanent Under-Secretary of State, minuted upon the Governor's despatch, that MacDonnell "is one of those persons as to whom somebody is always being discourteous ... [He] would have done better to have let the matter drop." The Duke of Newcastle agreed.[40]

It was during MacDonnell's period as Governor that the Torrens system of land titles registration was introduced in South Australia in July 1858. The Governor, "an educated, informed and well-connected person who was on the spot at the time and was observing the process with interest",[41] in at least five confidential despatches to the Colonial Office recognised Robert Richard Torrens as the "author" of the statute which introduced that system, on one occasion stating that Torrens's "labour" on the subject was nearly "singlehanded".[42] It may even be just possible that MacDonnell was the unknown helper of

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[39] *Loc. cit.*, n 37, folio 428.

[40] MacDonnell to Newcastle, 20 December 1860, CO 13/103, folios 334a, 335, 335a.

[41] Greg Taylor, "Is the Torrens System German?" *The Journal of Legal History*, Vol. 29, No. 2, August 2008, pp 253-285, at p 269.

[42] Taylor, *op. cit.*, n 41, citing Project (AJCP) reel 797); CO 13/97/274 (AJCP reel 797); CO 13/99/54ff (AJCP reel 798); CO 13/99/258ff (AJCP reel 798); CO 13/102/49ff (AJCP reel 800); South Australian Parliamentary Papers, no. 51/1858, 3.

"high legal authority" whose help Torrens expressly acknowledged.[43] MacDonnell and Torrens had been contemporaries at Trinity, each graduating BA in 1835. Torrens, the author of the statute and the chief architect of the system of land registration which bears his name --- a contribution without equal in the law of Real Property, both substantive and procedural --- was an Irishman, although not a lawyer. Nevertheless, his wide knowledge and understanding of the law of Real Property and its contemporary shortcomings entitle him to be noticed in the present work.

MacDonnell brought to the attention of both the Legislature of South Australia and the Colonial Office the need for the adjustment of the western boundary of South Australia, by the incorporation of a significant area of about 80,000 square miles between the 129th meridian and the 132nd meridian adjacent to the eastern boundary of Western Australia (an area then still legally part of, although unconnected geographically with, New South Wales), "with a view to effectually encouraging the spirit of further exploration and settlement".[44] Despite MacDonnell urging that this boundary alteration be effected without delay and the Secretary of State expressing agreement,[45] and there being no opposition from New South Wales or Western Australia, the adjustment did not come into effect until July 1863 during the tenure of MacDonnell's successor as Governor, Sir Dominick Daly.[46]

MacDonnell, a lawyer, as Governor had little need to avail himself of his legal qualifications or his experience as a colonial Chief Justice (apart from misguided views concerning the form of the Legislature to be adopted under Responsible Government, and the the foregoing instance of his appointment of Sir Charles Cooper to the Executive Council). In

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[43] Taylor, *op. cit.*, n 41, p 258 (citing *Register* (Adelaide), 21 November 1856, p 2; 13 November 1857, p 3); p 269 and n 91.

[44] MacDonnell to Labouchere, 11 March 1858 (laid on the Table [of the House of Assembly of South Australia] by His Excellency the Governor-in-Chief, No. 227).

[45] Stanley to MacDonnell, 28 May 1858 (laid on the Table [of the House of Assembly of South Australia] by His Excellency the Governor-in-Chief, No. 227): Dr Gerard Carney, "The Story Behind the Land Borders of the Australian States --- A Legal and Historical Overview", Public Lecture Series, High Court of Australia, 10 April 2013.

[46] Newcastle to Daly, 16 July 1863, Letters Patent, 6 July 1863 (identified in the Despatch from the Secretary of State to the Governor as "Supplementary Commission under the Great Seal, 6 July 1863, for altering the boundary of the Colony of South Australia"), pursuant to the *Australian Colonies Act* 1861 (Imp.), 24 & 25 *Vict.*, *c.* 44.

contrast, MacDonnell's successor, Sir Dominick Daly, another Irishman, but not a lawyer, was constantly confronted with significant constitutional and legal issues, including frequent changes of Ministry (nine governments during his six years as Governor), and the proceedings for the removal from office of the difficult and obstructive Mr Justice Boothby.[47] Daly, an elderly and benign Irish gentleman, of aristocratic family background, who was the first Catholic to be Governor of an Australian colony, had to deal with many problems of a legal nature where he would doubtless have benefited from the qualifications and experience of his predecessor.

The Supreme Court Judge

In 1850 a second Judge was appointed to the Supreme Court of South Australia. Before the announcement of the appointment of George John Crawford, an Irish barrister, there was speculation in the local press that the position of second Judge was to be filled by another Irish barrister, Richard Bolton McCausland, who shortly thereafter was said to have declined the position.[48]

It has been stated by Ralph M. Hague that there existed a formal arrangement, whereby vacancies in colonial appointments were filled in turn from England and from Ireland, an arrangement the benefit whereof is said to have been received by Crawford in his appointment in 1850 as second Judge of the Supreme Court of South Australia. Hague states that

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[47] Marjorie Findlay, "Daly, Sir Dominick (1798-1868)", *ADB*, Volume 4, p 12.

[48] *South Australian Register* (Adelaide), Monday,1 April 1850, p 3 ("It has been reported during the week that a Mr McCausland, of the Irish Bar, has been appointed Second Judge for South Australia. Our own private information confirms the report, and further warrants the expectation of his speedy arrival."), Tuesday, 2 April 1850, p 3 ("Richard B. McCausland, Esq., Barrister-at-Law, the gentleman understood to have been appointed to the second Judgeship in this colony, is nearly related to Lord Plunkett, being nephew to the late Lord Chancellor of Ireland. The admission of R. B. McCausland, Esq., to the Irish Bar took place during the Trinity Term of 1833."), Friday, 5 April 1850, p 2; *Adelaide Observer,* Saturday, 6 April 1850, p 2 (quoting the *Northern Whig* (Belfast), 20 December 1849, "Mr R. B. McCausland, of the Connaught bar, has declined the chief-justiceship of Adelaide."); Ralph M. Hague, *Hague's History of the Law in South Australia 1837-1867*, 2 volumes (Adelaide, 2005), Volume I, pp 286-287, 289; J. M. Bennett, *Sir Charles Cooper*, *First Chief Justice of South Australia 1856-1861*(Leichhardt, NSW, 2002), pp 91-92. McCausland was a year older than Crawford and seven years his senior at the Irish Bar (Edward Keane *et al.* (eds.), *King's Inns Admission Papers 1607-1867* (Dublin, 1982), pp 107, 303.

Crawford himself is said to have been instrumental in establishing that arrangement, "in concert with a very eminent individual", by a publication of his own entitled *A Voice from the Bar*.[49] Hague does not cite authority in support of such an arrangement.[50] However, an obituary of Crawford states,

> ... when a vacancy occurred for the Irish Executive, in its turn with the Prime Minister, to nominate a colonial judge (which right Mr Crawford was, by his pen, mainly instrumental in establishing, in concert with a very eminent individual, by a publication entitled "A Voice from the Bar"), the Earl of Clarendon, then Lord-Lieutenant of Ireland, recommended him to Earl Grey (although differing from His Excellency in politics) for the vacancy caused by Mr Richard McCautland [*sic*] declining to accept the proffered office.[51]

The existence of such an arrangement, alternating between English and Irish appointees, is not supported by early appointments by the British Government to the Supreme Court of New South Wales (Francis Forbes, called to the English Bar, but practised only in Bermuda; John Stephen, English barrister; James Dowling, English barrister; William Westbrooke Burton, English barrister; Alfred Stephen, English barrister), or to the Supreme Court of Victoria (William àBeckett, English barrister; William Stawell, Irish barrister; Redmond Barry, Irish barrister; Edward Eyre Williams, English barrister; Robert Molesworth, Irish barrister). In South Australia the alternation between Irish and English appointments among the first four judges (Sir John Jeffcott, Irish barrister; Charles Cooper, English barrister; George Crawford, Irish barrister; Benjamin Boothby, English barrister) may have been no more than coincidence.

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[49] [R. M. Hague], *Mr Justice Crawford, Judge of the Supreme Court of South Australia* (Adelaide, 1957), pp 5-7. Hague repeats this statement, in a more abbreviated form, in Ralph M. Hague, *op. cit.*, n 48, Volume I, p 179.

[50] Neither has any copy of a publication entitled *A Voice from the Bar* been discovered among the Hague Papers reposing in the Library of the University of Adelaide, or in any other location. The existence of this publication has not been independently confirmed from any other source. The present author expresses his gratitude to Professor Greg Taylor for conducting a search on his behalf in the Hague Papers on 15 May 2017.

[51] *South Australian Register*, Tuesday, 28 September 1852, p 3; *Adelaide Observer*, Saturday, 2 October 1852, p 7.

Crawford was not the first Irish lawyer to be a Judge of the Supreme Court of South Australia. The first Judge of that Court was the Irish barrister Sir John Jeffcott, who will be otherwise noticed in this thesis, in regard to the consequences of the duel in which he participated while on leave from his posting as Chief Justice of Sierra Leone and The Gambia and his subsequent trial, and acquittal, for murder.[52] However, in the words of his biographer, Jeffcott, who spent only a few months in South Australia, "could not leave any great mark upon the history of the province".[53]

George John Crawford, the son of a distinguished Protestant cleric in the Diocese of Armagh, was a Doctor of Laws from Trinity. He practised at the Irish Bar (the Connaught Circuit), principally in equity matters, for almost ten years, and also acquired some celebrity in the political sphere, through his assistance to his uncle John Beatty West, QC, who was MP for Dublin and a leading Irish politician. Of Crawford it was said that for some years he managed his uncle's estates so judiciously and with such kindness that the tenantry seldom mentioned his name without invoking a blessing on him.[54] One Irish newspaper was quoted as writing, when Crawford departed for South Australia, "For the sake of his wretched country, we regret that a gentleman who has already given so many proofs of his usefulness and benevolence to the poor should leave Ireland."[55]

In January 1850 Crawford, aged only 38, was appointed as second Judge of the Supreme Court of South Australia, at a salary of £800 a year (the serving and, until then, the only Judge, Charles Cooper, was not appointed Chief Justice until 1856, after Crawford's premature death in 1852). As in so many other instances, the appointment of Crawford was supported by "the high and flattering testimonials of some of the leading and most influential members of the legal profession"[56], that high regard being reflected in the opinion of his colleagues on the Connaught Circuit, who "present[ed] him with a most gratifying address,

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[52] See Chapter 8, text to note 67.

[53] R. M. Hague, "Jeffcott, Sir John William (1796-1837)", *ADB*, Volume 2, p 14.

[54] [R. M. Hague], *op. cit.*, n 49, p 2.

[55] *South Australian Register*, 19 April, 8 August 1850.

[56] *Adelaide Observer*, Saturday, 2 October 1852, p 7.

accompanied by two very splendid articles of plate".[57] In the light of such complimentary expressions regarding his character and professional ability, it is somewhat surprising that Crawford, aged only 38, would have been prepared to become a Judge in South Australia, at a relatively small salary. Perhaps he recognised that, despite his political contacts and his undoubted ability, he would never become a Judge in Ireland. Academically, Crawford was probably the most highly qualified lawyer to be appointed to judicial office in the Australian colonies. No other nineteenth century Judge in Australia, Irish or not, held the degree of Doctor of Laws. It is somewhat curious, and would appear to have been unnecessary, that shortly after his arrival Crawford on 27 June 1850 was appointed a Justice of the Peace for South Australia.[58]

The new Judge was well received by his judicial colleague and by the members of the local legal profession, who arranged a reception for the two Judges on 8 July 1850. It has already been noticed that in his speech on that occasion Crawford used a number of Irish idioms and expressions and that the two Judges manifested such a close relationship that they departed the occasion arm in arm.[59] A few days earlier, in accepting the invitation to that function (described by them as a "breakfast"), the two Judges graciously wrote that

> it shall be our earnest desire and study to promote that harmonious feeling between the Bar and the bench, which we consider highly conducive to the due administration of justice. We shall always feel deeply interested in the advancement of the South Australian Bar ...[60]

Cooper and Crawford largely succeeded in fulfilling those aspirations. Although Crawford as a barrister had had little experience in the criminal jurisdictions, he soon mastered that area of his judicial responsibilities, presiding over the Criminal Sessions of the Supreme Court from 12 to 24 August 1850. According to local newspapers, his conduct of

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[57] Ralph M. Hague, *loc. cit.*, n 48.

[58] Colonial Secretary's Office, 1 August 1850, published in *South Australian Register*, Friday, 2 August 1850, p 3.

[59] Text to Chapter 4, n 120.

[60] *Adelaide Observer*, Saturday, 6 July 1850, p 2.

those Sessions created the most favourable impression.[61] That may have been the impression held by the newspaper editors, but almost certainly was not that of the defendants who came before Crawford for sentence. Even in those days of harsh and severe penalties, sentences of death and of transportation for life were pronounced by Crawford without hesitation or apparent reluctance.

Whilst the inhabitants of South Australia enthusiastically resisted the importation of convicts to their territory, they were quite content to exile their own criminals to New South Wales and Van Diemen's Land, the sentence of transportation being available for those found guilty of certain crimes. This practice continued until January 1852, when (by the South Australian *Transportation Commutation Act* of 1851, 15 *Vict*., No. 18, assented to on 2 January 1852) all transportable offences were automatically commuted to prison sentences with hard labour. One consequence of the ending of transportation from South Australia was the need to build a new gaol, as the existing prison facilities in Adelaide were not adequate to accommodate such prisoners.[62]

Crawford was in some doubt, however, regarding his power to make orders for the remuneration of Counsel assigned to indigent prisoners. Patrick O'Connor, a youth brought before those Criminal Sessions in August 1850 on the capital charge of murder, was represented by George Milner Stephen, of the local Bar. Stephen applied to the Judge to have Counsel assigned to assist him in O'Connor's defence, and for such Counsel to be remunerated from the Colonial Exchequer. In the course of his application Stephen compared the situation of his client with that of an Aborigine charged with some minor offence, saying, "If a black were arraigned on the most trifling charge, such as stealing a piece of damper, he was provided with counsel at the public expense, and it was a duty we owed to our common humanity that a white, standing in peril of his life, should enjoy the same advantages."

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[61] [R. M. Hague], *op. cit.*, n 49, p 16; *South Australian Gazette*, 15 August 1850; *Adelaide Times,* 26 August 1850.

[62] Paul Sendziuk, *op. cit.*, n 2, p 33 at pp 37-38; Graham Jaunay, "South Australian Convicts: A Study", *The South Australian Genealogist*, Vol. 22, No 1, 1995, pp 7-9.

Stephen also made a similar application in the case of another prisoner, Yates, also charged with murder.[63]

The Judge stating that he did not know what power he had to make such an order, said that in Ireland it was customary for Counsel to be assigned to destitute prisoners, but they always acted gratuitously. Crawford inquired of the Advocate-General, William Smillie, who was prosecuting, regarding the practice in the neighbouring colonies. The Advocate-General said that it was his understanding that in those colonies Counsel were assigned by the Court, but without any remuneration being made to them. Yates, against whom the evidence was entirely circumstantial, was convicted of wilful murder, and immediately sentenced to death by hanging. [64] After a short retirement the jury acquitted O'Connor on the charge of murder. O'Connor then pleaded guilty to other charges (stopping the mail, forging and uttering an order for £11). Despite Stephen's plea for leniency, on account of his client's youth, Crawford sentenced the prisoner to transportation for life, the maximum penalty, on each of the two counts.[65]

It was not only for capital and other very serious offences that Crawford imposed heavy penalties. The last matter that came before him at his first Criminal Sessions was the relatively minor charge of stealing a flute. Despite a plea of guilty and the owner of the flute giving the prisoner a good character reference and recommending him to the mercy of the Court, Crawford imposed a sentence of imprisonment for six months with hard labour, observing that in consequence of that good character he would not pass such a severe sentence as he had originally intended.[66] It is not unreasonable to surmise that in such cases as the foregoing the failure of Crawford to temper justice with mercy was due not only to his lack of experience in criminal practice but also, as a highly qualified academic lawyer, to his dealing with criminal matters from a theoretical rather than a practical viewpoint. Nevertheless, he was prepared to ensure that destitute prisoners were assigned legal

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[63] *South Australian Register*, Thursday, 15 August 1850, p 3; *Adelaide Times*, Thursday, 15 August 1850, p 3. See, also, Chapter 5, text to n 22.

[64] *South Australian Register*, Thursday, 15 August 1850, p 3.

[65] *South Australian Register*, Thursday, 22 August 1850, p 3; Friday, 23 August 1850, p 3.

[66] *South Australian Register*, Saturday, 24 August 1850, p 3.

representation. The severe penalties regularly imposed by Crawford against European settlers may be contrasted with the instances of leniency, noticed in Chapter 5, which were shown by other Irish Judges towards members of the indigenous population. In regard to criminal matters it is also possible that there may have existed in Crawford's character that element of paradox which (as will be seen in the succeeding chapter) Professor Bolton discerned in the character of John Winthrop Hackett.[67] It is an interesting commentary upon the decorum maintained in the courtroom during his first Criminal Sessions that Crawford felt it necessary to interrupt a trial to deliver the following remonstrance, that "No person coming to the Court should bring dogs with them, as their snarling and barking interrupted the proceedings."[68]

There appears to have been a genuine sense of public and official loss upon Crawford's untimely death, from illness, at the early age of 40, in September 1852. In reporting that unexpected event to the Secretary of State, the Governor, Sir Henry Young, wrote,

> During his service of about 2 yrs., there was recognised in him some of the most suitable qualifications of a good Judge. Calmness, patience, firmness, diligence, quick perception, and uprightness invariably characterised his judicial conduct. In his private and domestic relations he was full of amiability. In addition to these intrinsic merits, he possessed the adventitious but important advantage of being universally respected and esteemed.[69]

The universal respect in which Crawford was held was manifested by the attendance of between 2000 and 3000 mourners at his funeral, greater than at any which had previously taken place in the colony.[70] The *Adelaide Observer*, in reporting his funeral, wrote that Crawford "as a Judge has given universal satisfaction, whilst his urbanity and kindness of heart has endeared his memory to all who had the pleasure of his acquaintance."[71] Four years later Cooper publicly recalled the isolation of having been a sole judge, and the strength he

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[67] Geoffrey Bolton, "A Trinity Man Abroad: Sir Winthrop Hackett", *Studies in Western Australian History* (University of Western Australia), Volume 20, 2000, p 67 at p 78.

[68] *South Australian Register*, Thursday, 22 August 1850, p 3.

[69] CO 13/78, Young to Pakington, 25 September 1852 (Mitchell Library A2313, p 182).

[70] *Adelaide Observer*, Saturday, 2 October 1852, p 7.

[71] *Adelaide Observer*, Saturday, 2 October 1852, p 7.

had received from Crawford "to whom he became deeply attached, and whose early loss by death he lamented much".[72]

The appointment of the Irish Crawford to the Supreme Court of South Australia or the earlier proposed appointment of Richard McCausland, another Irish barrister, to that position may have aroused among Irish lawyers some slight interest in South Australia as a potential professional destination. But it is possible that the arrival of several Irish practitioners in South Australia in 1850 may, however, have been no more than a coincidence. On 3 March 1850, shortly before Crawford's arrival in Adelaide, Luke Michael Cullen, an Irish barrister, "late in practice in Dublin and favourably known to some of the best Irish families" was admitted as an attorney and barrister of the Supreme Court of South Australia,[73] and on 21 September 1850, shortly after Crawford's arrival, Daniel Joseph O'Brien, an attorney of the Court of Queen's Bench in Ireland, was admitted as a practitioner of the Supreme Court of South Australia.[74] In October 1850 J. A. Hogan, of 12 Lower Gardiner Street, Dublin, who had just completed his apprenticeship of five years to a Dublin solicitor and was qualified to be admitted as an attorney and solicitor in Ireland, wrote to Earl Grey, the Secretary of State for the Colonies. Mr Hogan had decided to leave his homeland for Adelaide, and wished to inquire whether it was necessary for him to be formally admitted in Ireland (thereby incurring an expense of about £50) to be entitled to admission in South Australia. Mr Hogan's letter was received on 2 November 1850, and a response was despatched six days later informing him that he "can consult the Librarian at the Colonial Office, as to the Rules of Court of South Australia".[75]

Crawford's death created a vacancy in the Supreme Court. Matthew Joseph Martyn, who had been called to the Irish Bar in Trinity Term, 1843, went to South Australia in 1850, hoping to obtain some official position. Within hours of Crawford's death Martyn wrote to the Secretary of State, Sir John Pakington, "May I remind you that I came out to this Colony

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[72] *South Australian Register*, 24 December 1856, p 2; J. M. Bennett, *op. cit.*, n 48, p 100.

[73] *Adelaide Advertiser*, Saturday, 30 March 1850, p 3.

[74] *Adelaide Advertiser*, Saturday, 28 September 1850, p 3.

[75] J. A. Hogan to Grey, 30 October 1850, response to J. A. Hogan, 8 November 1850, CO 13/70, PRO Reel No. 781, p 512.

in the expectation of procuring some place under the Govt. and this [office] is now vacant", and referring to his submitted testimonials. Those included one from John Hatchell, Solicitor-General for Ireland, dated 15 January 1850, stating in part, "I am not surprised that you [Martyn] should wish to lay your fortunes out of Ireland. From the decline of junior business, and the crowded state of our Bar, few opportunities of advancement here occur to young men, unaided by strong professional connection".[76]

Somewhat curiously, at that time Martyn had not yet been admitted as a practitioner in South Australia. Almost a year later, on 6 June 1853, in an undivided profession, he was "admitted a barrister, attorney, solicitor, and proctor of the [Supreme] Court".[77] The Colonial Office, in retrospect, might have considered itself better served to have appointed even Martyn rather than the troublesome Benjamin Boothby, who ultimately received the office.[78] Unsuccessful in his hopes of judicial, or other, office, Martyn probably returned to practice at the Irish Bar. He had died before January 1874, when he was referred to in a newspaper notice as "the late Matthew Joseph Martyn, Barrister-at-Law, Dublin".[79]

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[76] CO 13/78, M. J. Martyn to Pakington, 24 September 1852 (enclosure in Young to Pakington), folios 139, 140. The Governor of South Australia, Sir Henry Fox Young (in a despatch whose terms succeeded in irritating the Permanent Under-Secretary of State, Herman Merivale), had declined to make a recommendation from the local candidates, "and leaves it it the Secretary of State to send out some person from this country [that is, the United Kingdom] to fill the vacant Office (CO 13/78, Young to Pakington, 25 September 1852 (received 12 January 1853), minutes, Herman Merivale, folio 134).

[77] *South Australian Register*, Tuesday, 7 June 1853, p 3; *Adelaide Observer*, Tuesday, 7 June 1853, p 3.

[78] The background to this, the most unsatisfactory appointment to the Supreme Court of South Australia, is considered in Greg Taylor, "The Early Life of Mr Justice Boothby", (2013) 34 *Adelaide Law Review*, p 167, especially at pp 198-201. As to Boothby's dismissal, see Greg Taylor, *Sir Richard Hanson* (Leichhardt, NSW, 2013), pp 158-164.

[79] *Warwick Examiner and Times* (Warwick, Queensland), Saturday, 17 January 1874, p 2. Martyn's name does not appear in the Queensland Roll of Barristers [1835-1988] (http://archive.sclqld.org.au/digitisation/Roll of H.M.Counsel/TranscriptBarristers 18351988.pdf) or in the Queensland Roll of Solicitors [1858-1871] (http://archive.sclqld.org.au/ digitisation/Roll of H.M.Counsel/ROLL%20OF%20SOLICITORS%201859.pdf).

The Practising Lawyer, Politician and Father of Federation

If South Australia was an anomaly among the Australian colonies, Patrick McMahon Glynn (1855-1931), a lawyer who was both Irish and Catholic, was an anomaly in South Australia. Glynn, a graduate of Trinity (despite his Catholicism), was called to the Irish Bar in 1879. However, "the good opinion" of many friends, "the flattering hopes of others, and a not altogether empty brief bag ... during sixteen months membership of the Irish bar" did not prove "a sufficient inducement to remain at home ... In Ireland energy or ability are only one of the requisites for professional success; there must be many accidental advantages."[80] With probably greater accuracy, Glynn told his mother, "Here [in Ireland] Prejudice, interest and cliqueism is nearly everything."[81] Australia was the obvious destination, as Glynn had kinsfolk, both paternal and maternal, living in Melbourne, Sydney and Adelaide, in which last city his paternal grandmother had died only two years previously. (Other kinsfolk also subsequently came to Australia, two of his brothers settling in South Australia --- further examples of chain migration.) He said that he "would be most happy to go to Australia. There seems a field there for a good speaker, here it is narrow and chances of opening few."[82] It is apparent that the "closed shop" condition of the Irish Bar (already noticed in Chapter 1) was still in existence in 1880.

Glynn's short career at the Victorian Bar was even less successful than in Dublin. He found that work in Melbourne was no more available for a new barrister than in Ireland. To his brother James in Dublin Glynn wrote, "Trying to get business here as a stranger is like attacking the devil with an icicle."[83] He received no encouragement from Sir Redmond Barry (whom Glynn described as "a swindle", saying, "He is a spruce old fellow, and no use to any

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[80] Diary of P. M. Glynn, 4 September 1880, Glynn Papers, National Library MS 4653, quoted in Gerald O'Collins, *Patrick McMahon Glynn, a Founder of Australian Federation* (Melbourne, 1976), p 18.

[81] P. M. Glynn, Dublin, to his mother Ellen Glynn (née Wallsh), 21 June 1880, in Gerald Glynn O'Collins (ed.), *Patrick McMahon Glynn: Letters to his Family (1874-1927)* (Melbourne, 1974), p 6. The capital initial letter in "Prejudice" appears in the original document. The prospects for a new practitioner at the Irish Bar had changed little in the forty years since Thomas Callaghan had expressed views similar to those of Glynn: see Chapter 1, text to n 54.

[82] *Loc. cit.*, n 80.

[83] P. M. Glynn, Melbourne, to his brother James Glynn, 25 April 1881, in O'Collins, *op. cit.*, n 81, p 24.

man"[84]), who advised Glynn "to go back at once".[85] As has earlier been observed, an Irish lawyer newly arrived in Melbourne in the 1850s and 1860s usually received welcoming assistance from his fellow countrymen already established in the Victorian legal profession. Glynn's experience in Melbourne in the early 1880s was very different.

The experiences of Glynn at the Dublin Bar and in attempting to establish a legal practice in Melbourne in the early 1880s have many similarities and parallels with those of Thomas Callaghan in Dublin and upon his arrival in Sydney forty years previously.[86] But even while despondent in Melbourne Glynn had thoughts of a career in politics. Whilst Duffy had regarded the law as a means to a career in politics, Glynn regarded politics as a possible means to a successful career in the law. He wrote to his sister in Ireland, "If I get on --- the devil thank the colony. I can't see how I am to do so without becoming a politician; and as such ought to succeed if I get a chance."[87] Those sentiments may be compared with the aspirations which Callaghan at a similar age confided to his diary on Thursday, 28 February 1839 ("I know not why **I** should not succeed there as well as the others who have gone before me ..."[88]). However, it was in South Australia, not in Victoria, that Glynn's aspirations were fulfilled. In South Australia, to which he removed two years later and where the legal profession was not divided, Glynn achieved success both in the law and in politics.

It was largely through the encouragement and influence of his mother's sister Grace Wallsh that Glynn obtained a professional opening in South Australia, and was soon established as a partner and then as principal of the firm of lawyers which he had joined. Grace was a nun, Sister Bernard in the Order of St Joseph, a Catholic religious teaching Order, in which she was an early and influential companion of the foundress, Saint Mary McKillop, in establishing the Order and of which she herself later became the Superior-

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[84] P. M. Glynn, Melbourne, to his mother Ellen Glynn, 28 October 1880, in O'Collins, *op. cit.*, n 81, p 21.

[85] P. M. Glynn, Melbourne, to his sister Elizabeth (Mrs O'Donnell), 2 January 1881, in O'Collins, *op. cit.*, n 81, pp 23-24.

[86] See Chapter 4, text to notes 1f.

[87] P. M. Glynn, Melbourne, to his sister Elizabeth, 2 January 1881, in O'Collins, *op. cit.*, n 81, p 23.

[88] Diary of Thomas Callaghan (Mitchell Library, State Library of New South Wales, MSS 2112, Box 1, Item 2), Thursday, 28 February 1839. Thus emphasised in the holograph original manuscript.

General. At the time of Glynn's arrival in Australia Sister Bernard was stationed in Adelaide. When the ship in which he was travelling called at that city on its way to Melbourne, Glynn had the opportunity of spending "a jolly few hours" with her and with his uncle Johnny Wallsh (Grace's brother).[89] Subsequently, Sister Bernard was transferred to Sydney, and it was there that she met Malcolm Henry Davis, of the Adelaide firm of solicitors, Hardy and Davis, who wanted "a Roman Catholic Irishman" to open a branch office for them in Kapunda,[90] a town located some 47 miles north of Adelaide, at a time when there were few Catholic lawyers practising in South Australia, let alone Irish Catholic lawyers. Through his aunt's good offices Glynn met Davis in Melbourne, and was ultimately engaged by the latter's firm, practising first at Kapunda, from August 1882, and later, after his entry into Parliament, in Adelaide.

Davis (who was Catholic, but English, not Irish) and his partner, Arthur Marmaduke Hardy, must have thought that Kapunda was a good opening for a branch office of their firm. Since 1860 the town had been accessible by rail from Adelaide, and until the copper mines had ceased operation in the 1880s Kapunda was the chief country town in South Australia. An early settler and administrative official in the colony, Boyle Travers Finniss, who became the first Premier of South Australia under Responsible Government, recorded the copper mines at Kapunda and at Burra Burra (the latter located about 100 miles to the north of Adelaide) as being described as "the wonders of the world".[91] Kapunda was of sufficient importance to be one of the destinations for Australia's first Royal visitor, Prince Alfred, Duke of Edinburgh, in November 1867. The great and unqualified enthusiasm of the welcome which His Royal Highness received in Kapunda suggests a total absence of any Fenian sympathy among the Irish population of the town --- a contrast to the situation in New South

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[89] P. M. Glynn, Melbourne, to his mother Ellen Glynn, 28 October 1880, in O'Collins, *op cit.*, n 81, p 18. The spelling Wallsh (with the double LL) of the surname of the maternal aunt and uncle of Patrick McMahon Glynn is that used by Glynn's grandson, Gerald O'Collin, SJ, in his biography of his celebrated ancestor (*op. cit.*, n 80), although on at least one occasion Glynn himself used the spelling Walsh (with one L) to refer to his paternal uncle (P. M. Glynn, Melbourne, to his mother Ellen Glynn, 28 October 1880, *loc. cit.*, *supra*).

[90] P. M. Glynn, Adelaide, to his mother Ellen Glynn, 5 July 1882, in O'Collins, *op.cit.*, n 81, p 52; O'Collins, *op. cit.*, n 80, p 33. The discovery of copper at Kapunda in 1843 had precipitated a mining boom in the vicinity: see n 7, *supra*.

[91] Boyle Travers Finniss, *The Constitutional History of South Australia ... 1836-1857* (Adelaide, 1886), p 80.

Wales, where four months later a self-proclaimed Fenian attempted to assassinate him.[92] Probably the Prince's only disappointment in his visit to Kapunda was that his expressed interest in visiting the mines was thwarted by the fact that all the miners and other workers had been given a holiday in order to welcome the Royal visitor.[93]

The desire of Davis and Hardy to employ a "Roman Catholic Irishman" suggests that by the early 1880s a significant proportion of the town's population of about 3000 came within either or both of the categories Catholic and Irish, and could be expected to bring their legal work to a fellow countryman and co-religionist. As early as 1850-1851 the Catholic church was one of only two places of worship in Kapunda (the other being the chapel of the sect called "The Howling Methodists", whose tenets, according to the local chronicler of the period "are not patronized in the township"[94]). Cornish settlers, especially the skilled miners, also constituted a significant part of the population of Kapunda, where the continuing rivalry between the Cornish (often Methodist and sometimes Orangemen) and the Irish (usually Catholic) on occasion descended into violence.[95] As Glynn informed his mother very shortly after his arrival in the town, many of the farmers in the vicinity of Kapunda were Irishmen from County Clare, and some even from the area of Gort in County Galway, where Glynn had been born. However, "[t]he Catholics as usual are the poorer class --- the protestants the wealthy and fashionable."[96] Michael Davitt, the Irish Land League agitator, who visited Kapunda in the 1890s, wrote that it felt as though "Kapunda was somewhere in Connaught".[97]

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[92] *Adelaide Observer*, Saturday, 9 November 1867, p 5; O'Farrell, *op. cit.*, n 22, pp 209-210; Keith Amos, *The Fenians in Australia, 1865-1880* (Kensington, NSW, 1988), Chapter 3, "The O'Farrell Incident". Fourteen years later Henry O'Farrell's brother, Peter Andrew Charles O'Farrell, who had previously been a leading solicitor and land speculator in Melbourne, attempted to shoot Archbishop James Alipius Goold, of Melbourne, at Brighton, Victoria, on 21 August 1882 (O'Farrell, *op. cit.*, n 22, p 100).

[93] *Kapunda Herald*, Friday, 10 August 1900, p 4.

[94] E. M. Yelland (ed.), *Colonists, Copper and Corn in the Colony of South Australia 1850-1851* by Old Colonist (Melbourne, 1970), pp 138-139.

[95] For example, the unexpected defeat of Glynn in the 1893 parliamentary election gave rise to local rioting in the town: Payton, *op. cit.*, n 9, p 71.

[96] P. M. Glynn, Kapunda, to his mother Ellen Glynn, 26 September 1882, in O'Collins, *op. cit.*, n 81, p 56.

[97] Quoted in Payton, *op. cit.*, n 9 p 71.

At the time of Glynn's arrival, there was only one other solicitor practising in the town, and several years after the establishment of that branch office there were only three lawyers recorded as practising in Kapunda, Glynn and Hardy being two of them (although Hardy was essentially located in the firm's Adelaide office).[98] In Kapunda Glynn soon achieved the professional success which had eluded him in Dublin and in Melbourne. As his biographer has observed, Glynn would not have been a total stranger with the people of Kapunda, as Sister Bernard had previously been stationed there as Superior of the local convent and school and his uncle Johnny Wallsh had been a regular visitor to the town.[99] Less than a year after his arrival Glynn in April 1883 became the editor of the local newspaper, the *Kapunda Herald*, regularly writing editorials and leading articles for that and other publications, and soon he was speaking and writing in support of the Land Nationalisation Society, of which he was one of the founders.[100] Combining his legal practice with journalism and involvement in local affairs, it was hardly surprising that in 1887 the voters of Kapunda elected Glynn to the House of Assembly of South Australia. Despite his earlier stated ambition of using politics as a means for professional success in the law, it is as one of the Fathers of Federation and as a successful politician in the early years of the Commonwealth of Australia that Glynn is now remembered.

Glynn was briefly South Australia's Attorney-General in 1899. More importantly, however, Glynn, an enthusiastic and committed supporter of Federation, was elected one of the ten Representatives from South Australia to the Federal Convention of 1897-1898, where he was an influential and respected participant. At that Convention Glynn was described by Alfred Deakin (in whose ministry he was later to serve as Attorney-General of the Commonwealth) as "a little Irish barrister, large-nosed and florid, with a brogue as broad as he was long and the figure of a jockey and the reputation of a hard and reckless rider".[101] Deakin omitted to mention Glynn's very large and distinguishing moustache.

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[98] Robert Haden Smith, *Law List of Australasia* (Melbourne), 1882, p 179; 1886-1887, p 192.

[99] P. M. Glynn, Kapunda, to his mother Ellen Glynn, 26 September 1882, in O'Collins, *op. cit.*, n 81, p 56.

[100] George E. Loyau, *Notable South Australians* (Adelaide, 1885), p 246.

[101] Alfred Deakin, *The Federal Story* (Melbourne, 1944), p 59.

It was the South Australian Representative Glynn, a devout Catholic --- not a Representative from New South Wales or Victoria, Colonies with large Catholic populations --- who was responsible on 2 March 1898 for inserting into the Preamble to the Constitution the words "humbly relying on the blessing of Almighty God". In this he was motivated by sincere religious belief as well as by political pragmatism, recording in his diary for that date,

> Today I succeeded in getting the words "humbly relying on the Blessing [*sic*] of Almighty God" inserted in the Preamble. It was chiefly intended to secure greater support from a large number of voters, who believe in the efficacy for good of this formal Act of reverence and faith.[102]

In a colony which contained so few Irish settlers it is surprising that three Irishmen (one a Catholic, where there were few adherents of that religion) had such a significant impact upon the development of South Australia and (in the case of that Irish Catholic) upon the establishment and development of the Commonwealth of Australia. Each of those three Irishmen achieved prominence and success upon his own merits and qualifications, be they administrative, judicial, professional or political. In doing so, each encountered the pitfalls and overcame, ultimately, the disadvantages of being an Irishman, a member of a minority in the population, where their superiors, their colleagues and almost all with whom they were regularly in contact belonged to a different ethnic background and often to a different religion. The success and recognition which Crawford and Glynn achieved in South Australia would have been beyond their grasp had they remained in Ireland. Each in his career in South Australia showed that assertiveness and ambition which often were among the national characteristics of Irishmen of the professional classes. When in the succeeding chapter the careers of Irish lawyers outside the Law are being considered, those characteristics will in many instances also be recognised.

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[102] Glynn Diary, 2 March 1898, National Library, MS 558, quoted in J. A. La Nauze, *The Making of the Australian Constitution* (Melbourne, 1974), p 226. See, also, Richard Ely, *Unto God and Caesar: Religious Issues in the Emerging Commonwealth 1891-1906* (Melbourne, 1976), Chapter 10, "Glynn's Triumph", especially at pp 69-70, 74.

CHAPTER 7

CAREERS OUTSIDE THE LAW

Other careers --- "How They All Live is a Mystery" --- Gold and the Lawyers --- Henry Cuthbert at Ballarat --- Agricultural and Pastoral Pursuits --- Lawyers as Pressmen and Journalists --- John Winthrop Hackett --- Lawyers in Politics --- Ancillary Careers: Academic or Ecclesiastical --- Conclusions

Not all those Irish lawyers who came to the Australian colonies confined their activities to the practice of the law. Most intended to practise their profession in their new home. Some, however, having been unsuccessful in that profession in Ireland, came with the express intention of giving up the law and following another career. Of those, many, disappointed in their hopes for a successful new career in their new country, returned to the practice of the law. In contrast, yet others, after some time in legal practice in Australia, chose (on occasion, through necessity) careers outside the law. There were still other Irishmen, who were not lawyers when they arrived in Australia, but who qualified for that profession after pursuing some other occupation.

There were legal practitioners in Ireland who, encouraged by the lure of gold, sought their fortune on the Australian goldfields, but, disappointed at the diggings, resumed the practice of the profession in which they had qualified. Others came to Australia intending to acquire land and to prosper in the fields of agriculture and sheep farming. Yet others pursued a career in journalism, either concurrently with legal practice or to the exclusion of the latter. Many entered the political arena, some achieving the highest offices in the Colonial Legislatures, and, after Responsible Government, in the executive governments of the colonies. Yet others pursued a life in academia. At least one practitioner, after a career at the colonial Bar and in the colonial Legislature, gave up the law for the Church. Not all stayed in their new country when they retired from a successful career in Australia. Few (Croke was one) returned to Ireland; others, such as Therry, disillusioned after a brief visit to Dublin,

retired to London, as also did McCreight, after a second, and more successful, legal career in British Columbia; Gavan Duffy, with a new family by his third wife, chose Nice on the French Riviera for his long retirement from Australian public life. Wrenfordseley, after his peripatetic judicial experiences in Australia and the Pacific, also retired to the Riviera, at Antibes.

This chapter will consider the reasons why many Irish lawyers did not confine their lives in their new country to the practice of the profession for which they had qualified in their old country, or sometimes in their new. It will then discuss other careers open to them and which many of those lawyers followed, either concurrently with their legal practices or in place of their previous profession of the law. Examples will be given where those other careers resulted from deliberate choice or from opportunities and circumstances largely beyond their control. A political career (on occasion leading to judicial appointment) was almost always followed concurrently with legal practice, as was often the case with a career in journalism, where frequently the income supplemented the lawyer's meagre professional earnings. Reliance has been placed upon such primary sources as personal diaries and memoirs, as well as personal correspondence and contemporary newspapers. It is recognised that all those personal primary sources are subjective, and that diaries and memoirs especially can be, in modern day parlance, "performative". Nevertheless, that does not appear so with the diary of Thomas Callaghan, which clearly was not written with an eye to posterity or to future publication. Whilst this chapter concentrates on careers of Irish lawyers, it should not be overlooked that in pursuing lives outside the law the Irishmen were hardly different from their non-Irish colleagues, especially in the field of politics.

"How They All Live is a Mystery"

At various times throughout the nineteenth century practitioners who left an over-crowded legal profession in Ireland found in Australia a situation that was hardly any better. Shortly before the discovery of gold in Victoria an Irishman, John Leslie Fitzgerald Vesey Foster (who, it will be recalled, later assumed the surname Foster-Vesey-Fitzgerald), cautioned prospective immigrants against false hopes of professional success. Foster,

although not himself a lawyer (despite having studied law for a short period after graduating from Trinity and before coming to Port Phillip in 1841), was a kinsman to many members of the legal profession, including his first cousin, William Stawell, later to be the second Chief Justice of Victoria. While in Ireland in 1851 Foster was the author of an account of the Colony in which he had spent nine years, writing,

> The lot of young men of education and good family is to be pitied, who have been induced to emigrate without the means of procuring an establishment of their own ...
> The prospects of professional men are not very encouraging. Physicians and surgeons constantly arriving in the emigrant ships, are to be met with, usque ad nauseam. Attorneys also are numerous: The Bar must eventually prove a lucrative profession in a place where so much real business is transacted, but its gains are not at present very good.[1]

Foster, however, concluded his views on a less pessimistic and more encouraging note. Perhaps, in expressing these sentiments, he was speaking of the personal experiences of himself and his family (many lawyers among them) in his native Ireland when he wrote, "How many men, disappointed in an over-crowded profession, would do well to realize their substance, and find there [in Victoria] occupation and comfort?"[2] Foster followed his own advice by returning to Victoria after the discovery of gold, to take up the position of Colonial Secretary of the colony in July 1853. But having sustained considerable obloquy following problems on the Ballarat goldfields and the Eureka violence in late 1854, he resigned his office in December of that year, ultimately returning to Europe in 1857.

In July 1854, while gold was being extracted in very considerable quantities in Victoria, the *Sydney Morning Herald* reprinted from the London *Law Times* the following article

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[1] John Fitzgerald Leslie Foster, *The New Colony of Victoria formerly Port Phillip* (London, 1851), p 63. It has already been observed (Chapter 2, text to n 3) that the Law was not the only profession in which there was in Ireland an oversupply of young graduates. Medicine was another. "In the second half of the nineteenth century Irish medical schools were producing more graduates than Ireland could absorb and there were complaints of overcrowding in the profession", and, further, that England was not a favoured destination for those young graduates, since "the greater financial rewards [there] could be accompanied by extensive prejudice and career restrictions" (Nicola Cousen, "Dr James Stewart: Irish Doctor and Philanthropist on the Ballarat Goldfields" (PhD thesis, Faculty of Education and Arts, Federation University, Ballarat, Victoria, May 2017), pp 54-55, and authorities cited therein).

[2] Foster, *op. cit.*, n 1, pp 83-84.

published two months earlier, cautioning young lawyers regarding their professional prospects in Australia.

> There has been a large emigration of lawyers to Australia, and from inquiries continually being made by correspondent as to the regulations for practice there, it would appear that many are contemplating the same step. Let us give to such a timely warning … Let those of our readers who have entertained thoughts of emigration to Australia pause before they resolve; and if they go it should not be as lawyers, or with any hope to thrive by the law.[3]

This newspaper admonition confirmed the observation of Foster regarding "the lot of young men of education and good family", and reflected the concern which Governor FitzRoy had in the preceding year expressed to the Secretary of State for the Colonies, Sir John Pakington, regarding "hundreds of gentlemen by birth, education & profession" who found neither gold nor employment suited to their station, and where the athletic secured a bare subsistence working on the roads, but where there was no opening for those used to sedentary employment. The Governor complained to the Secretary of State that those seeking introductions should be apprised before leaving England of the Colony's real circumstances.[4]

The misgivings of Foster and the concern of FitzRoy in the early 1850s should, however, be contrasted with a far more favourable description presented by a Scotsman who resided in the colony in the mid-1830s.[5] The accuracy of that description (which ran through at least eight editions, and was responsible for many early settlers arriving in the Port Phillip District) was, however, questioned by one of the author's neighbours at Wimmera, who described the publication as having "gulled half England and Scotland in 1839 and 1840".[6]

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[3] *Sydney Morning Herald*, Monday, 17 July 1854, p 5 (reprinted from *Law Times* (London), 6 May 1854).

[4] FitzRoy to Pakington, 10 February 1853, Hampton Family Archives, BA 3835/16 (xi), p 158, Worcestershire Records Office, Worcester, United Kingdom, quoted in John Kennedy McLaughlin, "Sir Charles FitzRoy", Chapter 10 in David Clune and Ken Turner (eds.), *The Governors of New South Wales 1788-2010* (Leichhardt, NSW, 2009), pp 215-216; Chapter 2 of this Thesis, text to notes 65, 66.

[5] [David Lindsay Waugh], *Three Years' Practical Experience of a Settler in New South Wales; being Extracts from Letters to his Friends in Edinburgh, from 1834 to 1837*, 8 ed. (Edinburgh, 1838)

[6] Edward Bell to Lieutenant-Governor La Trobe, 12 August 1853, being document No. 34 in Thomas Francis Bride (ed.), *Letters from Victorian Pioneers* (Melbourne, 1898), p 180.

Gold and the Lawyers

Despite the foregoing misgivings and admonitions, immigrants, in their thousands, arrived in Victoria and New South Wales throughout the 1850s, most attracted by the lure of gold. Some were professional men; all were seeking their fortune in a new country. Numerous nationalities were represented among the miners on the Victorian goldfields. In addition to many Irishmen and Englishmen, there were natives of countries on Continental Europe (Raffaello Carboni, a participant in, and the author of the first published account of, the Eureka uprising of 1854, hailed from Urbino in Italy), as well as Americans (many of whom, the "Forty-Niners", had been attracted to the gold fields of California in 1849, shortly after that territory had been transferred from Mexico to the United States), and other nationalities, especially Chinese. But all, in coming to Victoria, were motivated by, in the words of Carboni, "[g]old thirst, the most horrible demon that depraves the human heart, even a naturally honest heart."[7] Their chief destination was Ballarat, which was "a Nugety [*sic*] Eldorado for the few, a ruinous field of hard labour for many, a profound ditch of perdition for Body and Soul to all."[8]

One visitor to the diggings at Ballarat described, with some hyperbole, the mining community as consisting of,

> merchants, cabmen, magistrates and convicts, amateur gentlemen rocking the cradle merely to say they have done so, fashionable hairdressers and tailors, cooks, coachmen, lawyer's clerks and their masters, colliers, cobblers, quarrymen, doctors of physic and of music, aldermen, an A.D.C. on leave, scavengers, sailors, short hand writers, a real live lord on his travels --- all levelled by community of pursuit and of costume.[9]

The "real live lord on his travels" observed by Lieutenant-Colonel Mundy was probably Lord Robert Cecil, to whom reference will shortly be made.

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[7] Raffaello Carboni, *The Eureka Stockade* (ed. Geoffrey Serle) (Melbourne, 1963), p 12.

[8] Carboni, *op. cit.*, n 7, p 180.

[9] Godfrey Charles Mundy, *Our Antipodes; or Residence and Rambles in the Australasian Colonies with a Glimpse of the Gold Fields*, 3 volumes (London, 1852), Volume III, pp 346-347.

Other Irish professional men, apart from lawyers, were attracted by the lure of gold and departed their native Ireland for the Victorian diggings. For example, the character of the eponymous hero in the masterpiece trilogy *The Fortunes of Richard Mahony*[10] was based upon the author's father, Dr Walter Lindesay Richardson (ca. 1826-1879), a native of Dublin, who, having failed to make the hoped for fortune upon the Victorian goldfields, resumed in Ballarat the practice of his medical profession.[11] The local goldfields directory, which listed identities, occupations and addresses at the various mining sites in the vicinity of Ballarat contained no references to any lawyers, but named plenty of lemonade-sellers. At the Ballarat Diggings there were stated to be "4 doctors", as well as "39 store-keepers, 8 butchers, 4 smiths, and 1 Roman Catholic chapel."[12] The last mentioned suggests either a preponderance of Irishmen or that members of other denominations were not so conscientious in the observance of their religious obligations.

Nevertheless, Irish lawyers do not seem to have been particularly discouraged by the warnings of such as Foster or the anonymous author of the article in the *Law Times*, or the official concern of Governor FitzRoy. Some of those Irish lawyers considered that, as their practices had been so detrimentally affected by legislative reforms in Ireland, their situation could not be any worse in Victoria. The Encumbered Estates legislation and the abolition of imprisonment for debt were held responsible for the reduction in professional work in their homeland, which resulted in at least two Irish attorneys going to Victoria.[13] One of those attorneys, Charles Purcell, practising from "a dilapidated booth-tent" in Melbourne's Tent City (later known, more respectably, as Emerald Hill), was not reluctant to boast of relieving clients of the results of their success at the diggings. According to the contemporary historian William Kelly, Purcell "had come to the colony at a good juncture, when solicitors were

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[10] Henry Handel Richardson, *The Fortunes of Richard Mahony* (Melbourne, 1946).

[11] Dorothy Green, "Richardson, Ethel Florence Lindesay ('Henry Handel') (1870-1946)", *ADB*, Volume 11, p 381. See, also, n 1, *supra.*

[12] *Bryce Ross's Diggings' Directory* (Melbourne, 1853), p 11. Perhaps Adam Loftus Lynn and Richard Ocock (to each of whom further reference will shortly be made) had commenced practice in Ballarat too late in 1853 to be included in Bryce Ross's publication.

[13] Chapter 2, text to notes 101, 102.

scarce, business brisk, and money plentiful".[14] But Kelly's statement is hardly consistent with the discouraging views of Foster or FitzRoy or the *Law Times* author. Nevertheless, within a few years Purcell's professional standing seems to have materially improved, as he, together with other members of the Melbourne legal profession, was among the signatories of an Address to Charles Gavan Duffy, MP, upon the latter's arrival in Melbourne on Friday, 1 February 1856.[15] J. B. Barnes, the other attorney who had left Ireland when his practice had been detrimentally affected by the foregoing legislative changes, appears never to have been admitted to practice in Victoria.[16]

George Elliott Barton (1827-1903), a Dublin attorney, led a colourful life, in at least four countries. Barton interrupted his legal practice to pursue the hope of a fortune from the glittering metal at the Ballarat diggings. He later returned to his profession, which he combined with a controversial political career, serving in the Victorian Legislative Assembly, where he represented North Melbourne from 1859 to 1862. In the early 1860s Barton went to New Zealand, following the discovery of gold near Dunedin, and served briefly on the Otago Provincial Council. Somewhat footloose, and always involved in controversy, Barton then practised his profession successively in Wellington, San Francisco, New Zealand again (holding office as a Judge of the Native Land Court and the Validation Court in the 1890s[17]).

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[14] William Kelly, *Life in Victoria or Victoria in 1853, and Victoria in 1858*, 2 volumes (London, 1859), Volume I, pp 72-73.

[15] *Freeman's Journal* (Sydney), Saturday, 9 February 1856, p 4.

[16] CO 309/12, J. B. Barnes (quoted in Geoffrey Serle, *The Golden Age: A History of the Colony of Victoria, 1851-1861* (Carlton,Victoria, 1963) (1968 edition), p 49); Ruth Campbell, "Irish Lawyers in the Port Phillip District and Victoria 1838-1860", Philip Bull, Chris McConville and Noel McLachlan (eds.), *Papers delivered at the Sixth Irish-Australian Conference, July 1990* (La Trobe University, Melbourne, 1991), p 47.

[17] These Courts, established in the second half of the nineteenth century, dealt with the consequences of confiscation of Maori landholdings, especially the rights, including compensation, of native owners. The Validation Court was established by the *Native Land (Validation of Titles) Act* 1893, and was a specialist court, staffed by some of the Native Court Judges, with a jurisdiction to "validate" purchases and leases of Maori land which for various reasons had failed to comply with the requirements of the Native Lands legislation: R. P. Boast, "The Omahu Affair, the Law of Succession and the Native Land Court", (2015) *Victoria University of Wellington Law Review*, Volume 46, p 841, especially at p 843, n 5, and authorities cited therein.

He then repaired to San Francisco again, and finally to Europe where he died in Paris in 1903, although it is assumed that he did not practice law on the Continent.[18]

Barton's daughter provided the following explanation for his departure from Ireland:

> He was one of a number of students who sided with rebels in 1848, leading to his expulsion from Trinity College shortly after taking his [degree]. He "managed to get away with the connivance" of Orangemen figures "on condition that [he] went out to Australia."[19]

However, there are problems in accepting that statement and the expanded explanation offered by David V. Williams, that "support for the Catholic Young Irelander rebellion in 1848 was not what [Barton's] university or his family would have expected of him".[20] First, it is difficult to understand how Trinity (from which he had graduated in the Spring of 1848) could have expelled Barton after he had taken his degree. Second, as has been observed in an earlier chapter of this Thesis (Chapter 3 - "Leaving Home"), the unintended skirmish in July 1848 was not a rebellion. Third, the philosophical and ideological progenitor of Irish nationality (as distinct from Irish nationalism) in the nineteenth century, Thomas Davis, and many of those who came to be known as Young Irelanders were not Catholic.[21] As Professor O'Farrell has observed, of the seven leaders of the Young Ireland rising who were transported to Van Diemen's Land in 1849, three were Protestants (William Smith O'Brien, John Mitchel and Thomas Francis Meagher).[22] Further, if Barton had, in fact, sided with "rebels" in 1848, it is unlikely that he would have been called to the Irish Bar in the following year.[23]

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[18] Barton's career is outlined in David V. Williams, *A Simple Nullity? The Wi Parata Case in New Zealand Law and History* (Auckland, 2011), pp 153-154.

[19] Barton's daughter to Guy Hardy Scholefield, Letters Relating to Who's Who in New Zealand and Dictionary of New Zealand Biography, Alexander Turnbull Library, Wellington, quoted in Williams, *op. cit.*, n 18, pp 153-154.

[20] Williams, *op. cit.*, n 18, p 154.

[21] John N. Molony, *A Soul Came into Ireland: Thomas Davis, 1814-1845: A Biography* (Dublin, 1995), especially at p 2.

[22] Patrick O'Farrell, *The Irish in Australia* (Kensington, NSW, revised edition, 1993), p 47.

[23] Keane at al. (eds.), *King's Inns Admission Papers 1607-1867*, p 25; Williams, *op. cit.*, n 18, p 153.

At the same time as Barton was in Victoria and later in New Zealand there were also present in those colonies members of the English Prendergast family, whose father, Michael Prendergast, QC, held judicial appointments in London and Norwich. All three of the Prendergast sons ultimately followed their father into the Law, and all at various times emigrated to Victoria. The eldest son, Michael junior, was a colleague of Barton in the Victorian Legislative Assembly, and in 1860 the two of them conducted a political tour of the mining districts of the colony.[24] Both Barton and Michael Prendergast, while members of the Legislature, were the subject of an unrestrained and vitriolic denunciation in an editorial article published in the *Argus*, in which they were described as "drunken lawyers", "two eccentric itinerants", "itinerant stump orators", who were "the intemperate advocates of temperance". On account of Barton and Prendergast (and others of similar character) being among its members, the Legislative Assembly of Victoria was compared with "an asylum for the reception of 'drunken lawyers' and gibbering idiots". The article concluded by stating that the good sense of potential immigrants from Great Britain "will revolt at the prospect of settling in a colony which, imitating the conduct of the Roman Emperor, who made a consul of his horse, made a senator of --- a Barton."[25] It is apparent that Barton, despite his public stand on the topic, manifested an enthusiasm for alcohol.

The youngest Prendergast son, James, after leaving the Ballarat diggings (where it is possible that he and Barton may originally have met[26]) became a magistrate's clerk, before returning to London where he completed his legal studies and was called to the Bar.[27] Separately, Barton and these two Prendergast brothers all arrived in New Zealand in the early 1860s at the time of the goldrush near Dunedin, where all three established legal practices. Whilst fortune from mining may have eluded James Prendergast in Australia, his success in New Zealand, both in the law and in politics, culminated in his appointment as the third Chief Justice of that colony in 1875 and his subsequent knighthood.

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[24] *Argus* (Melbourne), Tuesday, 17 April 1860, p 4; Grant Morris, "Bench v Bar: Contempt of Court and the New Zealand Legal Profession in *Gillon v MacDonald* (1878)", (2010) 41 *Victoria University of Wellington Law Review*, p 541 at pp 542-543.

[25] *Argus* (Melbourne), Tuesday, 17 April 1860, p 4.

[26] Morris, *op. cit.* n 24, p 543, n 4.

[27] See Chapter 4, text to notes 5, 6, 7.

Barton was an Irish Protestant. Despite, or perhaps because of, their political and professional relations with him, the Prendergast brothers expressed anti-Irish sentiments and were scathing in their denunciations of what they discerned to be the power of the Irish Protestants in Victoria during the 1850s. It has already been observed that James's elder brothers held the Irish Protestants in the colony to be responsible for the termination of James's government employment.[28] Morris raises the possibility that James Prendergast's negative experiences with Irish Protestants in Victoria might have had some bearing upon the feud which subsequently developed between James and Barton in New Zealand, but expresses no firm conclusion on this point.[29] There were numerous courtroom confrontations between Barton and James Prendergast in New Zealand, all of which, to the delectation of the reading public, were reported in detail in newspapers throughout that colony. One such confrontation resulted in contempt of court proceedings being initiated by Chief Justice Prendergast and his colleague on the Supreme Court of New Zealand, Christopher William Richmond. However, fortunately for Barton, no penalty was imposed upon him.[30]

Meanwhile, in Australia the observations of Kelly and the apparent success of Purcell (to which reference has earlier been made) suggest that the professional prospects of solicitors who had arrived in Victoria in the early years of the goldrushes were better than the more pessimistic views held by Foster or Governor FitzRoy or the author of the article in the *Law Times*. Nevertheless, gloomy predictions regarding the prospects for young lawyers, especially in New South Wales, continued to appear in print in succeeding decades. In January 1865 an editorial article in the *Sydney Morning Herald*, emphasising the need for an additional, fourth, Judge to be appointed to the Supreme Court of New South Wales, referred to the increase in the members of the legal profession in the colony during the previous year, concluding, "We would caution British practitioners from resorting to the colony under an impression that it will afford a wide and lucrative field for their talents."[31]

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[28] Text to Chapter 4, notes 34, 35.

[29] Morris, *op. cit.*, n 24, p 544.

[30] *Re G. E. Barton* (1876) 2 NZ Jur (NS) (Supreme Court) 13.

[31] *Sydney Morning Herald*, Friday, 20 January 1865, p 2.

Five years later the same newspaper, in reviewing the business of the Supreme Court of New South Wales and the District Courts in the colony, expressed the need for the creation of an Australian Court of Appeal, on account of "the delay and expense of appeal to the Privy Council being such as to place them beyond the reach of any but rich suitors", and continued, regarding the increase in the number of lawyers,

> There have been a good many additions to both branches of the legal profession during the past year, and every term closes with the admission of a fresh batch of attorneys. How they all live is a mystery.[32]

The discovery of gold near Ballarat in the latter part of 1851 was soon followed by the arrival of lawyers. The fortunes of the few miners who struck it rich, the mushrooming population and the ensuing general prosperity of the area, required the services of lawyers, especially where money attracted disputes and crimes. The first lawyer to arrive on the scene was Adam Loftus Lynn; but at the outset he worked as a miner, rather than as a solicitor. After spending three months in digging, Lynn began to practise his profession at Ballarat on 1 May 1853. About six months later arrived another solicitor, Richard Ocock ("whose tall gaunt figure had a military look, and whose nose bore a striking resemblance to that prominent feature in the face of the Hero of Waterloo"[33]).

Lynn was an Irishman, born at Inyard, County Wexford, whilst Ocock was English, born in Devon.[34] They frequently appeared in the court of the corrupt Police Magistrate, John

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[32] *Sydney Morning Herald*, Friday, 25 February 1870, p 6.

[33] William Bramwell Withers, *The History of Ballarat, from the First Pastoral Settlement to the Present Time*, 2 ed. (Ballarat, 1887) (facsimile edition, Carlton, Victoria, 1980), pp 299-300. Probably for reasons other than his appearance, Ocock had a strong interest in matters military, and was closely involved in the establishment of the volunteer corps of the Ballarat Rangers (*loc. cit.*).

[34] Justin Corfield, Dorothy Wickham, Clare Gervasoni, *The Eureka Encyclopaedia* (Ballarat, 2004), pp 342, 406. Ocock posthumously acquired some slight literary recognition. The fictional character, the solicitor Henry Ocock, in *The Fortunes of Richard Mahony* was a composite of Richard Ocock and Sir Henry Cuthbert, an Irish solicitor, who had arrived at Ballarat in 1854 (Alan Stoller and R. H. Emmerson, "The Fortunes of Walter Lindesay Richardson", *Meanjin Quarterly* (University of Melbourne), Volume 29, Number 1, 1970, p 21 at p 23). The real-life Ocock and his family (or, at least his wife) were patients of Dr Richardson, although, curiously, Dr Richardson, in his midwifery books, recorded Mrs Ocock as being a banker's wife (Dorothy Green, *Henry Handel Richardson and Her Fiction* (revised edition, Sydney, 1986), p 338, n 14, and text thereto.

D'Ewes [or Dewes], whose misconduct in the trial of James Bentley significantly contributed to the violence at Eureka in late 1854. Of them D'Ewes observed,

> I was a good deal bothered by two Irish attornies [*sic*], who were generally retained by prisoners in any important cases ... and the only difficulty was to restrain their eloquence within the bounds of the decorum of the court.[35]

The identity of the "two Irish attornies" referred to by D'Ewes is a mystery. There can be little doubt that one was Lynn, but the identity of the other is less certain. Ocock was not Irish. However, Henry Cuthbert, born in Roscommon and a graduate of Trinity, was. But, if his obituary appearing in the *Argus* is accurate, Cuthbert did not commence to practise in Ballarat until mid-1855, by which time the appointment of D'Ewes as Police Magistrate at Ballarat had been terminated, and he had removed to Sydney. One possible explanation is that D'Ewes mistakenly assumed that Ocock was Irish (perhaps on account of his surname), and that his two Irish attorneys were Lynn and Ocock.[36]

During D'Ewes's inglorious time as Police Magistrate at Ballarat he officiated as deputy sheriff at the circuit sittings of the Court of General Sessions at nearby Buninyong, presided over by Judge Arthur Nicholas Wrixon. The successful practice of Wrixon, another Irish lawyer, who had arrived with his family in Melbourne in 1850, had been recognised by his appointment in 1853 to the County Court of Victoria. In his account of those sittings at Buninyong D'Ewes set forth a highly coloured, and probably greatly exaggerated, record of an incident involving the unnamed, but bibulous, Crown Prosecutor, who was also an Irishman, during the night before the sittings commenced. D'Ewes observed that the sentences (for most of the trials resulted in a conviction) were pronounced by the Judge "in a nasal twang and pure Milesian [that is, Irish] accent".[37]

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[35] J. D'Ewes, *China, Australia and The Pacific Islands in the Years 1855-56* (London, 1857), p 48.

[36] Withers, *op. cit.*, n 33, p 44; D'Ewes, *op. cit.*, n 35, pp 105, 125, 132; *Argus*, Saturday, 6 April 1907, p 15.

[37] D'Ewes, *op. cit.*, n 35, pp 61-64. As to the accent, or brogue, of Irish lawyers in Australia, see also Chapter 4, text to notes, 88, 89, 108, 109, 132.

Throughout the 1850s both the acquisition of gold itself and the legal work associated with its extraction and the resulting affluence of successful diggers, together with the general prosperity of the locality in which it was found, attracted lawyers, not only to the goldfields, but, more generally, to the entire colony of Victoria, and especially to Melbourne. Many of those lawyers were Irishmen, who had practised their profession in their native land. Disappointed by limited prospects in Ireland, and encouraged by hopes of greater success, professional or financial, in Australia, they left their homeland for the Antipodes.

For example, a year after Lynn had arrived at the Ballarat diggings, the Irish attorney John Gahan, who had come to Victoria aboard the appropriately named *Golden Era*, spent the next four years mining for gold.[38] There were several other instances of Irish attorneys working on the Victorian goldfields in the 1850s, before resuming the practice of their profession. Edward Fitzgerald had practised in Ireland for almost ten years before coming to Australia. After two years in practice in Adelaide, Fitzgerald arrived in Victoria in April 1852, and was admitted in that colony in April 1853. In the intervening year he had "been engaged in Gold Digging".[39] William David Atkinson practised in Ireland for less than three years before arriving in Victoria in late May 1853. Atkinson stated that in the the six months between his arrival and his admission in the Colony "he has worked at the Diggins [*sic*] and is now the Managing Clerk in office of John Hughes Clayton, attorney and solicitor".[40] Another Irish attorney, John Flanagan, after practising in Ireland for five years, had arrived in Victoria in December 1855. Upon his admission in the colony on 4 April 1856 (his referees included John Leslie Foster and John O'Shanassy, both Irishmen) Flanagan practised at Kyneton, a centre of Irish population, near the goldfields.[41] Charles Fausset had practised in Enniskillen, County Fermanagh and in Dublin for almost twelve years before departing Ireland for Victoria in early 1853. In his application for admission in the colony (which took place on 4 April 1854, upon the motion of Richard D. Ireland, another Irishman), Fausset stated that

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[38] Ruth Campbell, *op. cit.*, n 16, p 47.

[39] Public Record Office Victoria (PROV), Admission Papers, 82P/0000 (hereinafter referred to as "Admission Papers"), Unit 00001, Box 3.

[40] PROV, Admission Papers, Unit 00001, Box 1.

[41] PROV, Admission Papers, Unit 00001, Box 3; Ruth Campbell, *op. cit.*, n 16, p 47.

since his arrival in Victoria on 20 July 1853 he had been "employed as a Gold Miner and Post Office Clerk".[42]

There is even a suggestion (unsubstantiated and disputed) that George Higinbotham, in due time to become the third Chief Justice of Victoria, might have been encouraged to leave his native Ireland for the Antipodes by the discovery of gold in Victoria, and that upon his arrival in Melbourne in March 1854 he resided in the unsavoury "Canvas Town" (or "Tent City") among those preparing to depart the metropolis for the gold-diggings near Ballarat.[43] It has already been noticed that another Irishman, William John Foster, came to Victoria in 1852 hoping to seek his fortune on the Victorian goldfields, and subsequently went on to qualify in law. Perhaps Foster received encouragement in his professional career from his cousin, the Attorney-General and future Chief Justice William Foster Stawell, although his successful professional and political career was in New South Wales rather than in Victoria.[44] Francis Quinlan was aged only 19 when he arrived in Victoria from his native County Tipperary in 1853, hoping to make his fortune on the rich gold diggings at Dunolly. Whether he was successful in the search for gold is not known, but he succeeded in public life, and later (as will be seen) in the law, as a barrister and a Judge.

It was not only attorneys from Ireland who worked on the goldfields before being admitted in Victoria. Allan Fraser had been admitted as an attorney of the Supreme Court of Judicature for the Province of Nova Scotia (later to become part of Canada) on 2 December 1845, where he practised for the ensuing seven years. For eight months after his arrival in Victoria in March 1853 Fraser was "resident at the Ballarat Gold Diggings" (his apparent occupation there being somewhat inconsistent with his description as "Gentleman" in his application for admission as a practitioner in Victoria).[45]

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[42] PROV, Admission Papers, Unit 00003, Box 3.

[43] Edward E. Morris, *A Memoir of George Higinbotham: An Australian Politician and Chief Justice of Victoria* (London, 1895), p 36; J. M. Bennett, *George Higinbotham, Third Chief Justice of Victoria, 1886-1892* (Leichhardt, NSW, 2006), pp 11-12.

[44] See Chapter 3, text to note 49.

[45] PROV, Admission Papers, Unit 00003, Box 3.

Of the many Irish attorneys who were attracted to Victoria in the middle of the nineteenth century some had practised in their homeland for substantial periods. Thomas Somerville Fleming, an attorney in Ireland for almost 40 years, arrived in Melbourne in late 1855, where, immediately upon his admission a few weeks later, he joined the legal firm, Hines & Sandwell, in Collins Street, Melbourne, the senior partner, Hines, also being an Irishman.[46] John Armstrong had practised in Dublin since 1820 and arrived in Victoria in early 1853, being admitted in the Colony on 4 April of that year.[47] On the same date John Armstrong, who had practised in his native Ireland for 32 years before arriving in Victoria in January 1853, was also admitted.[48] George Ashe Ellis had practised in Dublin for more than 32 years, before arriving in Melbourne in October 1855. It was obviously not financial need that had caused Ellis to forsake his homeland for the Antipodes, since in his application for admission in Victoria (fourteen months after his arrival) he stated that in Melbourne "he has been living as a private gentleman".[49] John Jervis Emerson, who had been admitted in Ireland as early as 1818, had practised at Gorey in County Wexford, before arriving in Victoria in July 1855, where he was swiftly admitted only six weeks later, on 4 September 1855.[50]

William Gustavus Anderson had been admitted as an attorney in Ireland in 1830, but gave up professional practice to be employed as managing clerk to another attorney in Dublin, before emigrating to Victoria in 1853, where he was admitted on 5 December of that year.[51] In the following decade George Foott, after practising in Ireland for 20 years, arrived in Victoria in October 1863, and was admitted on 8 April of the following year.[52] John Fitzgerald, having practised as an attorney in Ireland for 23 years, gave up the Law for eight years of commercial employment, before arriving in Victoria in September 1871 and being admitted in the Colony

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[46] PROV, Admission Papers, Unit 00001, Box 3; Ruth Campbell, *op. cit.*, n 16, p 47, n 70.

[47] PROV, Admission Papers, Unit 00001, Box 1.

[48] PROV, Admission Papers, Unit 00001, Box 1.

[49] PROV, Admission Papers, Unit 00002, Box 2.

[50] PROV, Admission Papers, Unit 00002, Box 2.

[51] PROV, Admission Papers, Unit 00001, Box 1.

[52] PROV, Admission Papers, Unit 00003, Box 3.

in September 1872.[53] In contrast to the foregoing attorneys who had practised in their homeland for significant, often very lengthy, periods before, for various reasons, leaving Ireland to practise in Victoria, Robert Stirling Anderson had practised in Ireland for less than six years before arriving in Melbourne in June 1854, and being admitted three months later.[54] Similarly, James Fenton had practised in Ireland for less than eight years before his arrival in Victoria in early May 1861 and his admission in the colony on 8 July of that year.[55] It is fully apparent, however, that all those Irish attorneys who came to Victoria in the mid-nineteenth century had given themselves an adequate time to practise in their homeland before deciding for whatever reason --- an overcrowded profession at home, better professional prospects in Australia, the lure of gold, a sense of adventure, family or friends who had already emigrated --- to leave Ireland and commence a fresh professional life in Victoria.

The newcomers were usually well received by their fellow Irishmen who were already established in legal practice in Victoria. Often a new arrival's application for admission in the colony was supported by an affidavit of fitness from one of his compatriots who was already admitted there, and in many instances his admission was moved by one of the Irishmen practising at the Melbourne Bar, such as Richard D. Ireland, Robert Molesworth and Richard Billing. On 4 June 1852 the Attorney-General, William Stawell, moved the admission of William Grace, a native of Tipperary, who had been admitted in Ireland in 1828, and had subsequently practised in New South Wales (1833-1848) and in New Zealand (1848-1852) before arriving in Victoria in May 1852.[56] However, that spirit of friendly welcome to newly arrived Irish lawyers from their compatriots who were already established in the colonial legal profession had largely ceased well before the end of the nineteenth century. As is recorded in Chapter 6, the young Patrick McMahon Glynn, who had recently arrived from Ireland in late 1880, encountered a very different, and most unhelpful, reception when he called upon Mr Justice Barry in the hope of receiving some assistance in establishing himself at the Melbourne Bar.

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[53] PROV, Admission Papers, Unit 00003, Box 3.

[54] PROV, Admission Papers, Unit 00003, Box 3.

[55] PROV, Admission Papers, Unit 00003, Box 3.

[56] PROV, Admission Papers, Unit 00004, Box 4.

Among the Irish diggers on the Victorian goldfields there were numerous instances of what has later come to be referred to as "chain migration", and to which reference has already been made in this thesis. This practice was observed and remarked upon in the early 1850s by a future British Prime Minister. The young Lord Robert Cecil (later to be the third Marquess of Salisbury) spent a short time visiting the Victorian goldfields in the company of his friend Sir Montagu Chapman, a young Irish baronet, in March-April 1852. In his diary Cecil recorded

> At 7 this morning our tent was besieged by a number of Sir Montagu's former tenants, who came to send money home by him to their relatives in Ireland. Generally their wish was not to make money enough to return themselves to Ireland, but to bring their starving friends out here. "It's a wonderful country this for the poor man, sir, especially now", was what they all told him.[57]

One outstanding success story of the Ballarat gold fields was that of Henry Cuthbert. A native of Boyle in County Roscommon, Cuthbert was admitted as an attorney and solicitor in Ireland in 1853.[58] After a year in practice in Kilkenny, Cuthbert, accompanied by his younger brother, emigrated to Victoria, arriving in August 1854. In an instance of chain migration within a family, it was not long before he was joined by his father, his sister and all his other brothers. Cuthbert, having practised in Melbourne for some months, visited Ballarat, then in the midst of the goldrush, and he decided to set up his legal practice in that town.

Shortly after Cuthbert's arrival a Local Court was established at Ballarat. The Local Courts in Victoria were created pursuant to the local statute of 1855, 18 *Vict.*, No. 37, enacted in consequence of recommendations of the Royal Commission set up to inquire into the Eureka uprising. The Act provided for the establishment of a Local Court in each mining district, with power to make regulations about mining claims in the district and to adjudicate

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[57] *Lord Robert Cecil's Gold Fields Diary* (with Introduction and Notes by Ernest Scott) (Melbourne, 1935), p 30.

[58] M. Martina Benson, "Cuthbert, Sir Henry (1829-1907)", *ADB*, Volume 3, p 513. Benson gives the year of Cuthbert's admission in Ireland as 1853, whilst various obituaries (including *Age* (Melbourne), Saturday, 6 April 1907, p 12; *Argus* (Melbourne), Saturday, 6 April 1907, p 15; *Ballarat Star*, Saturday, 6 April 1907, p 9) state 1852. He was admitted to the King's Inns in Michaelmas Term, 1846, but the Admission Papers do not disclose the date upon which he was admitted as a practitioner (Edward Keane, *et al.*, *King's Inns Admission Papers 1607-1867* (Dublin, 1982), p 117).

in partnership disputes between miners involving less than £200. A chairman (soon to be known as the Warden) was to be nominated by the Governor in Council, and he was to be joined by nine members elected every six months by holders of the miner's right or a lease in the relevant mining district.[59] These Courts were unique in the history of Australian judicial tribunals in that they were largely elective in their composition. It was a matter of controversy whether professional representation was permitted for litigants before a Local Court. The Act was silent on this point. Despite an opinion from the Law Officers of the colony that the Local Courts could not refuse to hear lawyers, several (including the Local Court at Ballarat) persisted in refusing to allow such right of audience to members of the legal profession.[60] The Ballarat Court even called a public meeting on the question. That meeting, on 25 September 1855, enthusiastically supported the Court's stand, Raffaello Carboni, the author of a first-hand account of the Eureka uprising, asking rhetorically "[A]re you to allow the Ballaarat [*sic*] lawyers to fleece you of your hard earnings?".[61]

An early professional success of Cuthbert (who was one of the objects of Carboni's denunciation) was his insistence, in the face of the settled opposition of the Ballarat Court, upon his right to be heard on behalf of his client, and his ultimate success in that case.[62] Not only did Cuthbert act professionally in disputes involving miners and mining companies, but it was not long before he himself had become a gold mining entrepreneur, establishing his own very successful Buninyong Gold Mining Company. He also entered the newspaper world, becoming the proprietor of the *Ballarat Times*.

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[59] The history and circumstances surrounding the establishment of these Local Courts are set forth in John P. Hamilton, *Adjudication on the Gold Fields* (Leichhardt, NSW, 2015), Chapter 6, especially pp 71-77. See, also, R. L. Sharwood, "The Local Courts in Victoria's Gold Fields, 1855 to 1857", *Melbourne University Law Review*, Vol. 15, June 1986, p 508, at pp 519f.

[60] Donald Just, "The Victorian Mining Judicature Under the Gold Fields Act 1855" (Research Paper submitted for the degree of Bachelor of Laws Honours, University of Melbourne, 1971), pp 77-78; Sharwood, *op. cit.*, n 59, p 524.

[61] Raffaello Carboni, *op. cit.*, n 7, pp 15-16, 32-34; Sharwood, *op. cit.*, n 59, p 524.

[62] *Bendigo Advertiser*, Saturday, 6 April 1907, p 6. It is there stated that Cuthbert obtained a verdict for his client in the sum of £800, a statement repeated in M. Martina Benson, *op. cit.*, n 58. As has already been observed, the Act provided a jurisdictional limit of £200 in partnership disputes between miners.

A leading citizen in Ballarat, Cuthbert, a staunch member of the Church of England, was associated with many local activities in the development of that city. Ultimately succumbing to the requests of the local citizenry to represent them in Parliament, in 1874 he was elected unopposed to the Legislative Council, succeeding another Irish lawyer, Robert Walsh (of whom further mention will be made later in this chapter), who also had been the previous proprietor of the *Ballarat Times*. Cuthbert held various ministerial offices during the subsequent two decades, was one of the Victorian delegates to the 1891 Federal Convention in Sydney, and, knighted (KCMG) in 1897, remained in the Legislative Council until his death in 1907.[63] Interestingly, towards the end of his successful and fulfilling life, Cuthbert appears to have forgotten, or at least to have disregarded, his Irish origins. In an interview four years before his death Cuthbert characterised himself as an Englishman.[64]

A goldfield success story similar to that of Henry Cuthbert, but a generation later and on the other side of the continent, was that of Sir Norbert Michael Keenan. Keenan, of a "Dublin Castle Catholic" family, and a graduate of Trinity, was called to the Irish Bar in 1890. Despite his background, and although the son of the leading educationist in Ireland (Sir Patrick Joseph Keenan), Norbert did not persist in practice in Dublin, but sought professional success in the Antipodes, arriving in Western Australia in 1895. The death of his father in the preceding year may have been a reason for his departure from Ireland. Like Cuthbert, Keenan combined a very successful legal practice with a career in politics. He established himself at Kalgoorlie, then in the midst of a mining boom, which greatly contributed to Keenan's professional success, just as Cuthbert had enjoyed similar success in the Ballarat of the 1850s. A leading citizen of Kalgoorlie, Keenan served as mayor of that town before removing to Perth when elected to the Legislative Assembly in 1905. There he practised at the Bar, took Silk, strongly supported the establishment of the University of Western Australia (upon whose first Senate he served), held various ministerial offices (including Attorney-General and Minister for Education, the latter being a position for which he was eminently suited by his family

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[63] *Argus* (Melbourne), Saturday, 6 April 1907, p 15; M. Martina Benson, *loc. cit.*, n 58. Cuthbert, like Richard Ocock, posthumously acquired some slight literary recognition. See n 34, *supra*.

[64] *Punch* (Melbourne), 5 November 1903, p 632, "Victoria's Representative Men at Home by "Lauderdale", No. 12 --- Hon. Sir Henry Cuthbert, K.C.M.G., M.L.C., K.C.", where Cuthbert is quoted as saying to the interviewer, "We will go inside and see if lunch is ready. We can go round the grounds afterwards; lunch is the most important thing at the present moment. An Englishman can always talk better after lunch." Perhaps the interviewer misheard Cuthbert.

background), was knighted, and achieved the distinction of being, at the age of 86, Western Australia's oldest parliamentarian.[65] The influx of young Irish lawyers (such as Keenan, aged 30; the Harney brothers, Edward and Francis, each aged in his early 30s; Moorhead, aged 25; Lavan, aged 23) --- all aged in their 20s or 30s --- to Western Australia, in consequence of the goldrushes of the mid-1890s, may be compared to the situation in Victoria some forty years earlier.

An unusual instance of an Irishman, originally attracted to Australia by the lure of gold, but who many years later became a lawyer, was Henry Edward King. Born at Kilmallock in County Limerick, King, aged 20, arrived in Sydney in 1852, but soon moved north to what was in 1859 to become the colony of Queensland. Having qualified as a surveyor, he became a commissioner of Crown Lands, and later a gold commissioner at Gympie, where the goldfield was the most important mining centre in the colony. Elected to the Queensland Legislative Assembly in 1870, King held office as Secretary for Public Lands and Mines before being unanimously elected Speaker in 1876. After seven years in that office, King had a career change. Apparently in consequence of unfortunate investments, he left politics, and in the words of the *Brisbane Courier*, "At an age when men are very loath to enter a new line of life he attacked the difficult, and to most men, repulsive study of the law".[66] He enrolled as a student at law in 1884, and having achieved brilliant academic results, was admitted (on the motion of the Attorney-General) to the Queensland Bar in September 1886. While studying, it would appear that he also worked as a journalist for the *Brisbane Courier*. "We can partly vouch [wrote that newspaper] for the success he achieved in one part of his double task, and the manner in which he passed his legal examination shows that he was equally successful in the other."[67] He held office as Crown Prosecutor in the District Court from mid-1890 until early 1910, shortly before his death, and was briefly a Deputy Judge of the District Court.[68] Interested in matters military, and not one to forget his Irish roots, King in early 1887 was

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[65] G. C. Bolton, "Keenan, Sir Norbert Michael (1864-1954)", *ADB*, Volume 9, p 545; *Kalgoorlie Western Argus* (Kalgoorlie, Western Australia), Tuesday, 26 September 1905, p 14.

[66] *Brisbane Courier*, Wednesday, 8 September 1886, p 4.

[67] *Loc. cit.*, n 66.

[68] *Brisbane Courier*, Wednesday, 9 February 1910, p 5.

involved in the establishment of the Queensland Irish Volunteers, in which he held the rank of captain.[69]

Agricultural and Pastoral Pursuits

Some Irish lawyers were involved in agricultural or other rural pursuits, either independently of, or in combination with, their professional activities. Reference has already been made to George Fletcher Moore, one of the earliest judicial officers in Western Australia, and a noted explorer in that colony.[70] Shortly after his arrival in late 1830 Moore obtained a land grant on the Upper Swan, some distance from Perth. There he farmed and grew wool. After his appointment as Commissioner of the Civil Court, in February 1832, the nature of his official duties did not preclude him from continuing his farming and pastoral activities.

In the same colony, half a century later, John Winthrop Hackett, to whom further reference will shortly be made, was also associated with a pastoral property. Hackett was not particularly successful as a barrister, but had experience in academia and journalism. Although totally innocent in matters rural or pastoral, in November 1882 he departed Melbourne and, for reasons never adequately explained, leased from the Western Australian Government a sheep station, *Wooramel Station*, consisting of 240,000 acres, located 870 kilometres north of Perth.[71] It hardly needs to be said that the entire venture, which lasted for only five months, was a total disaster. Hackett returned briefly to Melbourne, before going back to Western Australia, where in the fullness of time his importance and influence were to become second only to those of John Forrest. Various explanations have been suggested for Hackett's curious decision to abandon the occupations for which he was qualified and in which he had experience, and to embark upon this enterprise which was so totally out of

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[69] *Freeman's Journal* (Sydney), Saturday, 12 March 1887, p 18.

[70] Chapter 5, text to n 24.

[71] *Western Australia Government Gazette*, 14 November 1882, p 466.

character. Dr Alexander Collins, whilst admitting the difficulty at this distance of time of knowing with any certainty what drew Hackett to *Wooramel Station*, offers various possible reasons, such as land providing financial security and conferring upward social status.[72] Hackett's career, both before and after the *Wooramel Station* interlude, will be considered later in this chapter.

Another Irish lawyer who, upon his arrival in Australia, for a time followed the occupation of a pastoralist, before resuming the practice of the law was William Foster Stawell. As has already been observed,[73] Stawell departed his native Ireland because his professional prospects there appeared to him to be bleak. However, upon his arrival in Melbourne in December 1842, Stawell at the outset decided to participate in a pastoral venture with his cousin John Leslie Fitzgerald Vesey Foster, later to be the Colonial Secretary of Victoria, who had arrived at Port Phillip in the previous year and was already established at a property near Avoca. Although Stawell acquired part of that property in his own name and ran it until 1853, the depression years, according to Stawell's biographer, soured his enthusiasm for "squatting", and he very quickly returned to Melbourne to resume the profession of the law.[74]

Lawyers as Pressmen and Journalists

Journalism and literary pursuits attracted many Irish lawyers in colonial Australia. In those fields, especially as proprietors or editors of newspapers, they often exercised very considerable influence in public affairs and in the material, social and intellectual development in the colonies. Indeed, the very first Irish barrister (if a degree of flexibility be permitted to the definition of Irish) arose to prominence through the print media as well as in

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[72] Alexander Collins, " "A Veritable Augustus": The Life of John Winthrop Hackett, Newspaper Proprietor, Politician, Philanthropist (1848-1916)" (PhD thesis, Murdoch University, Western Australia, March 2007), p 57.

[73] Chapter 3, text to notes 79, 80.

[74] J. M. Bennett, *Sir William Stawell, Second Chief Justice of Victoria, 1857-1886* (Leichhardt, NSW, 2004), p 11 (citing Sir John McI. Young, *Sir William Foster Stawell* (Melbourne, 1989), p 5).

the courtroom. The colourful Irishman Darcy Wentworth (1762-1827)[75] --- surgeon, highwayman (despite his aristocratic connections), trusted supporter of Governor Macquarie, magistrate, superintendent of police --- was father to William Charles Wentworth, regarded by his contemporaries as one of Australia's greatest native sons. The younger Wentworth, born in 1790 to a convict lass Catherine Crowley, but acknowledged by his father, attended school in England. He later returned to England, to study law, and was called to the Bar at the Middle Temple in 1822. When William came back to Sydney two years later, accompanied by his friend and professional colleague Robert Wardell, the two had determined not only to practise law at the Sydney Bar, but also to establish a newspaper. For that purpose they even brought with them from England a printing press.[76] Their newspaper, the *Australian*, commenced publication in Sydney in October 1824.

Five years earlier William had already, in England, been the author of the first book by an Australian-born author ever to be published, whose lengthy title was appropriate for a publication running to 466 pages.[77] Both in the practice of the Law and as journalist and newspaper proprietor William achieved success and acclaim. In the fullness of time it was essentially through his efforts that Responsible Government for the various Australian Colonies was achieved (although his hopes for a hereditary Upper House in the New South Wales Legislature came to nothing when another Irish lawyer (applying a similar degree of flexibility to that adjective) and journalist, the brilliant but ill-fated Daniel Deniehy, ridiculed the proposal as a "Bunyip aristocracy"). William was also largely responsible for the establishment of the first university in Australia, the University of Sydney. During William Wentworth's two years as a proprietor of the *Australian*, that newspaper established a tradition, continued to modern times, of the print media criticising public officials (especially, in Wentworth's case, the Governor of the colony). Despite never becoming King's or Queen's Counsel (a dignity which did not then exist in Australia), Wentworth's professional pre-eminence at the New South Wales Bar was recognised in February 1835 when he was

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[75] John Ritchie, *The Wentworths* (Melbourne, 1997), especially Chapter 1.

[76] Andrew Tink, *William Charles Wentworth* (Crows Nest, NSW, 2009), p 67.

[77] W. C. Wentworth, *A Statistical, Historical, and Political Description of The Colony of New South Wales and its Dependent Settlements in Van Diemen's Land with a Particular Enumeration of the Advantages which these Colonies offer for Emigration, and their Superiority in many Respects over those Possessed by the United States of America* (G. and W. B. Whitaker, London, 1819).

accorded the distinction of wearing a silk gown. Although senior Law Officers (the Attorney-General or Solicitor-General) customarily wore a silk gown in court, Wentworth was the first New South Wales barrister in private practice to be so recognised by that "patent of precedence".[78] Upon Wentworth's final departure from Australia to continue the years of his retirement in England, the Governor, Sir John Young, in recommending him for a knighthood (which was not forthcoming), praised him to the Colonial Office as "the colonist most distinguished by genius and services".[79]

Shortly after his admission as a solicitor in 1845 the Irish born James Martin, future Premier and then Chief Justice of New South Wales, was invited by Robert Lowe to become editor and manager of the latter's weekly newspaper, the *Atlas* (positions which he held from May 1845 until August 1847). In pursuing the campaign for Responsible Government (New South Wales had already since 1842 enjoyed a degree of Representative Government), Martin, through editorials in the *Atlas*, was a continuing thorn in the side of Governor Gipps[80] and Governor FitzRoy. He was also a frequent critic of the Colonial Office and its staff and especially Lord Stanley as Secretary of State. In an editorial headed "The Serfdom of the Colonies" he wrote,

> The apparent insignificance of the distant dependencies has hitherto enabled the Colonial-office to assume the most despotic power without resistance or enquiry. The idea of governing the colonies by the will of one man, is one which we cannot but look upon as the most monstrous that can well be conceived. [81]

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[78] *Sydney Gazette*, 12 February 1835. The first Queen's Counsel in New South Wales, indeed in Australia, was the Irish born John Hubert Plunkett, appointed on 6 June 1856. Plunkett, until recently, had been the long-serving Attorney-General of the Colony. See J. M. Bennett, "Of Silks and Serjeants", *The Australian Law Journal*, Volume 52 (May 1978), p 264 at pp 270-271.

[79] Young to Newcastle, 21 October 1862, CO 201/523 (PRO Reel 1810).

[80] Even before Martin took over as editor, Gipps was a frequent target of criticism and ridicule (for example, "Sir George the Elephant", Saturday, 22 March 1845, p 194) in the columns of the *Atlas.*

[81] *Atlas*, Saturday, 19 July 1845, p 397.

A month later Martin continued his editorial denunciations of the Colonial Office, especially regarding the patronage which Martin perceived to be exercised by its officials, writing,

> There is no matter too small or too insignificant to escape the notice and the interference of these gentlemen [Lord Stanley the Secretary of State, and James Stephen, the Permanent Under-Secretary] ... In no case are we safe from their controlling power. They can send out their friends and their dependants to fill the highest offices --- they can create new offices for the benefit of their petty agents of political corruption at home; and they may fix the salaries of these people in what amount they please ...[82]

Continuing his denunciation of the patronage exercised at Whitehall, Martin complained that

> ... [t]he Colonial Office will do us the great and grievous injustice of sending out its most insignificant retainers and hangers-on to fill the highest situations amongst us, and thereby exclude persons who are better qualified, and have great claims upon our consideration ... [the problem would cease] if we had responsible government, and the patronage of Downing-street were abolished."[83]

Despite his Irish birth, Martin as editor of the *Atlas* had no hesitation in criticising other Irish members of the local legal profession. In his editorial headed "The Patronage of the Colonial Office" he cast aspersions upon the professional competence of, among others, Attorney-General Plunkett, Mr Justice Therry, Thomas Callaghan, John Moore Dillon, the Crown Solicitor for Criminal Business, describing them as men "conspicuous ... only for their remarkable inferiority".[84]

Nevertheless, Martin as editor raised a number of matters important to the constitutional arrangements for the colony and the administration of justice --- such as the tenure of the judiciary ("not during good behaviour as in England, but during the pleasure of Lord Stanley

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[82] *Atlas*, Saturday, 23 August 1845, p 457.

[83] *Atlas*, Saturday, 13 September 1845, p 493.

[84] *Atlas*, Saturday, 20 September 1845, p 505. See Chapter 2, text to notes 63, 64.

and his clerks"[85]); whether attorneys should have the right to appear in Courts of Quarter Sessions,[86] and the right of audience of attorneys generally;[87] whether a barrister should be entitled to receive instructions direct from the client, without the intervention of a solicitor;[88] and, most importantly, the need for Responsible Government to be granted without delay to New South Wales, "untrammelled by the ignorance and despotism of a Secretary of State".[89]

The criticisms and denunciations made by Martin in the columns of the *Atlas* in the mid-1840s, especially those directed against the Colonial Office (in particular, Lord Stanley, the Secretary of State), should be compared with similar criticisms made by another Irishman, George Higinbotham, from the late 1860s, first as a member of the Parliament of Victoria and subsequently as a Judge, and later Chief Justice, of the Supreme Court of that colony. In 1869 in the Legislative Assembly Higinbotham replicated the assertion made by Martin a quarter of a century earlier that the real power in the Colonial Office lay not with the Secretary of State, a Cabinet Minister, whose occupancy of the office might be transient, but with the permanent officials in his department --- to whom Higinbotham disparagingly referred as the Minister's "clerks". The insult was then compounded by his assertion that since Responsible Government the Australian colonies had been "really governed during the whole of that time by a person named Rogers".[90] That was a reference to the academically brilliant and highly regarded Sir Frederic Rogers, who had been the Permanent Under-Secretary of State at the Colonial Office since 1860, and was the recipient of the highest public honours and distinctions. Almost twenty years later his successor as Permanent Under-Secretary, Sir Robert Herbert, recalled that derogatory and insulting reference to Rogers, informing the Governor of Victoria that

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[85] *Atlas*, Saturday, 4 October 1845, p 530.

[86] *Loc. cit.*, n 85.

[87] *Atlas*, Saturday, 25 October 1845, p 566

[88] *Loc. cit.*, n 87.

[89] *Atlas*, Saturday, 1 November 1845, p 577.

[90] 2 November 1869, VII Victorian Parliamentary Debates, pp 2136-2137; J. M. Bennett, *George Higinbotham, Third Chief Justice of Victoria 1886-1892* (Leichhardt, NSW, 2006), pp 102-104.

> The Chief Justice of Victoria [Higinbotham] is unfortunately very ignorant of the law (Constitutional) as well as of the practice in respect of these matters as to which he has been for more than 20 years in a fog, which he has not desired to dispel by acquiring information on rudimentary points. He still dreams that a Satanic influence like that of "the clerk Rogers" affects successive Secretaries of State, and that the latter always systematically neglect their duties. [91]

Passage of time did not alter Higinbotham's views of the Colonial Office in respect to affairs of Victoria. In the late 1880s the Irish born barrister and politician William Shiels (soon to be Attorney-General and then Premier of Victoria) was an early supporter of women's rights and of divorce reform. A private member's Bill regarding divorce which he had negotiated through the Victorian Parliament was referred to London for Royal Assent. Shiels sought the support of the Chief Justice to obtain the agreement of the Colonial Office, which in the event was reluctantly given. In a lengthy letter responding to Shiels, Higinbotham lost no opportunity to denounce the interference of Whitehall in legislation enacted by the Parliament of Victoria, expressing his opinion that

> illegal intervention in our domestic affairs by the Imperial Government is ill-advised legislation, is an attempted interference, equally arbitrary & equally unconstitutional, with the right of each Australian Legislature to make laws for the community it represents. Open resistance to such claims by the Imperial Government would be, in my opinion, the only legitimate mode of performing an imperative duty devolving in such a case upon the Colonial Legislature & Her Majesty's Colonial Government.[92]

Higinbotham himself, as a young and not very busy barrister in the mid-1850s, was for three years the editor of the *Argus*, at that time one of the most influential newspapers not

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[91] Minutes, Sir Henry Loch, Governor of Victoria, to Sir Henry Holland, Secretary of State (confidential), 4 August 1887, CO 309/131, folio 231; Bennett, *op. cit.*, n 90, pp 211-212.

[92] George Higinbotham to William Shiels, 16 December 1889, Shiels Papers, State Library of Victoria MS 14898, Box 4645/4. Higinbotham's unrestrained criticisms of the Colonial Office and its officials give substance to Frederic Eggleston's later description of Higinbotham as combining "the fanaticism of Loyola with the chivalry of Bayard". Eggleston continued, "He had an intransigence, an inability to compromise which made him a difficult colleague and rather impracticable as a statesman." (E. H. Sugden and F. W. Eggleston, *George Swinburne: A Biography* (Sydney, 1931), p 53.)

only in Melbourne but in the entirety of Australia. In the words of Professor Geoffrey Blainey,

> Soon the owner [Edward Wilson] began to wonder whether he really owned his own newspaper, for it increasingly expressed Higinbotham's individualistic opinions. Next the editor became a politician ... His speeches were even more electrifying than his editorials, and his later speech-making in the opinion of that fine orator Alfred Deakin was incomparable.[93]

Drink destroyed the brilliant life of Daniel Henry Deniehy. Born in Sydney of Irish convict parents, Deniehy was an outstanding orator and writer, a member of the Stenhouse Circle (he was articled to N. D. Stenhouse), a group influential in the cultural, literary and philosophical life of the Colony,[94] achieved professional success as a solicitor, actively participated in the movement for Responsible Government (in which, by ridiculing it as "a Bunyip Aristocracy", he destroyed Wentworth's proposal for a hereditary Upper Chamber in the new Parliament), and was himself elected to the Legislative Assembly. As a writer and journalist, Deniehy's articles appeared in the *Freeman's Journal*, the *Southern Cross* and other publications. His *How I Became Attorney-General of New Barataria* (published in Sydney in 1860) was a brilliant and pungent satire opposing the appointment of Lyttleton Bayley (a very recent arrival in the Colony) as Attorney-General in the second Cowper Ministry in early 1859. It is unnecessary here to rehearse the achievements and the failings of Deniehy, which are set forth in detail by his biographer.[95] Suffice it to say that, had he not died, aged only 37, as a result of a fall in a Bathurst street, from "loss of blood and fits induced by habits of intemperance",[96] Deniehy could have achieved recognition as one of Australia's greatest sons.

An Irishman who in Australia was more successful as a journalist than as a barrister was Gerald Henry Supple. But his fame, or notoriety, rests not upon his career in either profession, but upon the fact that he was convicted of murder and sentenced to death. Although said to have studied law, history and literature in Dublin,[97] Supple's name does not appear in either

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[93] Geoffrey Blainey, September 2006, Foreword to J. M. Bennett, *op. cit.*, n 90, pp v-vi.

[94] Ann-Mari Jordens, *The Stenhouse Circle* (Melbourne University Press, 1979).

[95] Cyril Pearl, *Brilliant Dan Deniehy: A Forgotten Genius* (Melbourne, 1972).

[96] G. P. Walsh. "Deniehy, Daniel Henry (1828-1865)", *ADB*, Volume 4, p 44 at p 45.

[97] E. M. Finlay, "Supple, Gerald Henry (1823-1898)", *ADB*, Volume 6, p 221.

the King's Inns Admission Papers or in the *Alumni Dublinenses*. His Irish patriotic poetry was published in Dublin and he was employed as a journalist in London before migrating to Melbourne in 1857. Defective eyesight impeded Supple's progress at the Victorian Bar, to which he was admitted in December 1862, and he concentrated on a career in journalism with the *Age*. Disagreeing with the views of the editor of that newspaper, George Paton Smith, concerning matters Irish, Supple left that employment in 1862.

However, Supple maintained his animus against Paton Smith, also a barrister, and later to become Attorney-General of Victoria, and on 17 May 1870 in La Trobe Street, Melbourne he fired at Paton Smith. Although the intended victim was only wounded in the elbow, a bystander, John Sesnan Walshe, was killed by the shot. Despite his defence by fellow Irishman and leading barrister George Higinbotham, Supple was convicted by the jury, and sentence of death was pronounced by the Irish born Chief Justice, Sir William Stawell. That sentence, confirmed by the Full Court, was later commuted to life imprisonment. In October 1878, after Paton Smith's death, Supple was released on compassionate grounds. He thereupon departed Melbourne for New Zealand, where he resumed his career as a journalist, but not as a barrister, in Auckland.

An outstanding example of an Irish lawyer acquiring fame, not in the legal profession but through journalism, was John Winthrop Hackett. The eldest son of a Church of Ireland cleric, Hackett was probably expected to follow his father's calling. His two younger brothers did so, and each of his two sisters married a clergyman. Having graduated from Trinity in Classics and English in 1871, he then qualified in law and was called to the Irish Bar in 1874. However, he did not give himself time to establish a practice in Dublin, since after only a few months, Hackett in February 1875 accompanied his close friend Alexander Leeper to Australia.[98] Hackett's biographer has offered various possible reasons for that departure from Ireland and for Australia being the chosen destination.[99] The main reason was probably the lack of professional prospects at the over-crowded Irish Bar, joined with the encouragement from his friend Leeper that prospects were better in Australia. Leeper had already visited Australia four years earlier, in 1871 (when he had met his future wife, the daughter of the

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[98] Alexander Collins, *op. cit.*, n 72, p 40.

[99] Alexander Collins, *op. cit.*, n 72, pp 35-40.

leading solicitor and member of the New South Wales Parliament, George Wigram Allen), and had already secured employment as senior classics master at the Melbourne Grammar School. In addition, Hackett already had a kinsman, James Thompson Hackett, living in Melbourne, where he was completing his law studies (another instance of chain migration).[100]

Somewhat curiously, however, Hackett did not at the outset settle in Melbourne, but first tried his fortune at the Sydney Bar. Despite the connection, through Leeper, with the influential Allen family, Hackett did not succeed in Sydney. After a few months Hackett was complaining to Leeper of lack of professional work and of promises, unfulfilled, to send him briefs, and he confided to Leeper that "I think Mr. Allen is not inclined to help me."[101] That reluctance on the part of Leeper's future father-in-law (in a position of influence as Speaker of the Legislative Assembly, and soon to be knighted) to give professional assistance to Hackett may have been due in part to the poor impression Hackett originally made upon some members of the Allen family. Adeline Allen, the future Mrs Leeper, wrote of Hackett, "I don't like him much. He talks so incessantly ...".[102] Her sister Ethel was more outspoken, stating that she thought Hackett "the rudest young man [she] ever saw".[103] The feeling was mutual. Although Mrs Allen does not appear to have disliked him, Hackett was concerned about the opinion she held of him. In a lengthy, chatty and newsy letter to Leeper, Hackett inquired, "I wish you had given me the exact words of Mrs. A's [Mrs Allen's] letter about **me**, that I might have known clearly what to think."[104]

Soon, however, Hackett left legal practice in Sydney, to accept the invitation from Leeper, by then the Principal of Trinity College within the University of Melbourne, to be his Vice-Principal, with academic responsibilities towards the students. In return Hackett received

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[100] Alexander Collins, *op. cit.*, n 72, p 40.

[101] Hackett (from 359 Liverpool Street, Darlinghurst) to Leeper (in Melbourne), 6 September 1875, folios 3-4, Leeper Papers, Trinity College, University of Melbourne (hereinafter referred to as "Leeper Papers"), Box 21c, Packet 14 [1875].

[102] Adeline Allen's Diaries, 25 May 1875, quoted in Alexander Collins, *op. cit.* n 72, p 44.

[103] J. R. Poynter, *Doubts and Certainties: A Life of Alexander Leeper* (Melbourne University Press, 1997), p 98.

[104] Hackett (from 359 Liverpool Street, Darlinghurst) to Leeper (in Melbourne), 29 November 1875, folios 4-5, Leeper Papers, Box 21c, Packet 14 [1875]. The word "me" is emphasised in the original document.

no salary, but was provided with free accommodation and board. Although admitted to the Victorian Bar, Hackett's legal career in Victoria was no more successful than in New South Wales. Neither the pursuit of a career in journalism nor his forays (unsuccessful) into politics as a parliamentary candidate were sufficient to induce Hackett to remain in Melbourne. At the time of his unsatisfactory experience on a remote pastoral property in Western Australia, Hackett had become acquainted with Charles Harper, the proprietor of the *West Australian*, the leading newspaper in the Colony. Hackett returned to Western Australia in 1884, to join Harper as a partner and business manager of that publication, soon becoming its editor, and ultimately, after Harper's death, becoming its sole proprietor. Upon the achievement of Responsible Government for Western Australia in 1890, Hackett was appointed (and later elected) to the Legislative Council, remaining a member of that House until his death. Through the *West Australian* and his membership of the Parliament the influence and significance of Hackett in Western Australia in the late nineteenth and early twentieth centuries was probably second only to that of Sir John Forrest, the first Premier of the Colony and one of the Fathers of Federation.

During his first visit to Western Australia Hackett had been admitted to the Bar of that Colony in December 1882, although he does not appear to have had any serious intention of practising his profession there.[105] Nevertheless, Hackett did, on one celebrated occasion, appear as a barrister in the Supreme Court of Western Australia, and that in the following somewhat unusual circumstances. Manifesting that aggressiveness characteristic of so many Irishmen, especially Irish lawyers, Hackett both personally and through the *West Australian* was an active partisan, on the Vice-Regal side, in the imbroglio involving the Governor, Sir Napier Broome, and the Chief Justice, Alexander Onslow, and the former's purported interdiction of the latter from the exercise of his office in 1887. However, another aggressive Irish lawyer, the radical and fiery John William Horgan, briefly a member of the Legislative Council, enthusiastically took the part of the Chief Justice, or, probably more accurately, of

[105] Alexander Collins, *op. cit.*, n 72, p 56, citing *Inquirer and Commercial News* (Perth), 6 December 1882, p 6.

opposition to the Governor.[106] Horgan also took the opportunity of denouncing Hackett's newspaper, the *West Australian*, as a "reptile sheet ... The embodiment of lies, distortion, snobbery, and low journalism".[107] Although Onslow was largely vindicated by the Privy Council and by the Colonial Office and restored to his Chief Judicial functions (to popular acclaim, the Governor being burned in effigy --- twice), Harper and Hackett were not content to allow that outcome to stand. In late 1888 they petitioned the Governor to inquire into Onslow's conduct as Chief Justice. It is unnecessary here to set forth the details of the inquiry before the Governor and the Executive Council, the reluctance of the Colonial Office again to become involved, and the subsequent, rather inconclusive, proceedings in the Legislative Council. Suffice it to say that Onslow (by then Sir Alexander) remained Chief Justice of Western Australia until his retirement on account of ill health in 1901, whilst Broome left Western Australia in September 1890, very shortly before the proclamation of Responsible Government in October of that year, to become Acting Governor of Barbados.

One of the complaints of the petitioners, all of which were enthusiastically endorsed and supported by the Governor, was that the Chief Justice had acted intemperately in a libel case which had been heard by him and a special jury in August 1888. That was *Hensman v. Harper and Hackett*, an action which aroused considerable public interest, brought by A. P. Hensman, an elected member of the Legislative Council, and later to be Attorney-General of the colony, against the proprietors of the *West Australian*.

The Defendants' own newspaper reported the commencement of the proceedings as follows:

> In this action the plaintiff, Mr. A. P. Hensman, M.L.C. sought to recover the sum of £5,000 damages out of a libel alleged to have been committed by

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[106] Horgan, a man of uncontrollable temper, had practised in his hometown of Cork for fourteen years before arriving in Sydney in 1875. After practising as a solicitor in New South Wales, in West Maitland and Wagga Wagga, he removed to Perth in early 1881. (Tom Stannage, "Horgan, John (1834-1907)", *ADB*, Volume 9, p 367). Among Horgan's various professional partners in Western Australia was, briefly, Richard William Pennefather, also Irish born, and at the time Attorney-General of Western Australia. That partnership ended with proceedings for assault between them, arising out of a dispute over accounts which culminated in an incident in which Horgan broke Pennefather's spectacles and cut his nose (*Albany Advertiser* (Albany, Western Australia), Tuesday, 1 March 1898, p 3).

[107] Quoted in Geoffrey Bolton, "A Trinity Man Abroad: Sir Winthrop Hackett", *Studies in Western Australian History* (University of Western Australia), Volume 20, 2000, p 67 at p 71.

> the defendants Mr. Harper, M.L.C., and Mr. J. W. Hackett, J.P., of and concerning the plaintiff in the West Australian newspaper, of which they are the proprietors. The plaintiff conducted his own case; the defendants were represented by Mr. S. Burt, Q.C., Mr. J. W. Hackett, one of the defendants, and Mr. E. G. S. Hare. A considerable number of persons were present on the floor of the Court, and there were several ladies among the spectators in the gallery.[108]

There would appear to be a logical conflict in Hackett, a party to the proceedings, being represented by Hackett himself, as Counsel, in which capacity Hackett was also representing the other defendant. (Should he have appeared robed, as Counsel; or unrobed, as a litigant in person?) However, that difficulty does not seem to have been recognised by Hackett himself, the other Counsel, the plaintiff or even the Chief Justice. Hensman was ultimately successful, the jury awarding him damages in the not inconsiderable sum of £800. This case, in which Hackett was involved personally, commercially and professionally, seems to have been the only occasion when he appeared as a barrister during his lengthy period as a member of the Western Australian Bar.[109] That element of paradox which Professor Bolton discerned in Hackett's character[110] emerges in the contrast between, on the one hand, the aggressive partisan favouring a malevolent Governor over a poorly treated Chief Justice and, on the other, the benevolent philanthropist whose devotion to the cause of public education resulted in the establishment of the University of Western Australia. But such a paradox is often a characteristic of the Irish.

In Victoria a lawyer who was both a very successful barrister and a newspaper proprietor was Robert Walsh. Born at Rathfarnham near Dublin in 1824, Walsh graduated from Trinity in 1846. After practising at the Irish Bar for six years from 1847, he arrived in Victoria in 1853, being admitted in that colony two years later. For almost twenty years Walsh practised as a barrister in Ballarat, combining his professional work with ownership of

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[108] *West Australian*, 21 August 1888. The entire newspaper report is one of the "Documents Put In" in the proceedings before the Legislative Council: Western Australia, Legislative Council, *Votes and Proceedings*, 1889; Administration of Justice in the Supreme Court; Petition from Messrs. Harper & Hackett respecting His Honor the Chief Justice with Notes of the Inquiry Held by His Excellency the Governor in Executive Council, and Papers Connected Therewith. No. 4, Q1, p cxiii.

[109] Enid Russell, *A History of the Law in Western Australia and its Development from 1829 to 1979* (Nedlands, University of Western Australia, 1980), p 222.

[110] Bolton, *op. cit.*, n 107, p 78.

the *Ballarat Times*. He represented Ballarat East in the Legislative Assembly from 1871 to 1874, being Attorney-General for a year during that period, but thereafter he concentrated on his career at the Bar. In 1874 Walsh relocated his professional practice to Melbourne, being appointed a Crown Prosecutor in 1886, taking Silk in 1890, and in 1899, very shortly before his death, being an Acting Judge of County Courts and Chairman of Quarter Sessions, during the absence on leave of Judge Casey.[111] Both in his parliamentary seat and in the ownership of the *Ballarat Times* Walsh was succeeded by Henry Cuthbert.

James Joseph Casey was another Irish lawyer who combined a career in law and politics with newspaper ownership. Born at Tromroe, County Clare in 1831 and educated at Galway College, Casey at the age of 18 sought adventure in America, where he worked as a gaol warder and as a clerk on a Mississippi steamboat. After briefly returning to Ireland, he set forth for Australia, arriving in Melbourne in early 1855. Established in Bendigo, Casey soon became prominent in local affairs, and sat in the Legislative Assembly from 1863 to 1880. During that period Casey and a partner acquired ownership of the *Bendigo Advertiser* and established two other local newspapers. He also studied law and in 1865 he was admitted to the Bar, acquiring a successful practice, and being from time to time a Crown Prosecutor. Throughout his parliamentary career Casey held various ministerial offices (including Minister of Justice and Solicitor-General), and was an early supporter of the movement for Federation. Interested in law reform while in politics, and author (with Frank Gavan Duffy) of a Justices' manual, Casey was appointed a Judge of the County Court in 1884 and later acted briefly on the Supreme Court.[112]

Reference has been made earlier in this chapter to Francis Quinlan,[113] whose career had several parallels with that of Casey. It would appear that Quinlan, like Casey, was briefly involved in a newspaper, the *Victorian.* It has been stated by Quinlan's grandson, Judge F. Joseph Cornish, of Toronto, Ontario, that Quinlan founded, and for a time edited, the

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[111] *Victoria Government Gazette*, No. 33, May 12, p 1433; *Argus*, 25 August 1899; P. Mennell, *The Dictionary of Australian Biography* (London, 1892).

[112] John C. Oldmeadow, "Casey, James Joseph (1831-1913)", *ADB*, Volume 3, p 365; *Argus* (Melbourne), Monday, 7 April 1913, p 12; *Bendigo Advertiser*, Monday, 7 April 1913, p 5.

[113] See p 229, *supra.*

Victorian.[114] Such statement is not correct, since that publication was, in fact, established by Charles Gavan Duffy, at whose invitation Daniel Deniehy went to Melbourne to be its editor. The *Victorian* was the third attempt to establish a Catholic newspaper in Victoria, one of its objectives being to "harmonise the views of the Irish population and to avoid any sectional partisanship in the Catholic community". The first issue appeared on 5 July 1862, offering its readers "all the Catholic intelligence of the Australian Colonies". The *Victorian* did not succeed. It failed to maintain the support of the Archbishop of Melbourne, James Alipius Goold, who in April 1863 declared that it had "ceased to be the exponent of Catholic opinion in Victoria".[115] A year later, on 2 April 1864, it ceased publication. During his editorship Deniehy was a frequent contributor to the *Victorian*.

Christopher John Nugent Dease, descended from ancient families of the Catholic aristocracy of Ireland, combined his professional life as a solicitor with that of a newspaper proprietor. In Yass, where he practised in the late 1860s and early 1870s, Dease was the proprietor of the *Yass Courier*. After removing to Kempsey in about 1872, where he practised for about twelve years until his death in 1884, Dease became the proprietor of the *Macleay Herald*. In both locations Dease took an active part in public affairs. In May 1869 Dease was one of the petitioners for incorporation of the township of Yass. In early 1871 he participated in meetings of the Catholic parishioners held at the instance of the Bishop of Goulburn to resolve the question of parish indebtedness incurred by the recently deceased parish priest, the Reverend Richard Duigan. In the midst of those more serious activities Dease also found time to deliver a lecture at the Yass Mechanics' Institute on the lyric and epic poetry of the famous Irish poet Thomas Moore, at which the lecturer both recited and sang a number of Moore's poems.[116] Ecumenical in his attitude towards religion in Yass and disclosing a fine sense of humour, Dease responded to the suggestion that the three clerics in the town --- Presbyterian, Anglican and Catholic --- should collect funds together, by saying

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[114] Quoted in Eric Edgar Hewittt, *Judges Decadal* (Ashburton, Victoria, 1994), Chapter 2, pp 77-86, especially at p 82. Judge Cornish, in this regard, appears to have been relying on an obituary of Quinlan appearing in the *Tablet* (London), 10 February 1910.

[115] Quoted in Cyril Pearl, *op. cit.*, n 95, p 105.

[116] *Yass Courier*, Friday, 27 January 1871, p 2.

that "the proceedings would resemble that of three fat single gentlemen who were rolled into one, and he hoped that the time would come when such junction would be practicable."[117]

At one of the meetings called to consider the indebtedness (of at least £150) incurred by the late Father Duigan, Dease was among the 20 or so prominent Catholic parishioners in attendance. The resident priest at Young could not contain his anger at the report of the meeting appearing in the *Yass Courier*. In a letter to the editor of that newspaper, signed "A Catholic, not of a clique", the good Father, manifesting both a lack of Christian charity and a disregard for factual accuracy, launched into a spirited, and defamatory, denunciation of most of the laymen who had attended the meeting. He described Dease (who had, in fact, made a quite respectable donation of two guineas [£2-2-0] to the fund to defray the debt), as one "who never gave a single rasper to the fund, [and] is a pious, impecunious stalking attorney, who appears to busy himself very much about other people's concerns and neglect his own."[118] It says much for Dease's tolerant character and personality that he was prepared to publish in his own newspaper such a defamation of himself. Indeed, he was described by the biographer of his sister, the Reverend Mother Teresa Dease, a nun of considerable significance in the history of religious Orders in the United States of America, as being "amongst the most tolerant of mortals, a fact he demonstrated in the conduct of his journal."[119]

In Kempsey Dease also took "an active, intelligent, and self-denying part in all public movements for the general good, and was known and esteemed by all the leading men [in Kempsey]",[120] being instrumental in the establishment of a reformatory prison and in supporting the creation of a harbour of refuge at Trial Bay. That he was also in the opinion of his sister a "man of infinite humour[, whose] geniality was inexhaustible"[121] was exemplified

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[117] Robert Lehane, *Irish Gold* (Charnwood, ACT, 2002), p 172.

[118] *Yass Courier*, Friday, 10 February 1871, p 3.

[119] *Life and Letters of Rev. Mother Teresa Dease, Foundress and Superior General of the Institute of The Blessed Virgin Mary in America, Edited by A Member of the Community* (Toronto, Canada, 1916), p 229.

[120] *Sydney Mail: New South Wales Advertiser* (Sydney), Saturday, 2 August 1884, pp 243, 245.

[121] *Loc. cit.*, n 119.

in an incident that occurred while Dease was practising as a solicitor in Kempsey, where he was also the proprietor of the *Macleay Herald*, "in the columns of which he reflected the serene brightness of his mind and geniality of his disposition."[122] On one occasion the editor of the rival newspaper in Kempsey, the *Macleay Chronicle*, wrote a paragraph deploring the lack of taste, and even the lack of sense of decency, in Dease walking nude on the river bank after having a swim. Dease retorted with an action in defamation, and proved to the satisfaction of the Court that he was not nude; for at the time complained of he was dressed in a pair of spectacles and a pair of slippers. Dease won the case.[123] It is, perhaps, understandable that this incident was not recorded by the biographer of Dease's sister as an example of Dease's infinite humour and geniality. Despite being a "live, clever, keen-witted lawyer ... who when anyone threw a stone at his glass house, forcibly replied with half-a-brick",[124] Dease, when he died, aged 68, on 26 July 1884, left no will.[125]

Lawyers as Politicians

Sir Charles Gavan Duffy, who had been a member of the House of Commons before coming to Australia and ultimately attaining the highest political office in Victoria, considered that the only profession for any Irishman aspiring to become a politician was the law.[126] At a time when Members of Parliament received no salary there were numerous instances of Irish lawyers in Australia choosing to combine their practice of the law with membership of one of the colonial Legislatures, commencing with the appointment of John Hubert Plunkett to the New South Wales Legislative Council in 1836, when he assumed office as Attorney-General. There is little purpose in listing the many Irish lawyers who combined a career in politics with

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[122] *Loc. cit.*, n 119.

[123] *Macleay Chronicle* (Kempsey), 28 July 1926, p 4.

[124] *Loc. cit.*, n 123.

[125] *Sydney Mail: New South Wales Advertiser* (Sydney), Saturday, 2 August 1884, p 245; *New South Wales Government Gazette*, Tuesday, 21 October 1884 (No. 532).

[126] Sir Charles Gavan Duffy, *My Life in Two Hemispheres*, 2 vols. (London, 1898, facsimile edition, Dublin, 1969), Volume I, p 59.

their practice of the law (references to some of whom have otherwise been made in this thesis, and the names of most appearing in Appendix A).

It is, however, instructive to compare and contrast two Irish born lawyers among the Fathers of Federation in the 1890s, and their respective attitudes towards the Almighty and the Constitution of the Commonwealth. The decision of Patrick McMahon Glynn to come to Australia and the circumstances in which he ultimately achieved professional and political success in his new homeland have been set forth in Chapter 6.[127] As is there recorded, it was Glynn, a devout Catholic, who was responsible on 2 March 1898 in having inserted into the Preamble to the Constitution the words "humbly relying on the blessing of Almighty God".

At the same Convention was another Irish lawyer, Henry Bournes Higgins, a delegate from Victoria. Higgins was born in Ireland at Newtownards, County Down, where his father, the Reverend John Higgins, although brought up in the Church of Ireland, was a Wesleyan minister. The Higgins family emigrated to Australia, for reasons of health, arriving in Melbourne in early 1870, when Henry was aged 18. He graduated from the University of Melbourne (where he was influenced by the teaching of the great Professor W. E. Hearn), and practised at the Victorian Bar from 1876. Higgins shed the Wesleyanism of his father, and spiritually moved towards agnosticism. However, years later Professor G. V. Portus said of Higgins that he had never met anyone "so aloof from religion in any sense of creed, whose life lay so deep in the things of the spirit."[128] That opposition to organised religion and to the intrusion of religion into government, which Higgins regarded as being exclusively a secular domain, was manifest in the Federal Convention of 1897-1898.

Higgins, who at the Convention often found himself at odds not only with his fellow-Victorian delegates, including Alfred Deakin, but with almost the entirety of the Convention, was described by Deakin as a

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[127] Chapter 6, section "The Practising Lawyer, Politician and Father of Federation". especially text to n 102.

[128] G. V. Portus, *Happy Highways* (Melbourne, 1953), p 234; John Rickard, "Higgins, Henry Bournes (1851-1929)", *ADB*, Volume 9, p 285.

> large-headed, rudely-featured youth [Higgins was aged 46 at the time] who had conquered a tendency to chest weakness by means of the Australian climate, a rigid regimen, and hard physical exercise, he was handicapped by what would have proved to many insurmountable objects to success as a speaker, an awkward manner, a nervous stammer, and slowness of speech. But he was endowed with an iron will and a fine brain capable of prolonged effort and acting with the power and precision of a machine. By sheer hard work he won his way to the front of the Bar, into Parliament and into the Convention.[129]

Although in the early Commonwealth Parliaments Higgins found himself in broad agreement with Deakin, it was Higgins who helped to bring down the latter's government in 1904, and who, although never a member of the Labor Party, was Attorney-General in the short-lived Labor Government of J. C. Watson. However, it was at the Convention that Higgins achieved a victory for principle in the matter of religion. He considered that the recognition of the Almighty in the Preamble to the Constitution might alarm many people, since it now gave some positive warrant to Australian Courts (as had been the case in America) to justify intolerant or restrictive legislation.[130] The details of the debate on this topic are set forth by Professor La Nauze.[131] Suffice it to say that, despite Barton's scepticism, the majority of the Convention were convinced that what Higgins called a "safeguard against religious intolerance" would do no harm and might win some votes in favour of Federation. Higgins's proposal was adopted, becoming section 116 in the Constitution, and the States were left free, if they wished, to legislate for religious intolerance.[132] That section provides,

> The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

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[129] Alfred Deakin, *The Federal Story* (Melbourne, 1944), p 68.

[130] Convention *Debates* Melbourne, 1898, Volume I, p 656. The true concern of Higgins, that there might be an implied power in the Commonwealth Parliament to legislate regarding religion, despite (in the author's view) the inability of Higgins to articulate properly that concern to the Convention, is discussed in Luke Beck, "Higgins' Argument for Section 116 of the Constitution", *Federal Law Review* (2013), Volume 41, Number 3, p 393.

[131] J. A. La Nauze, *The Making of the Australian Constitution* (Melbourne, 1974), pp 228-229.

[132] La Nauze, *loc. cit.*, n 131. See also Richard Ely, *Unto God and Caesar: Religious Issues in the Emerging Commonwealth 1891-1906* (Melbourne, 1976), pp 54-55 and, especially, Chapter 9, "Disaster for Higgins", pp 60f.

The political career of Higgins in the Commonwealth Parliament lasted only five years and was overshadowed by his great achievements as a Justice of the High Court of Australia, to which he was appointed in October 1906, being also from 1907 the President of the Commonwealth Court of Conciliation and Arbitration. But probably the achievement for which Higgins, as one of the Founding Fathers, should be most truly honoured was the insertion into the Constitution of section 116. That provision of the Constitution has been a great safeguard against religious intolerance and the intrusion of religion into the powers of the Commonwealth, thereby ensuring, so far as the Constitution and the laws of the Commonwealth can do so, that there should in Australia be a total division between Church and State.

Thus it came about that one Irish lawyer, a Catholic, was responsible for the Almighty being recognised in the Constitution of the Commonwealth, whilst another Irish lawyer, brought up as a Wesleyan, but by then committed to no religious belief, was responsible for ensuring that such recognition should not impinge upon the nation or its people.

Ancillary Careers: Academic or Ecclesiastical

Most of the Irish lawyers in Australia in the nineteenth century were not great scholars, although many were extremely successful in their profession and several evinced brilliant ability. Reference has already been made, earlier in this chapter, to the academic career of John Winthrop Hackett as Vice-Principal of Trinity College in the University of Melbourne. Perhaps the only Irish lawyer in Australia who was a great academic scholar, and who was internationally recognised as such, was William Edward Hearn, who, the son of a Church of Ireland clergyman, was born at Belturbet, County Cavan. After a brilliant academic career at Trinity College, Dublin, Hearn was called to the Irish Bar in 1853. However, preferring an academic career to professional practice, he had already in 1849 become Professor of Greek at the Queen's College, Galway. Five years later he was appointed one of the foundation professors at the newly established University of Melbourne, and when a separate Faculty of

Law was there established he became Dean of that Faculty. As has already been recounted,[133] Hearn before coming to Australia was awarded the valuable and prestigeful Cassell Prize for his Essay in 1851. For his scholarly writings, both on political economy and on the law, Hearn achieved international acclaim, his *The Government of England* (1867) receiving praise from the great constitutional scholar, A. V. Dicey, although subsequently it and his other published works have been criticised for their "cautious and sometimes superficial judgments".[134]

Hearn took a prominent part in public affairs, especially after his election to the Legislative Council in 1878, where he served until his death. His earliest foray into politics in January 1859 (when he unsuccessfully contested a by-election for the Legislative Assembly) incurred the indignation of that other Irish lawyer Sir Redmond Barry, who had been largely responsible for the establishment of the University of Melbourne and was its inaugural Chancellor (continuing in such office until his death more than twenty years later). That chancellorial disapprobation of Hearn's political career continued throughout the 1870s and placed in jeopardy his academic appointment. Nevertheless, upon Barry's death in 1880, it was Hearn who succeeded him in the Chancellor's office. (Later in the century another Irish born lawyer, Sir John Madden, by then Chief Justice of Victoria, became Chancellor of the University of Melbourne.) Although admitted to the Victorian Bar in 1860, Hearn practised little in Australia, and his appointment as Queen's Counsel in 1886 was more a recognition of his scholarship in the law than of his standing in professional practice.[135] The monumental codification of the law in Victoria, to which Hearn devoted much of his later years, although receiving formal parliamentary support, never achieved statutory recognition.[136]

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[133] Chapter 2, n 84.

[134] J. A. La Nauze, "Hearn, William Edward (1826-1888)", *ADB*, Volume 4, p 370. But see Gregory C. G. Moore, "A Biographical Sketch of William Edward Hearn (1826-1888): A Slightly 'Irish' Perspective" (2005) *34th Annual Conference of Economists*, http://researchonline.nd.edu.au/bus_conference/16, where it is established that some of La Nauze's criticisms of Hearn's scholarship are without foundation.

[135] La Nauze, *op. cit.*, n 134, at p 371.

[136] La Nauze, *loc. cit.*, n 134, at p 371.

At least one Irish lawyer in Australia experienced a total change of career, relinquishing the law to follow a vocation in the Church. Edward Jones Brewster, born in 1812, was the son of a Dublin solicitor and the nephew of Abraham Brewster, Lord Chancellor of Ireland (1867-1868). He graduated from Trinity, and was called to the Irish Bar in 1837.[137] In the following year he arrived in Sydney, where he was admitted to the colonial Bar on 15 September 1838. Through the influence of John Hubert Plunkett, the Attorney-General of New South Wales, Brewster obtained appointment in 1839 as Chairman of Quarter Sessions and as Commissioner of the Court of Requests for the Port Phillip District, then still part of the colony of New South Wales (at a salary for the two offices of £350 a year).[138] With the arrival in Melbourne in 1841 of the first Resident Judge of the Supreme Court in the Port Phillip District, John Walpole Willis, Brewster's appointment to the former office was superseded,[139] and he soon resigned the latter office (being replaced therein by Redmond Barry), whereupon he commenced practice at the Bar in Melbourne. For two and half years (1846-1848) Brewster was one of the elected members for Port Phillip in the partly-elected Legislative Council of New South Wales (which, of course, was located in Sydney). As a legislator Brewster was responsible for introducing measures to simplify conveyancing procedures and for facilitating the recovery of property by landlords from defaulting tenants. This last enactment, 11 *Vict.*, No. 2, was copied from the British *Small Tenements Recovery Act*, and was at one time commonly known as "Mr. Brewster's Act".[140]

Throughout the period of Brewster's membership of the Legislative Council the legal profession in New South Wales was divided between barristers and solicitors (at that time usually referred to as attorneys). Brewster sought to have the two branches of the profession amalgamated, as they been before 1835. The background to Brewster's legislative efforts in this regard and especially concerning the the right of a solicitor to practice as an advocate, at least before the Courts of Quarter Sessions, have been set forth in detail by Sir Victor

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[137] Keane et al. (eds.), *King's Inns Admission Papers 1607-1867* (Dublin, 1982), p 53.

[138] Gipps to Normanby, 3 October 1839 (No 134, New South Wales Governor's Despatches, June-December 1839, CY 647, A 1221, p 383 at p 385).

[139] Gipps to Stanley, 16 April 1842 (No. 73, New South Wales Governor's Despatches, April-July 1842, CY 661, A 1228, p 99 at p 113).

[140] J. M. Bennett (ed.), *A History of the New South Wales Bar* (Sydney, 1969), Chapter 1, "Early Years 1824 to 1856" by Sir Victor Windeyer, p 57.

Windeyer.[141] It should not be overlooked, however, that Brewster's efforts to amalgamate the two branches of the legal profession had an element of self-interest. In 1846 he unsuccessfully attempted to become a solicitor. His application was refused by the Supreme Court (Stephen CJ, Dickinson and Therry JJ) on the ground that Brewster did not have the qualifications prescribed by the Rules of Court for the enrolment as a solicitor.

Brewster considered that one way to overcome that result, and thus for him to be able to practise as a solicitor, was for the two branches of the legal profession to be amalgamated. As a member of the Legislative Council Brewster in September 1846 introduced the *Division of the Legal Profession Abolition Bill*. That proposal engendered a degree of public controversy. In late September the Melbourne *Argus* published a letter addressed to Brewster from "An Attorney, Solicitor and Proctor of the Supreme Court of New South Wales, for the District of Port Phillip". That letter, lengthy and discursive, was denunciatory not only of the Bill itself but also of Brewster's unsuccessful attempt to become a solicitor.[142] A select committee of the Legislative Council to which the Bill was referred ultimately reported, a year later, against the proposed amalgamation, but recommended that attorneys should be allowed to appear as advocates on circuit (that is, away from Sydney) and at Quarter Sessions. Those recommendations were adopted in June of the following year by Act 11 *Vict.*, No 57.[143]

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[141] J. M. Bennett (ed.), *op. cit.,* n 140, Chapter 1, "Early Years 1824 to 1856" by Sir Victor Windeyer, p 61.

[142] *Argus* (Melbourne), Tuesday, 29 September 1846, p 3.

[143] Windeyer, *op. cit.*, n 140, pp 61-63. In 1890 another Irish barrister, Everard Digby, attempted to become a solicitor, his application to the Supreme Court meeting with as little success as that of Brewster more than forty years earlier (*Ex parte Digby* (1890) 6 WN (NSW) 90). However, in consequence of Digby's application, not only were the Rules of Court amended but a new Statute was enacted to facilitate barristers becoming solicitors (the *Legal Practitioners Act* of 1892 (55 *Vict.*, No. 31), section 3, providing that "every barrister of five years' standing upon being on his own application disbarred shall be entitled without examination to be admitted to practise as an attorney"). (Details of the life of Everard Digby (1854-1922), who, after arriving in Sydney in 1881, combined law with journalism, are set forth in K. A. J. [K. A. Johnson], "Everard Digby - Editor Australian Men of Mark", *Australian Biographical & Genealogical Record Newsletter*, January 1983, Number 1, p 6.) When another Irish barrister, James Grant, who had been called to the Irish Bar in 1878 (although Kenneth Ferguson (ed.), *King's Inns Barristers 1868-2004* (Dublin, 2005), p 195, gives the year of his Irish call as 1883), sought to avail himself of the provisions of that Act and to become a solicitor, he was successful, although at the time of his application his standing at the New South Wales Bar (to which he had been admitted only in 1891) was not of the requisite five years (*Ex parte James Grant* (1892) 9 WN (NSW) 77). However, four years later that decision was, in effect, overruled by the Supreme Court in *Ex parte Mugliston* (1896) 12 WN (NSW) 120, in which Windeyer J, during argument, observed that he had "always questioned the decision in *Ex parte Grant*" (despite the fact that he had participated in the earlier decision of the Court).

Whether in consequence of his failure to achieve the amalgamation of both branches of the legal profession in New South Wales or because he discovered in himself a true religious vocation, Brewster abandoned legal practice and departed Melbourne for England, where he remained for the rest of his long life. In 1853, after appropriate studies at Oxford, Brewster received Holy Orders in the Church of England. He continued his priestly career until his death at the age of 86 in 1898 at Cape Town, while *en route* to Australia.[144]

Brewster was not the only Irishman in Australia to move between the law and the Church. Thomas Clarke Laurance (1831-1916), the son of a leading merchant in Cork, had an interesting and unusual career. As a boy he went to sea for several years, then studied law, being admitted as an attorney and solicitor in the Irish Courts in 1853. After three years in practice, Laurance, who at the age of 12 in America had embraced Wesleyanism, entered the ministry of that Church. Together with his wife and children Laurance in late 1864 arrived in Western Australia, where he enthusiastically devoted himself to his calling both in Perth and in rural areas of the colony throughout the ensuing twenty years. Laurence used his legal qualifications to assist the indigent by appearing *pro bono* for Aborigines and foreigners who were charged with criminal offences and were unable to pay for professional representation. Doubtless it was to enable him to do so that Laurance obtained admission to the Western Australian Bar in 1873.[145]

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[144] *Argus* (Melbourne), Saturday, 23 April 1898, p 10. The move by Brewster from the Law to the Church may be compared with the career of Henry Cary (1804-1870), an Englishman --- not an Irishman --- who moved from the law to the Church and then back to the law. In 1827 Cary was called to the English Bar, where he was more interested in writing on the law rather than in practising it. Cary was ordained a priest in the Church of England in 1832. Dissatisfied with his prospects and circumstances in his homeland, Cary arrived in Sydney in 1849, where he was for a short time rector at St Mark's, Darling Point, before becoming a schoolmaster. Having returned to the practice of the law in 1855, Cary was briefly Master in Equity in the Supreme Court and in 1859 was appointed a Judge of the District Court in New South Wales. (Windeyer, *op. cit.*, n 140, p 66; K. J. Cable, "Cary, Henry (1804-1870)", *ADB*, Volume 3, p 363.)

[145] *Western Mail* (Perth), Friday, 10 November 1916, pp 31, 32; Friday, 9 March 1917, p 44; *Argus*, Friday, 10 November 1916, p 6; *A Biographical Register, 1788-1939* (National Centre of Biography, Australian National University, Canberra), "Laurance, Thomas Clarke (1831-1916)"; Rica Erickson (compiler), *The Bicentennial Dictionary of Western Australians pre-1829 - 1888* (Nedlands, W.A., 1988), Volume III K - Q, p 1805; Friends of Battye Library Dictionary, %20of%20WA/L.pdf, p 1803. See Chapter 5, text to n 36.

Conclusions

It will be seen that there was a wide variety of reasons and circumstances why some Irish lawyers in Australia during the nineteenth century followed callings and occupations other than the law. Some entered another career through necessity, such as those who upon their arrival found it as difficult to establish a practice in the law in the Antipodes as it had been in their native Ireland. Or they had to occupy themselves remuneratively between their arrival and their admission to the local profession. In the 1850s the goldfields on occasion constituted an appropriate stopgap, as did journalism both before and after the goldrushes. For other Irish lawyers a career outside the law was a matter of deliberate choice, for they had come to Australia with no intention to practise the law (although sometimes there was a change in that decision). Again, there were those who combined the practice of the law with another career, especially politics. Yet others deliberately chose, for a variety of reasons, to abandon legal practice in order to concentrate on a totally different career outside the law, be it journalism, academia or the Church. There was still another category, those young Irishmen who had not qualified as lawyers in their homeland, and came to Australia inspired by a sense of adventure and hoping to make their fortune, perhaps on the goldfields, but who subsequently qualified as lawyers in Australia and abandoned their earlier occupation.

Whatever their motives and whatever the circumstances and reasons for a career beyond the law, those Irishmen brought with them to Australia characteristics such as ambition, family loyalty, aggressiveness, consideration for those worse off than themselves and skill with words --- oral or written --- by which educated Irishmen have down the centuries been distinguished, whether in their native land or beyond the seas.

CHAPTER 8

DUELLING AND AGGRESSIVENESS AMONG IRISH LAWYERS

Prevalence of duelling in Ireland --- Lawyers were enthusiastic participants --- Cases decided upon the duelling field rather than in court --- Duelling among lawyers in the Australian Colonies --- Horsewhipping

Charles Dickens described duelling as part of the curriculum of education in the Ireland of the eighteenth and early nineteenth centuries.[1] Although the practice of duelling was socially acceptable, regarded as one of the marks of the gentlemanly classes, it was held in abhorrence by the Common Law.[2] However, the Common Law was defective, in that it did not penalise the preparations for a duel (such as the challenge, the arrangements for time and place of the encounter). What was required was a law which would enable the authorities to nip the preparations in the bud, without being obliged to wait until a crime had been committed. Such a necessary remedy was applied by royal proclamation during the Tudor and Stuart periods, and enforced by the Court of Star Chamber.[3] That Court punished all preparations for duels by fine and imprisonment --- "all the middle acts and proceedings which tend to the duel".[4]

By the end of the eighteenth century it was recognised that, even where neither combatant suffered either death or injury, the duel constituted a serious criminal offence. Where one of the participants was killed in the duel, not only the perpetrator, but also his seconds, were guilty of murder, and the seconds of the victim were likewise guilty as

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[1] Charles Dickens, "Dead (and Gone) Shots", *All the Year Round,* 10 May 1862, Vol. 1, p. 212.

[2] Richard Burn (ed. John Burn), *A New Law Dictionary; Intended for General Use as well as for Gentlemen of the Profession,* Vol. I (London, 1792), p 298 *s.v.* "Duelling".

[3] Sir William Holdsworth, *A History of English Law* (London, 1966 (reprint of 3 ed.)), Vol. V, p 200.

[4] *Lord Darcy of the North v. Gervase Markham* (1616) Hob. at 121, quoted by Holdsworth, *loc. cit.*, n 3.

accessories.[5] However, a duel which did not end in death remained only a Common Law misdemeanour until the passing, in 1803, of Lord Ellenborough's Act, 43 *Geo*. III, c. 58.[6]

In no class of Irish society at that time was the practice of duelling more enthusiastically pursued than in the legal profession, especially among barristers. For success at the Bar "[a] nice capacity for pleading and a nice eye for levelling, were equally essential."[7] It was said that many members of the Bar in the 1790s owed their eminence, not to powers of eloquence or to legal ability, but to a daring spirit and the number of duels they had fought.[8] The story is told of Dr Francis Hodgkinson, Vice-Provost of Trinity College, Dublin, who, when an old man, was asked by a young friend, going to the Bar, as to the best course of study to pursue, and whether he should begin with Fearne or Chitty. Dr Hodgkinson, who had long been secluded from the world, and whose observation was beginning to fail, immediately reverted to the time when he had been himself a young barrister; and his advice was, "My young friend, practise four hours a day at Rigby's pistol gallery, and it will advance you to the Woolsack faster than all the Fearnes and Chittys in the library."[9] Duels were almost universally fought with pistols, which were often handed down in a family from one generation to another.

A vivid description of Irish judges and practitioners is given by Sir Jonah Barrington, Judge of the High Court of Admiralty in Ireland (to whom reference has already been made in Chapter 1). Barrington took a gleeful delight in recounting the shortcomings of his judicial colleagues. "A duel [he wrote] was indeed considered a necessary piece of a young man's *education*, but by no means a ground for any future animosity with his opponent --- on the

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[5] Richard Burn, *loc. cit.*, n 2. See, also, Richard Burn, *The Justice of the Peace and Parish Officer,* 25 ed. (G. W. Marriott (ed.)) (London, 1830), Vol. II, p 1019, *s.v. "*Homicide (Murder)".

[6] Sir James FitzJames Stephen, *A History of the Criminal Law of England,* 3 volumes (London, 1883), Vol. III, p 100.

[7] Charles Dickens, *op. cit.*, n 1, p 214.

[8] [James Edward Walsh], *Ireland Sixty Years Ago* (Third edition, revised, Dublin, James McGlashan, 1851), Chapter II, p 22.

[9] [James Edward Walsh], *op. cit.*, n 8, Chapter II, p 22.

contrary, proving the bravery of both, it only cemented their friendship."[10] If, that is, they both survived. No gentleman could take his proper station in life till he had "smelt powder"; no barrister could go on circuit until he had obtained a reputation in this way; no election, and scarcely an assize, passed without a number of duels.[11]

Barrington, although given to some exaggeration,[12] claimed that, since about the beginning of the nineteenth century, 227 "memorable" duels were fought, even naming some of the more celebrated antagonists, many of whom were members of the aristocracy, and many being either current or future holders of high judicial office.[13]

It is interesting that Barrington makes no mention of any sanctions of the law being visited upon the participants in the encounters which he describes in some detail. The stringent laws against duelling were treated largely as a dead letter. Hardly ever did a prosecution ensue; even if it did, no conviction would follow, since every man on the jury was probably himself a duellist, and would not find his brother guilty. After a fatal duel the judge would leave it a question to the jury, whether there had been "any foul play"; with a direction not to convict for murder if there had not.[14] This attitude on the part of the courts in Ireland was a reflection of the preparedness of eighteenth century society to exempt gentlemen from normal legal prescriptions.[15]

For example, a celebrated duel of that period, although not mentioned by Barrington, involved Henry Flood, MP for Callan in County Kilkenny. Flood, whilst educated for the Bar (admitted to the Inner Temple in 1751, but did not seek admittance to the King's Inns in

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[10] Sir Jonah Barrington, *Personal Sketches of His Own Times*, 3 volumes, 2 ed., "revised and improved" (London, 1830), Vol. II, p 7. The emphasis appears in the original publication. See Chapter 1, text to notes 30, 66-71.

[11] [James Edward Walsh], *op. cit.*, n 8, Chapter II, pp 21-22.

[12] R. W. Bentham, "The Bench and Bar in Ireland", *Tasmanian University Law Review*, Volume 1 (1958-1963), p 209 at 217.

[13] Barrington, *op. cit.*, n 10, Vol. II, p 6.

[14] [James Edward Walsh], *op. cit.*, n 8, p 31.

[15] James Kelly, "George Robert Fitzgerald [called Fighting Fitzgerald] (ca. 1746-1786)", *Oxford Dictionary of National Biography*, Vol. 19, p 797 at p 798; see, also, James Kelly, *"That Damn'd Thing Called Honour": Duelling in Ireland 1570-1860* (Cork, 1995), p 62.

Dublin and never practised law in Ireland), pursued a career in politics. The local rivals of the Flood family in Callan were the Agar family.[16] As a result of a disputed election in 1768, in which Flood was successful, he was challenged to a duel by James Agar. (The two had already engaged in a non-fatal duel in 1765 at Holyhead.) Their encounter, in September 1769 at Dunmore Park near Kilkenny, resulted in Agar being shot dead.[17] Flood was tried for his murder, at the Kilkenny assizes in April 1770. The verdict was manslaughter in his own defence, and he was honourably acquitted.[18]

Indeed, so great had become the prevalence of duelling among the Irish legal profession that the rules regarding such encounters were in 1775 formalised during the sittings of the summer assizes at Clonmell, "by the gentlemen delegates of Tipperary, Galway, Mayo, Sligo and Roscommon, and prescribed for general adoption throughout Ireland".[19] Those rules occupied at least 25 separate paragraphs, to which a number of additional paragraphs (referred to by Barrington as "Additional Galway Articles"[20]) were subsequently appended. The rules included provisions relating to the preliminaries giving rise to the encounter, as well as to the practical arrangements therefor.

Fighting, to settle matters of honour or injured pride, or for sheer derring-do, thus had notable models for imitation by lesser legal figures, who followed them with enthusiasm.

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[16] Details of the background to the feud between the Flood family and the Agar family and of the duel itself are set forth in Kelly, *op. cit.*, (*"That Damn'd Thing Called Honour"* ...), n 15, pp 100-104.

[17] "Henry Flood, Esq., who lately accepted a challenge from James Agar of Ringwood, Esq., who fired the first pistol, which was returned by another shot from Mr. Flood, and which killed Mr. Agar, is admitted to bail on security of 10,000*l.*", *Dublin Mercury*, 26 September 1769.

[18] *Lloyd's Evening Post* (London), April 30, 1770 - May 2, 1770, Issue 2001; letter from Mr [Charles Kendal] Bushe to [the Right Honourable] Henry Grattan, September 1769 (where Flood is referred to as "Harry Flood" and Agar as "Mr Agar the elder"), quoted in Henry Grattan [son], *Memoirs of the Life and Times of the Rt. Hon. Henry Grattan* (London, 1839), Vol. I, p 140; also, pp 139-140, 198. This was the same Henry Flood who, fourteen years later, challenged Henry Grattan to a duel in October 1783, as a result of a vitriolic attack on Flood made by Grattan in the Irish House of Commons on 28 October 1783, during a debate on a financial motion (Kelly, *op. cit.* (*"That Damn'd Thing Called Honour"* ...), n 15, pp 134-136.

[19] Barrington, *op. cit.*, n 10, Vol. II, p 15.

[20] Barrington, *op. cit.*, n 10, Vol. II, p 23.

Barrington reckoned that, in his time, "the number of killed and wounded among the bar was very considerable. --- The other learned professions suffered much less."[21]

It has been suggested that the frequency of duels in Ireland arose from "some extraordinary and half frantic irritability in the national spirit"[22] --- a characteristic which many of the Irish immigrants brought with them to Australia. Professor O'Farrell, in considering the attempted assassination of Prince Alfred by Henry James O'Farrell in 1868 and of Archbishop Goold of Melbourne by Henry's brother, the solicitor, Patrick O'Farrell, in 1882, as well as the attempted shooting of the editor of the Melbourne *Age* in 1870 (resulting in the unintended killing of a bystander) by the short-sighted Irish barrister and journalist Gerald Supple, has suggested that "the migration of professional men placed some under immense nervous strain to which they occasionally capitulated".[23]

Not only did such encounters with pistols seek to repair punctured egos, but barristers in particular were sometimes disposed to continue adversarial court contests out of doors with passages at arms, even at times involving the litigant parties. Counsel often fell out on circuit, would leave the court and hurry to an adjoining field, "blaze" and return (if the issue admitted of it) to the court, where judge and jury were anxiously expecting them.[24] Dickens also cites the instance of one noble lord who, being worsted in a series of suits, determined to vindicate himself by calling out, seriatim, the dozen or so barristers who were retained on the other side. Commencing with the attorney and distributing the parts among his own sons, he disposed of three, "when some circumstances arose and checked his further progress."[25] This was almost certainly the occurrence described in detail by Barrington, who himself was one of the two counsel retained by his noble client (identified as Lord Mount Garret, afterwards Earl of Kilkenny). His Lordship, ultimately "finding that neither the laws of the land, nor

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[21] Barrington, *op. cit.*, n 10, Vol. II, p 7.

[22] R. M. Hague, *Sir John Jeffcott: Portrait of a Colonial Judge* (Melbourne, 1963), p 35.

[23] Patrick O'Farrell, *The Irish in Australia*, revised edition (Kensington, NSW, 1993), p 100. See Chapter 7, text to n 94, and following.

[24] Dickens, *op. cit.*, n 1, p 214.

[25] *Ibid.*

those of battle, were likely to adjust affairs to his satisfaction, suffered them to be terminated by the three duels already narrated."[26]

Barrington himself fought a duel with another barrister Leonard McNally in about 1793. McNally had fallen into professional disrepute with his colleagues, and, "[a]nxious to regain his station by some act equalising him with his brethren", he provoked a duel with Barrington, who had recently been appointed King's Counsel. McNally was wounded, but soon recovered, and Barrington suffered a scratch. Subsequently they became, if not close friends, at least firm political allies.[27]

Barrington also refers to instances of horsewhipping among members of the legal profession, apparently as an alternative to a possibly fatal duel. A "brave [he had survived three duels], but certainly capricious" barrister named Curran [apparently, John Philpot Curran], was whipped by "a very *savage* nobleman, Lord Clanmorris" (for reasons not recorded). A gentleman was said to have spat in the eye of another eminent barrister in the very chamber of the Irish House of Commons, that incident also apparently resulting in a horsewhipping, presumably at the instance of the the recipient of the trajectile. Barrington states that the horsewhippings (which he facetiously refers to as "those little *incivilities*") "were arranged very amicably, and without the aid of any deadly weapon whatsoever, I suppose for *variety's* sake." However, Counsellor O'Callaghan, a friend of the victim Curran, whom he had persuaded to keep quiet about the horsewhipping incident, was himself soon

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[26] Barrington, *op. cit.*, n 10, Vol. II, pp 40-47.

[27] Barrington, *op. cit.*, n 10, Vol. II, pp 47-52.

after shot dead by a Galway attorney. No explanation is offered by Barrington for this conduct on the part of the murderous attorney.[28]

There was a darker side to this pugnacity. It reflected the social discord and unrest that had simmered in Ireland for generations (especially from the defeat of King James II at the Battle of the Boyne in 1690 until the Union with Great Britain in 1801). By the same token, it was said that "[t]he universal practice of duelling, and the ideas entertained of it, contributed not a little to the disturbed and ferocious state of society in Ireland".[29] There were tensions arising out of religious differences in a country where the religion of the vast majority of the population was largely (at least in theory) proscribed, and where the official power and the social influence of the nation were concentrated among the members of a religion which constituted a small minority of the population. The deep injustice of the Penal Laws in his homeland, resulting in the suppression of the Catholic majority, while favouring the Protestant landlords, was recognised by the great Irish-born political philosopher Edmund Burke in his celebrated letter to Sir Hercules Langrishe.[30]

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[28] Barrington, *op. cit.*, n 10, Vol. II, pp 6-7. The words in italics thus appear in the original publication. It is possible that Barrington may here be confusing this incident with an occurrence in July 1791 when John Philpot Curran became embroiled in an unseemly altercation with a member of the Bingham family of County Mayo. Bingham was so irate that he sought out Curran at the Four Courts and beat him severely with a whip, in order to provoke a challenge to a duel. Ultimately Bingham made a public apology and no duel took place: Kelly, *op. cit.*(*"That Damn'd Thing Called Honour" ...*), n 15, p 198. However, there is a proximity as to dates, since Counsellor O' Callaghan was killed only two months later, in September 1791, at Ennis in County Clare (not far distant from Galway): Kelly, *op. cit.*, p 201. Curran himself was no stranger to duels: apart from the provocation by Bingham, he fought five duels (not merely three, as indicated by Barrington, *supra*): Kelly, *op. cit.*, *supra*, pp 137-138, 149, 198. Curran had achieved professional celebrity at the Cork Assizes in 1780, when he appeared for an elderly Catholic priest, Father Neale, against Lord Doneraile, a cruel Protestant landlord, who had horsewhipped the priest for publicly denouncing an adulterous parishioner. The jury awarded Father Neale damages of 30 guineas for the assault. Lord Doneraile then challenged Curran to a duel, in which Doneraile fired and missed, and Curran declined to fire: Kelly, *op. cit.*, *supra*, pp 137-138 (Kelly, however, identifying Curran's opponent as being, not Lord Doneraile himself, but Captain St. Leger, a kinsman of the defendant and a witness in the case).

[29] [James Edward Walsh], *op. cit.,* n 8, p 21.

[30] *The Writings and Speeches of Edmund Burke* (general editor Paul Langford), 9 volumes, Volume IX (ed. R. B. McDowell (Oxford, 1991), Part II. Ireland, "A Letter to Sir Hercules Langrishe, Bart., M.P., on the subject of The Roman Catholics of Ireland ..." (1792), at p 597. See Chapter 1, text to n 1. The foregoing passage is quoted (not entirely accurately) by Ann Galbally, *Redmond Barry: Anglo-Irish Australian* (Melbourne, 1995), p 8, who, however, incorrectly, cites Henry Grattan, *op. cit.*, n 18, Vol. IV, p 240, as authority therefor.

It has already been noticed (in Chapter 1) that until the end of the eighteenth century the Judges of the Irish Courts and the barristers who appeared before them were drawn from the English legal profession or from Irish practitioners of the Protestant Ascendancy,[31] since it was not until 1792 that the penal statutes prohibiting Catholics from the practice of the law were repealed.[32]

The practice of duelling in Ireland, especially among members of the legal profession, fell into disfavour after the Union with Great Britain in 1801, and by the time Dickens was writing, some sixty years later, appeared "to be utterly extinct".[33] Nevertheless, acceptance of duelling in so-called matters of honour continued to be a characteristic of Irish gentlemen well into the nineteenth century, especially throughout Britain's colonial Empire. For example, one of the participants in what was probably the last duel fought in Canada, in March 1845, was an Irishman. That was the dedicated and dispassionate colonial official Dominick Daly, a Catholic and a future Governor of South Australia. Despite his official position, Daly, somewhat curiously, accepted the challenge of an excited French-Canadian who was opposed to the union of Upper and Lower Canada. Neither participant suffered injury in this encounter.[34] In the late eighteenth and early nineteenth centuries lawyers had been enthusiastic participants in duels in Upper Canada (the predecessor of modern Ontario), where they followed the rules adopted at the Clonmell Assizes of 1775, referred to by Barrington.[35] In that colony members of the legal profession made up the majority of would-

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[31] As to the meaning of the phrases "Protestant Ascendancy" and "Irish Ascendancy", see R. F. Foster, *Modern Ireland 1600-1972* (London, 1988), Chapter Eight, "The Ascendancy Mind", pp 167f, especially pp 170-180; R. F. Foster, "Ascendancy and Union", Chapter 4 in *The Oxford History of Ireland*, ed. R. F. Foster (Oxford University Press, 1992); Jarlath Ronayne, *The Irish in Australia: Rogues and Reformers, First Fleet to Federation* (Dublin, 2002, revised edition, 2003), pp 5-6. See Chapter 1, n 23.

[32] By 32 *Geo*. III, c.21 (18 April 1792). See Chapter 1, text to notes 24, 25.

[33] Dickens, *op. cit.*, n 1, p. 212.

[34] Desmond McCabe, "Daly, Sir Dominick (1798-1868)", *Dictionary of Irish Biography*, Volume 3, p 19 at p 20. See also Marjorie Findlay, "Daly, Sir Dominick (1798-1868)", *ADB*, Volume 4, p 12; A. G. L. Shaw, "Daly, Sir Dominick (1798-1868)", *Oxford Dictionary of National Biography*, Volume 15, pp 2-3. See Chapter 6, text to n 39, and following. This duel fought by Daly may be contrasted with the duels in which Thomas Welsh, Attorney-General of Van Diemen's Land, participated a year earlier, in March 1844 (to which reference is made later in this Chapter). Daly's career did not suffer as a result of his encounter, whereas Welsh was peremptorily dismissed by Lieutenant-Governor Sir John Eardley-Wilmot.

[35] Text to notes 19, 20, *supra*; *Colonial Advocate* (York [Toronto], Upper Canada), 3 February 1825.

be duellists. It has been estimated that, at the very least, half these men were lawyers or law students who went on to become lawyers. Just as in Ireland, in Missouri and in the Australian colonies these encounters usually arose out of contested court cases.[36]

In the Australian colonies, with their small populations, social distinctions acquired a significance and importance which might not have been recognised in contemporary Great Britain or Ireland. One of the marks of a gentleman was considered to be his entitlement to issue or to accept a challenge to a duel.[37] Further, it has been asserted that, in a colony with no police force and a rudimentary legal apparatus, "the code of honour may have served a useful purpose ... Derived from trial by combat, duelling was a peculiarly upper class activity."[38] Thus at the very time when duelling in England and Ireland was coming to an end, the practice still continued in the Australian colonies, where the predilection of Irish lawyers for resolving their differences by duelling had, on occasion, its counterpart in Australia. Although they were "mostly regarded as a mockery of the real thing, and frequently ended in farce",[39] nevertheless some encounters were more serious.

One of the most celebrated Australian duels involving an Irish lawyer was that in August 1841 between Redmond Barry and Peter Snodgrass. Barry was an Irish barrister whose successful life and career in Melbourne, where he arrived in 1839, has already been noticed in earlier chapters. Snodgrass, four years younger than Barry, was a squatter of Scottish origins. He was a wild young man and a high-liver, who later confessed to Mr Justice Willis that he was usually tight in the mornings ("tight" being a euphemism for "drunk" or

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[36] Cecilia Morgan, ""In Search of the Phantom Misnamed Honour": Duelling in Upper Canada", *Canadian Historical Review* (December 1995), Volume 76, Issue 4, pp 529-563, at p 535, n 20; pp 544-545, n 53.

[37] Paul de Serville, *Port Phillip Gentlemen and Good Society in Melbourne Before the Gold Rushes* (Melbourne, 1980), Chapter 5, "A Question of Honour", pp 109f; Appendix VI, "Duels,Challenges, Horsewhippings and Courts of Honour", pp 214f.

[38] Jarlath Ronayne, *op. cit.*, n 31, pp 120-121.

[39] G. Davison, J. Hirst and S. Macintyre (eds.), *The Oxford Companion to Australian History* (Melbourne, 1998), pp 197-198.

"inebriated").[40] The duel arose out of a private letter in which Barry had referred unfavourably to his fellow Melbourne Club member, Snodgrass. When the letter was shown to him, Snodgrass demanded satisfaction from Barry. In the words of Edmund Finn ("Garryowen"), who was an eyewitness to Melbourne of the 1840s,

> Though the weather was the reverse of promising Barry made his appearance on the ground done up with as much precision as if attending a Vice-Regal levée. Even then he wore the peculiarly fabricated bell-topper ... was strap-trousered, swallow-tail coated, white-vested, gloved and cravated to a nicety ...
> When they sighted each other at the recognised measurement, before Barry took the firing-arm from his supporter, he placed his hat with much polite tenderness upon the sward near him, ungloved, drew down his spotless wristbands, and saluted his wicked-looking antagonist with profound obeisance ... Then taking his pistol and elevating himself to a majestic pose he calmly awaited the word of command ....
> Snodgrass fussed and fidgeted a good deal ... he was Barry's antithesis as a student of the proprieties. It was his over-eagerness on such occasions that caused his duelling to eventuate more than once into a fiasco.

That is what happened on this occasion. Snodgrass fiddled with his gun, the hair-trigger prematurely went off, and he "inadvertently discharged too soon." His opponent having been completely outfaced, "Barry at once magnanimously fired in the air."[41] At the time of the duel Barry was aged barely 28. But he had already achieved that degree of restraint and self-control, which, together with his invincible politeness and unfailing courtesy, were qualities so constantly required of him in the face of gross provocation from the notoriously rude and irascible Mr Justice Willis, the Resident Judge of the Supreme Court of New South Wales in the Port Phillip District, before whom Barry frequently appeared. Barry's biographer equates his demeanour and conduct at the duel with that of the man in society who strives first for control over himself, confident that this will lead to power over others, and suggests that by

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[40] de Serville, *op. cit.*, n 37, p 112, cites Ronald McNicoll, *The Early Years of the Melbourne Club* (Melbourne, 1976), pp 28-29, as authority for the statement attributed to Snodgrass concerning his regular matutinal condition. It is possible that that statement was made in the course of Snodgrass's bankruptcy proceedings before Mr. Justice Willis, to which McNicoll makes reference.

[41] Garryowen [Edmund Finn], *The Chronicles of Early Melbourne 1835-1852* (Centennial edition, Melbourne, 1888), Vol. II, pp 779-780. Galbally, *op. cit.*, n 30, pp 58-59, in setting forth the foregoing extract from Garryowen, inaccurately transcribes the phrase "drew down his spotless wristbands" (wristbands being shirtcuffs) as "drew down his spotless waistbands", thus giving the false, and somewhat indelicate, impression that Barry was in the process of removing his trousers.

his attire Barry was signifying both his full-blooded response to the occasion and his contempt for anything less.[42] That Barry should have been willing to accept the challenge of anyone, let alone of such an irresponsible and thin-skinned young wildcard as Snodgrass,[43] reveals that Barry was manifesting the traditional characteristics and attitudes of his colleagues at the Bar in his native land, of a generation or so earlier.

A similar element can also be discerned in the character of Sir James Dowling, second Chief Justice of New South Wales. As has already been observed,[44] Dowling, although born in London, was proud of his Irish ancestry[45] (his grandfather, Vincent Dowling, was "not only an Irishman by birth, but possessed of all those attributes that distinguish the Irish Gentleman", whilst his father, a younger Vincent Dowling, had been educated for the Irish Bar, but was never called, and never practised law[46]). By members of his family the Chief Justice was regarded as an Irishman. His son, James Sheen Dowling, recalling that his father was of Irish extraction, said that "no-one could be in his company long without being made aware of it", and that "[h]e had all the attributes of an Irishman".[47] Whilst ever conscious of the dignity of the Supreme Court of New South Wales, and priding himself upon the public persona he presented, as Judge and as Chief Justice, Dowling could, at least in private, give way to his emotions, and those working with him were not secure from his occasional outbursts. His son Vincent, at that time employed as clerk to his father, wrote, "I am still my Father's Clerk and come in for the usual blowings up which cannot be helped but there is an

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[42] Galbally, *loc.cit.*, n 30, p 58, referring to Edward Bulwer-Lytton, *Pelham: or, the Adventures of a Gentleman* (London, 1828).

[43] Despite his personal shortcomings, Snodgrass in 1851 was elected to the first Victorian Legislative Council, retaining his seat until Responsible Government. Thereafter, he was a member of the Legislative Assembly until his death in 1867: Alan Gross, "Peter Snodgrass (1817-1867)", *ADB,* Volume 2, p 455.

[44] Chapter 2, text to notes 53-58.

[45] Anthony Dowling, *Fortis et Egregius or Dowling of Ballyroan* (Sydney, 1996), pp 6, 63; Anthony Dowling (ed.), *Reminiscences of a Colonial Judge* (James Sheen Dowling) (Sydney, 1996), p 46.

[46] Reminiscences of James Sheen Dowling, typescript, Chapter 1 (Mitchell Library C194; Dowling Papers National Library MS 3485/2), p 1.

[47] Anthony Dowling (ed.), *Reminiscences of a Colonial Judge*, n 45, p 46.

old saying money pays for a broken head. I have also several disagreeable things to do but I am like the Cobbler I grin at them all and remember that it cannot last for ever."[48]

Thomas Callaghan, who had been the frequent recipient of Dowling's benevolent interest and hospitality from the time of the young barrister's arrival in the colony from Ireland in February 1840, could nevertheless be both frank and uncharitable in the opinions he confided to his diary, where he frequently referred to Dowling as "Blowhard" or "Old Blowhard", and on one occasion, quite undeservedly, as "the old dotard" and "[a] sneaking, heartless, talentless old debauchee".[49] He even went so far as to describe the Chief Justice (albeit in somewhat qualified terms) as "a nasty old man".[50]

By the time of his duel with Barry, Snodgrass was not without experience in such encounters. During the course of an evening in the Melbourne Club, Snodgrass considered himself insulted by William Ryrie, another young squatter, and challenged the latter to a duel, with an outcome similar to that with Barry several years later.[51] It has also been stated that Snodgrass had "issued at least one further challenge" (presumably, that in 1842 to George Brunswick Smyth, which was the subject of a court of honour in the Melbourne Club).[52] In early 1837 Snodgrass himself had been on the receiving end of a challenge from Alan McPherson. But this time it was Snodgrass's opponent who could not load and fire his pistol

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[48] Vincent Dowling to his brother James Sheen Dowling, 13 February 1837, Dowling Correspondence, Mitchell Library A489, f 182.

[49] J. M. Bennett (ed.). *Callaghan's Diary* (Sydney, 2005), for example, Saturday, 19 September 1840; Saturday, 19 June 1841; Tuesday, 26 October 1841. (This publication is hereinafter referred to as *Callaghan's Diary*.)

[50] *Callaghan's Diary*, p 36, Friday, 1 January 1841.

[51] Garryowen, *op. cit.*, n 41, Vol. 2, pp 779-780; de Serville, *op. cit.*, n 37, p 110; also, *The Australian Encyclopaedia* (Sydney, 1958), Vol. III, article "Duelling", p 301, where, at p 302, it is asserted (without attribution) that in the duel with Ryrie, Snodgrass accidentally shot himself in the toe, whilst in the duel with Barry, Snodgrass again (presumably also accidentally) shot himself in the foot.

[52] de Serville, *op. cit.*, n 37, p 109. At about the same time, Snodgrass's father, Lieutenant-Colonel Kenneth Snodgrass, who had formerly been acting Lieutenant-Governor of Van Diemen's Land and subsequently acting Governor of New South Wales, was charged with attempting to provoke a duel with his neighbour near Raymond Terrace, James King of Irrawang, and in July 1842 was fined £100 (E. J. Lea-Scarlett, "Snodgrass, Kenneth (1784-1853)", *ADB*, Volume 2, p 454 at p 455).

properly, and who, in consequence "was Humbugged and made a fool of by every one of his acquaintance."[53]

In 1845 James Croke, the Crown Prosecutor for the Port Phillip District, was challenged to a duel by an attorney, James Hunter Ross. The Irish Croke, a native of Mallow, County Cork, was a mercurial figure of impulsive and eccentric disposition, who was later described by a contemporary as "a cross-grained and red-gilled customer" and as the the "queer old Crown Prosecutor, often as uncouth in his tongue as in his general demeanour".[54] The challenge, continuing the tradition among lawyers in Ireland of a generation or so earlier, had its origin in an exchange between the two practitioners during the course of the hearing of a civil case before Mr Justice Therry. An interjection by Ross provoked Croke into saying that the former "had trumped up the case for his own benefit", which comment resulted in Ross's challenge. However, as a result of the tactful handling of the situation by Dr Thomas Black, whom Ross had requested to act on his behalf, the duel was averted and feelings were assuaged, despite Croke refusing to provide the requested apology. Mr Justice Therry, who appears to have become aware of the threatened duel, subsequently expressed his felicitations to the parties upon this resolution of their differences.[55]

In the light of his celebrated disputes with officialdom in the Port Phillip District (ranging from Superintendent Charles La Trobe,[56] through Chief Justice Sir William àBeckett,[57] and Mr Justice Willis,[58] to such colleagues at the Melbourne Bar as Robert

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[53] Vincent Dowling to his brother James Sheen Dowling, 13 February 1837, Dowling Correspondence, Mitchell Library A489, f 182.

[54] Garryowen, *op. cit.*, n 41, Vol. I, p 85, Vol. II, p 866.

[55] Garryowen, *op. cit.*, n 41, Vol. II, p 781.

[56] CO 309/1, ff. 285, 290, 292, 292a, 293a, 333, 351-352,

[57] Diary of Robert William Pohlman (La Trobe Library, State Library of Victoria, MS 10303), 7, 8 February 1846, 17-19 March 1847, 8 July 1847, 10 December 1847.

[58] Sir Arthur Dean, *A Multitude of Counsellors* (Melbourne, 1968), p 12; H. F. Behan, *Mr Justice J. W. Willis* (Glen Iris, 1979) p 261; Max Bonnell, *I Like a Clamour: John Walpole Willis, Colonial Judge, Reconsidered* (Leichhardt, NSW, 2017), pp 211-212.

Pohlman and Redmond Barry[59]), it is somewhat surprising that this was the only recorded occasion upon which Croke was challenged to a duel.

Other instances of Irish lawyers in the Australian colonies participating in duels include the encounter in Hobart in March 1844 between two barristers, Thomas Welsh, Attorney-General of Van Diemen's Land, who was an Irishman, and another barrister, Robert Stewart, arising out of a verbal exchange in court between Welsh and his predecessor as Attorney-General, Edward Macdowell, another Irishman. Welsh, a highly respected member of the Irish Bar, had arrived in Van Diemen's Land in 1841, to replace Macdowell, who had been dismissed by Lieutenant-Governor Franklin. Not surprisingly, Macdowell held a grudge against Welsh, and was determined to undermine him and bring him down.

An opportunity to do so arose when Welsh, as Attorney-General, was prosecuting in a perjury trial, and Macdowell (who had returned to private practice at the Bar) was appearing for the accused. According to Welsh, Macdowell in addressing the jury, attributed to Welsh allegations "in most offensive language" that, in effect, Macdowell had used his former office to make it "subservient to the private ends of private individuals", and said that Welsh's conduct was wanting in "manliness". Emotions became enflamed. Exchanges between the two continued after the trial, and at the Union Club in Hobart on the following day. When Welsh, after Macdowell's departure from the Club, told bystanders that Macdowell's conduct was cowardly, Stewart said that he would not hear his friend defamed, and issued the challenge to Welsh. The duel was fought at five o'clock on the following morning in the Hobart Domain. Stewart fired at Welsh, but missed. Welsh fired "in an opposite direction it never having been my intention to fire at him". Honour was deemed satisfied, and the combatants shook hands.[60]

A few days later Attorney-General Welsh again fought a duel, this time with Thomas Macdowell, another Irishman, who was Edward Macdowell's younger brother, but was a journalist, not a lawyer. Here the *casus belli* was totally absurd. It arose out of Welsh, at a

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[59] Diary of Robert William Pohlman, *op. cit.* n 57, 8 July 1847.

[60] Welsh to Stanley, 24 March 1844, CO 280/168, folios 339a, 340a, 341a.

dinner for "Irish Gentlemen", singing a song relating to "bygone days of Ireland", to the sentiments wherein, if not to the manner of Welsh's rendition whereof, Thomas Macdowell took great exception. Despite the pleas of the majority of his co-diners, Welsh desisted from continuing the song. Nevertheless Thomas Macdowell publicly accused him of playing politics, and "branded [Welsh] with the epithets of coward and scoundrel". Welsh issued a challenge, and the duel ensued. Thomas Macdowell discharged his pistol into the air, and Welsh declared himself satisfied, although he declined the offer of Macdowell's hand.[61] Such a ridiculous incident could well have emerged from the pages of Sir Jonah Barrington's reminiscences.

No criminal charges were brought against any of the participants in these two duels, and, indeed, one local newspaper published a spirited defence of duelling as a way of upholding the "sanctity and character of *honour*".[62] Nevertheless, the commission of two breaches of the peace by the Attorney-General of the Colony was too much for Lieutenant-Governor Wilmot, who suspended Welsh, and reported to the Secretary of State that he had provisionally appointed a replacement to the office.[63]

Edward Macdowell's aggressiveness, a very Irish characteristic, and his disposition to resolve a professional dispute upon the duelling field rather than in the courtroom was also manifest in August 1849. During the course of a Supreme Court hearing there was a falling out between Francis Villeneuve Smith, the Crown Solicitor and Clerk of the Peace of Van Diemen's Land (and later to be Premier, Judge and Chief Justice in Tasmania), and Macdowell, who by then had become the Commissioner of the Insolvency Court. A challenge was issued; a duel resulted --- one of the last reported duels in that Colony. The borrowed pistols did not discharge, and the participants decided not to continue. One local newspaper,

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[61] Welsh to Stanley, 24 March 1844, CO 280/168, at ff 343, 344, 346.

[62] *Cornwall Chronicle* (Launceston, Tasmania), 30 March 1844, quoted in Stefan Petrow, "Duelling in Van Diemen's Land: The Dismissal of Attorney-General, Thomas Welsh, in 1844", *Tasmanian Historical Research Association, Papers and Proceedings*, Volume 47, No. 3 (September 2000), p 185.

[63] Wilmot to Stanley, 25 March 1844, CO 280/168, f 319. After Welsh's death in Dublin in 1859 an obituary published in Hobart stated that, after leaving Van Diemen's Land, he has been appointed Attorney-General in Calcutta, a statement which, according to Stefan Petrow, cannot be verified (*Hobart Town Advertiser*, 17 January 1860; Stefan Petrow, *op. cit.*, n 62, p 185).

in reporting the encounter stated that, in nine cases out of ten, duels gave little cause for alarm and were calculated to bring the parties into "the most prominent ridicule".[64] Smith and Macdowell were fortunate that, unlike Welsh, each participant retained his official employment. It has been suggested that, because of the high regard in which Lieutenant-Governor Denison held Smith on account of his official services, His Excellency declined to intervene, and preferred to allow the incident to fade from memory.[65] All the foregoing duels in the Australian Colonies were fought with pistols, and all the antagonists emerged uninjured (at least in body, if not in reputation).

Sir John Jeffcott, an Irishman and a graduate of Trinity College, who had practised at the English Bar, but not at the Irish Bar, in 1837 became the first Judge in South Australia. Four years earlier at Exeter in England he had fought a duel, with pistols, in which he had fatally wounded his opponent, a young and popular local Irish physician, Dr Peter Hennis, MD. Jeffcott stood his trial for murder, at the Exeter Assizes in March 1834. The prosecution offered no evidence and Jeffcott was acquitted. This is probably the only instance in Australian history of a Judge of a superior Court being tried for murder, Jeffcott at the time of the duel being on leave from his position as Chief Justice of The Gambia and Sierra Leone.[66]

There were other instances of duels or of physical confrontations between lawyers, albeit not of Irish origin, in the Australian colonies. Thus their only significance to the present topic is to show that the prevalence of duelling among lawyers was not confined to Irishmen, although Irish lawyers probably participated with greater enthusiasm and frequency than did their non-Irish colleagues.

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[64] *Colonial Times* (Hobart), 14 August 1849, p 2, quoted in Stefan Petrow, *op. cit.*, n 62, p 187.

[65] J. M. Bennett and R. C. Solomon, *Sir Francis Villeneuve Smith, Third Chief Justice of Tasmania 1870-1885* (Alexandria, NSW, 2019), p 80.

[66] R. M Hague, *Sir John Jeffcott: Portrait of a Colonial Judge* (Melbourne, 1963), pp 29-50. See Chapter 6, text to notes 52, 53.

Horsewhipping

The practice of horsewhipping (references to instances whereof among Irish lawyers have have already been made[67]) also was not unknown in the Australian colonies.[68] Thomas George Gregson ("a man in whose mouth eloquence becomes vituperation - argument is turned into slang, and discussion worse than pothouse brawling"[69]), an early Premier of Tasmania, was unrestrained in his violent denunciations of those with whom he found himself in dispute. The dusky complexion of Francis Villeneuve Smith (Premier, Judge and ultimately third Chief Justice of Tasmania), gave occasion for Gregson to denounce Smith in most unseemly language, even in the House of Assembly.[70] Gregson had been instrumental in securing the recall of the Lieutenant-Governor, George Arthur, in 1836. However, the latter's officers remained in the colony. Having fought a duel with Henry Jellicoe, one of Arthur's supporters, Gregson horsewhipped the Governor's nephew, Henry Arthur (who had held an official position in the customs service during his uncle's administration of the colony). Gregson asserted that, having been provoked by Arthur's insults in a theatre saloon, he had been denounced by Arthur in a placard as "a liar, a bully and a dastardly coward" (which latter allegations Arthur denied), and that he had horsewhipped Arthur in consequence.[71] The latter initiated a criminal prosecution against Gregson for assault. He was sentenced to imprisonment for three months and a fine of £200. In consequence of a petition signed by

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[67] Barrington, *op. cit.*, n 10, Vol. II, pp 6-7.

[68] de Serville, *op. cit.*, n 37, Appendix VI: Duels, Challenges, Horsewhippings and Courts of Honour, pp 214f.

[69] *Mercury* (Hobart), 14 September 1855, p 2.

[70] Bennett and Solomon, *op. cit.*, n 65, pp 149-155.

[71] At the end of December 1835 Henry Arthur had attempted --- but without success --- to provoke into a duel Alfred Stephen, that inveterate opponent of duelling, who at the time was the Attorney-General of Van Diemen's Land (J. M. Bennett, *Sir Alfred Stephen, Third Chief Justice of New South Wales 1844-1873* (Leichhardt, NSW, 2009), pp 92-93). Some sixteen years later Alfred Stephen's elder brother, Mr Justice Sidney Stephen (a Judge of the Supreme Court of New Zealand), had a similar experience, when in January 1852 in Dunedin Dr Henry Manning, a fiery local doctor, attempted --- but also without success --- to provoke Sidney Stephen into a duel, and Manning was bound over to keep the peace (A. H. McLintock (ed), *An Encyclopaedia of New Zealand*, 3 volumes, (Wellington, 1966), Vol. 1, p 501; Vol. 2, p 311 at p 312).

1400 citizens on Gregson's behalf, the new Lieutenant-Governor, Sir John Franklin, remitted the remainder of Gregson's sentence, "as an act of grace calculated to allay public feeling".[72]

Some sixteen years later, in November 1852, Gregson himself was subjected to a horsewhipping, at the hands of John Donnellan Balfe. An Irish born political journalist (who later entered the Tasmanian House of Assembly), Balfe had arrived in Van Diemen's Land in October 1850. Both then and for many years thereafter his reputation was clouded by rumours and innuendoes concerning his role in the arrest and subsequent conviction for treason felony of William Smith O'Brien and the other leaders of the Young Ireland movement in 1848.[73] As Balfe himself had joined the Young Irelanders in 1847, before becoming a paid informer for Lord Clarendon, the Lord Lieutenant of Ireland,[74] it is not surprising that such epithets as "Judas" and "spy" were directed towards him. Denunciations in various local newspapers regarding Balfe's participation in the arrest and conviction of the Young Ireland leaders, provoked him in late September 1851 to challenge the co-founder and editor of the *Examiner*, James Aikenhead, to a duel, with the consequence that Balfe was bound over to keep the peace for six months.[75]

A little over a year later Gregson, having asserted that Balfe was the controlling power behind the *Hobart Town Advertiser,* at a public dinner denounced Balfe for receiving "blood-money", and compared him to Judas --- to the latter's advantage.[76] Aroused by these allegations, Balfe (who was renowned for his heavy drinking --- in earlier days of amity between them he had once boasted to Gregson of drinking 40 glasses of hot brandy and water

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[72] F. C. Green, "Gregson, Thomas George (1798-1874)", *ADB*, Volume 1, p 475.

[73] Stefan Petrow, "The Bully of Tasmanian Politics: John Donnellan Balfe 1850-1880", *Tasmanian Historical Research Association, Papers and Proceedings*, September 1999, Volume 46, No. 3, p 117 at p 118. The death sentences pronounced upon Smith O'Brien and the other Young Irelanders were commuted to transportation to Van Diemen's Land. It is curious that Balfe chose the same destination when shortly thereafter he himself departed, voluntarily, from Ireland.

[74] For Balfe's activities as a spy, Stefan Petrow, "Idealism Betrayed: John Donnellan Balfe, Supergrass of 1848", in R. Davis and S. Petrow (eds.), *Ireland and Tasmania 1848: Sesquicentenary Papers* (Sydney, 1998), pp 70-94.

[75] *Examiner* (Launceston, Tasmania), 27 September 1851; Stefan Petrow, *op. cit.*, n 73, p 120.

[76] *Colonial Times* (Hobart), 9 November 1852; J. D. Balfe, *The Celebrated Trial of Regina v. Balfe* (Hobart, 1853), p 15; L. L. Robson, *A History of Tasmania* (Melbourne, Oxford University Press, 1983), p 479; Stefan Petrow, *op. cit.*, n 73, p 121.

at one sitting[77]), Balfe attacked Gregson with "a large jockey whip". For this conduct he was convicted of assault, and fined £200. The payment of that fine was then raised by public subscription.[78] Obviously, in each of these two incidents involving Gregson, public opinion was on the side of the assailant rather than the victim.

Although not a lawyer, Balfe, in his conduct towards anyone who crossed him, manifested the attitudes of those hot-heads of his native Ireland, who, especially when enflamed by drink, were ever ready to resort to duelling or horsewhipping, often not so much to protect their honour from perceived affront, but to put an end to inconvenient opposition. However, in the Australian colonies the civil authorities (unlike those in Ireland a generation or more earlier) were prepared to intervene, and to restrain such practices by binding over one, or both, of the participants to keep the peace.

In 1837 in London the eccentric and malevolent James Mudie, in his warped and libellous publication, *The Felonry of New South Wales*, maligned Dr John Kinchela, the Irish-born former Attorney-General and acting Supreme Court Judge in the colony. Upon Mudie's return to Sydney in 1840 he was publicly horsewhipped in George Street, Sydney by Kinchela's son (also John Kinchela, and also Irish born). Mudie brought civil proceedings for

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[77] Stefan Petrow, *op. cit.*, n 73, p 122.

[78] M. Roe, "The Establishment of Local Self-government in Hobart and Launceston, 1845-1858", *Tasmanian Historical Research Association, Papers and Proceedings*, (1966), Volume 14, p 36; Stefan Petrow, *op. cit.*, n 73, p 121.

assault and battery against the younger Kinchela, and the jury awarded him damages of £50 (which sum, together with the costs, was thereupon paid by a public subscription).[79]

Another instance of horsewhipping, this time in Victoria, involved John Leslie Fitzgerald Vesey Foster, a son of a Baron of the Irish Court of Exchequer and a scion of the Irish Protestant aristocracy, to whom reference is otherwise made in this Thesis.[80] After arriving at Port Phillip in 1841, he embarked upon pastoral ventures, before entering public life. In 1843, in consequence of a dispute over a land deal, Foster challenged the vendor, Dr Farquhar McCrae, to a duel. When the latter declined, Foster publicly horsewhipped him and his mount. In consequence of that assault Foster incurred a fine of £10 and damages of £250.[81]

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[79] *Trial of the case, Mudie v. Kinchela, for horsewhipping the Plaintiff: in the Supreme Court of New South Wales on Monday, October 26, 1840 before The Hon. Mr. Justice Willis and a Special Jury* (Sydney, 1840). It should be observed that the name of Kinchela's son is given as James Butler Kinchela by the anonymous author in "John Kinchela (1774?-1845)", *ADB* Volume 2, p 51 at p 52 (which article also incorrectly refers to the younger Kinchela being "fined" £50). The foregoing pamphlet, *Trial of the case, Mudie v. Kinchela ...*, is stated (at p 3) to be "taken directly from the Sydney Herald, with the exception of Mr. Therry's speech for the defence, which has been revised for this publication". It is unlikely that Therry would have been mistaken as to the name of the client for whom he had appeared at the recently conducted trial, and especially as the report of his address had been revised by Therry himself, for the publication thereof. It should be observed, further, that Bernard T. Dowd and Averil F. Fink, in "Mudie, James (1779-1852)", *ADB*, Volume 2, p 264 at p 266, also give the name of the assailant in the horsewhipping incident as John Kinchela. Sir Roger Therry, although his later *Reminiscences* are not always entirely accurate in detail, whilst not identifying Kinchela's son by name, states therein that the horsewhipping, "in the principal street of Sydney", resulted not in a criminal charge, but in a civil action brought by Mudie against the son for assault, and that "[t]he jury awarded him 50*l.* damages, which with the costs were paid immediately by a subscription in Court": Sir Roger Therry, *Reminiscences of Thirty Years' Residence in New South Wales and Victoria*, 2 ed. (London, 1863), facsimile edition (Sydney, 1974), p 178.

[80] Chapter 3, text to notes 42f; Chapter 7, text to notes 1 and 2. Foster, a graduate of Trinity (BA, 1839), although admitted to the King's Inns in 1835, was not called to the Bar or admitted as an attorney (Edward Keane *et al*. (eds.), *King's Inns Admission Papers 1607-1867* (Dublin, 1982), p 175), where Foster's name is shown as John Vesey Fitzgerald Foster. That name also appears in the records of Trinity College, where it is noted that he "[a]ssumed the surname of Vesey-Fitzgerald": *Alumni Dublinenses* (London, 1924), p 302; whilst in *A Catalogue of Graduates Who Have Proceeded to Degrees in the University of Dublin, From the Earliest Recorded Commencements to July, 1866* (Dublin, 1869), p 205, his name is shown as John FitzGerald Leslie Foster. In the *Australian Dictionary of Biography*, it is stated that his mother (the Honourable Letitia Vesey, née Fitzgerald) "was a sister of Lord Fitzgerald and Vesci and in compliance with his will she and her son John assumed the surname of Foster-Vesey-Fitzgerald in 1860": Betty Malone, "Foster, John Leslie Fitzgerald Vesey (1818-1900)", *ADB*, Volume 4, p 205.

[81] Betty Malone, *loc. cit.*, n 80, p 205.

One famous instance of horsewhipping with an Irish flavour, although neither of the participants was a lawyer, occurred in Ballarat in February 1856. Lola Montez, the notorious Irish-born courtesan, in the course of an Australian theatrical tour was denounced in the columns of the *Ballarat Times* for the immorality perceived in her performance of the Spider Dance (her rendition of which in Melbourne several months earlier had been condemned by the *Argus* "in terms of unmeasured reprobation"[82]). Lola, in true Irish spirit, retaliated by publicly horsewhipping the editor of the *Times*, Henry Seekamp, in the main street of Ballarat (or, possibly, in the less public precincts of the United States Hotel in that town), much to the delectation of the bystanders and to the enhancement of the continuing popularity of her Terpsichorean performances.[83] It was reported that Seekamp, also armed with a whip, "so far forgot himself as to return the compliment with interest."[84]

The Irish lawyers who came to the Australian colonies in the nineteenth century brought with them attitudes to the law and its practice which were probably alien to their English trained colleagues. The foregoing instances of duelling, and direct physical confrontations (including horsewhippings), manifest one such attitude. There was (and to an extent remains to the present day, especially in New South Wales) a toughness, indeed an aggressiveness, in the conduct of litigation and the dealings between legal representatives, reminiscent of those practitioners two hundred or more years ago, who, according to Sir Jonah Barrington, sometimes preferred to decide their court cases upon the duelling fields rather than in the court rooms.

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[82] *Argus* (Melbourne), Thursday, 20 September 1855; *Courier* (Hobart), Tuesday, 25 September 1855, p 2. In Melbourne one outraged moral campaigner, Dr John Lawrence Milton, the leader of the City Court Mission, sought a warrant for Lola's arrest, although he had not witnessed her dance: Miska Hauser, *Letters from Australia 1854-1858* (translated [from the German] by Colin Roderick; edited, with introduction and notes, by Colin Roderick and Hugh Anderson) (Maryborough, Victoria, 1988), Letter 18, Ballarat, 21 September 1855, p 62 at pp 65-66. A public meeting in Ballarat, where one speaker raged furiously against Lola, calling her "that wicked specimen of a female Satan", resolved to march on her venue at the Royal Theatre --- perhaps in the hope of observing the object of their denunciations (Hauser, *loc. cit.*)

[83] *Age* (Melbourne), Saturday, 23 February 1856, p 3; Michael Cannon, "Montez, Lola (1818-1861)", *ADB*, Volume 5, p 271 at p 272; Anne Beggs Sunter, "Seekamp, Henry (c. 1829-1864) ...", *ADB*, Supplement 1580-1980, p 355 at p 356.

[84] *Age* (Melbourne), Saturday, 23 February 1856, p 3; *Portland Guardian* (Portland, Victoria), Monday, 3 March 1856, p 3.

CHAPTER 9

CONCLUSIONS: GENERATIONS OF IRISH LAWYERS IN AUSTRALIA

Breaking new ground --- Historiography and Hagiography --- Repulsion and Attraction --- Demographics --- In Their New Home --- Total coalescence of Irish lawyers into the Australian legal profession

This thesis breaks new ground. It deals with matters rarely discussed or recognised in Australian historiography, being the reasons why throughout the nineteenth century a significant number of Irish legal practitioners, mainly young, chose to leave their homeland, and why the Australian colonies, especially New South Wales and Victoria, were their destinations of choice; and then the consequences of their arrival in those colonies --- consequences to those lawyers themselves and to their new country. Whilst much has been written of the Irish in Australia, those studies have largely dealt with the Irish in a sociological context. The role of Irishmen in the professional life of the Australian colonies has been much overlooked. The presence --- neither its causes nor its consequences --- of significant numbers of Irish lawyers in nineteenth century Australia has not previously attracted scholarly research. It is surprising that this Thesis appears to be the first assessment of those causes and consequences. One possible explanation is the dearth of primary sources, a fact to which further, more detailed, reference will shortly be made.

To be a pioneer in such an area of research is, for any scholar, a challenge and a recognition that there is much further research to be undertaken. What emerges from this thesis should enable and encourage other scholars to pursue, extend and amplify the study of this subject. They may venture in different directions, such as the participation of Irish lawyers in the evolving Australian political parties of the late nineteenth century (especially the Labour [later, Labor] Party) and in the trade union movement, the attitude of those lawyers to the Irish Home Rule movement; and the concern of those lawyers for social reform in such colonial areas as education, marriage, divorce, public health, pensions, unemployment

benefits, or their involvement in the cultural, sporting and recreational activities of the Australian Colonies --- the existence of which have been recognised, if at all, only in passing in this thesis.

Historiography and Hagiography

In 1883 Frederic William Maitland, an outstanding early scholar in the study of English Legal History, chose for his inaugural lecture as Downing Professor of Law in the University of Cambridge, the title "Why the History of English Law is not Written". A biographer has observed,

> Maitland's answer long seemed unexceptionable, even obvious: a legal historian must be a lawyer and successful lawyers will not turn to history. But when history became a more exclusive discipline, exception was taken by historians who were not lawyers.[1]

That latter sentence confirms that fashions exist in the writing of history. The ideas and conclusions of some historians have emerged through the distorting prism constituted by those fashions. For example, social historians such as Professor Manning Clark have largely overlooked legal history. An otherwise uninformed reader of his monumental *A History of Australia*[2] might be forgiven for thinking that in the Colonial era there was little in the way of courts, the legal profession, constitutional development, or even the Rule of Law. A similar criticism could be directed to the *The Oxford History of Australia.*[3] A more recent scholar of note, in writing of Maitland, has observed,

> [Maitland's] findings and vision, although preserved among technical legal historians, have become almost forgotten among the wider historians and the general public ... This amnesia is a good example of what is not usually considered by those who discuss paradigm shifts, namely the way in which

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[1] S. F. C. Milsom, "Maitland, Frederic William (1850-1906), *Oxford Dictionary of National Biography*, Volume 36, p 204.

[2] C. M. H. Clark, *A History of Australia*, 6 volumes (Melbourne, 1962-1987).

[3] *The Oxford History of Australia* (General Editor, Geoffrey Bolton), 5 volumes, 2 ed. (Oxford, 1996).

earlier knowledge of a high quality is too often quietly forgotten.[4]

The other side of that coin is where careless research perpetuates a myth. An instance is the false assertion that the Irish barrister Thomas Callaghan was awarded a bronze medal, or any medal, at the 1851 Exhibition for his compilation of the then Statutes of New South Wales. That false statement, which might have originated with the commentator J. Henniker Heaton, has been adopted unquestioningly by later writers.[5]

Another aspect of the presence of Irish lawyers in the Australian Colonies is the superficial and disdainful treatment of them by later scholars, whether in the field of history or of law. It is to be regretted that so few of the Irish lawyers in Australia --- many of whom contributed significantly to their new homeland --- have been the subjects of serious biographical study. Such a lacuna, especially concerning Justices of the High Court of Australia, was recognised more than fifty years ago.[6] That Australian experience contrasts with the current situation in England, where an eminent legal scholar, of Australian birth, has observed that

> biographical information of one sort or another is burgeoning on modern legal history and that it may have a great variety of forms: raw documentation such as diaries and letters, lists of basic information about individuals, memorial archives, surveys of surviving material in books and articles ... [together with an admixture of] judgements about the individual subject ... running from the hagiographical to the denunciatory.[7]

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[4] Alan Macfarlane, *F. W. Maitland and the Making of the Modern World* (eBook: http://alanmacfarlane/TEXTS/Maitland).

[5] See Chapter 4, text to notes 69-73.

[6] Clifford L. Pannam, "Judicial Biography --- A Preliminary Obstacle", *University of Queensland Law Journal*, Vol. 4, No. 1 (April, 1961), p 57.

[7] William Cornish, *Life Stories and Legal Histories* (Selden Society Lecture, 4 July 2012) (London, 2015), pp 4-5. Nevertheless, as recently as 1982 one historian was complaining that "[J]udicial biography is an infrequent and neglected product of English legal scholarship ... [S]ophisticated and original treatment of English judicial luminaries is conspicuous by its absence" (A. Hutchinson, "Book Review" (1982) 3 *Journal of Legal History*, p 83 (reviewing H. Hirsch, *The Enigma of Felix Frankfurter* (1981), quoted in James A. Thomson, "Judicial Biography: Some Tentative Observations on the Australian Enterprise", *University of New South Wales Law Journal* (1985), Volume 8, No. 1, p 380).

Shortly after the death of George Higinbotham his son-in-law, Professor Edward Morris, a man of great scholarly pretensions, in his memoir of the lately deceased Chief Justice descended into a mere hagiography of unbalanced and biased praise[8] (described by a later scholar as "an affectionate literary remembrance rather than a biographical study"[9]). When Dr Gwyneth Dow embarked upon her analysis of Higinbotham's involvement in the Church-State Victorian conflicts in education in the latter part of the nineteenth century, and the effect upon Higinbotham of the resolution of those conflicts, she feared that, on account of the absence of private papers and the dearth of material on his private life, "a biography of Higinbotham would be unlikely".[10] Dr Dow's fears ultimately proved groundless, although more than forty years elapsed until Dr Bennett rectified that omission.[11]

The life of Henry Bournes Higgins by his niece Nettie Palmer is probably the first biography of an Australian lawyer to have been written by a woman. Although stylistically elegant, it is similarly adulatory and non-critical, the author being preoccupied with her kinsman, whom she elevates to a pinnacle.[12] The works of Morris and Palmer each also suffer the disadvantage that neither author was a lawyer. Similarly, sixty years later, the author of what was apparently intended to be a comprehensive history of the magistracy in New South Wales was not a lawyer. The shortcomings and defects resulting from that lack of qualification and experience are not to be overlooked.[13]

There was then a considerable hiatus in the writing of biographies of lawyers in Australia until the latter part of the twentieth century and the early part of the twenty-first century. Irishmen (Dowling, Stawell, Higinbotham, Fleming, Martin, Darley, Wrenfordsley)

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8 Edward E. Morris, *A Memoir of George Higinbotham: An Australian Politician and Chief Justice of Victoria* (London, 1895).

9 Clifford L. Pannan, *op. cit.*, n 6, p 57.

10 Gwyneth M. Dow, *George Higinbotham: Church and State* (Melbourne, 1964), p v.

11 J. M. Bennett, *George Higinbotham, Third Chief Justice of Victoria 1886-1892* (Leichhardt, NSW, 2006).

12 Nettie Palmer, *Henry Bournes Higgins: A Memoir* (London, 1931). The shortcomings of Palmer's biography have been largely overcome by John Rickard in *H. B. Higgins: The Rebel as a Judge* (Sydney, 1984).

13 Hilary Golder, *High and Responsible Office: A History of the NSW Magistracy* (Sydney, 1991).

have been included in the series of the Lives of the Colonial Chief Justices by Dr J. M. Bennett. Professor John N. Molony has written a scholarly biography of John Hubert Plunkett,[14] and the Reverend Gerald O'Collins has been able to rely upon a valuable collection of family correspondence in the life of his grandfather Patrick McMahon Glynn.[15] Otherwise, except for various articles in the *Australian Dictionary of Biography*, little of a biographical nature has been written about Irish lawyers in Australia during the nineteenth century, and their contribution to the development of the nation.

Apart from the relatively few biographical studies just mentioned, it is also noteworthy that, until now, scholarly research into the Irish in Australia has been largely confined to social history. Few scholars in this field have been lawyers, and thus their researches have suffered the consequences recognised in the foregoing conclusions expressed by Maitland, Milsom and Macfarlane. Likewise, few of the writers on Australian legal or general history have given consideration to the role of Irish lawyers, even in the wider context of Irish settlement in Australia.[16]

Further, in Australian historical, and especially biographical, writings there has been a tendency to categorise, perfunctorily and without question, historical figures according to their perceived good or wicked characters. Whilst for Dr Hazel King Governor Bourke was a

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[14] John N. Molony, *An Architect of Freedom: John Hubert Plunkett in New South Wales 1832-1869* (Canberra, 1973).

[15] Gerald O'Collins, SJ, *Patrick McMahon Glynn - A Founder of Australian Federation* (Melbourne, 1965); Gerald O'Collins, SJ (ed.), *Letters from Irish Australia* (Sydney, Belfast, 1984).

[16] The historiography of Australian legal history is considered in Horst Lücke, "Legal History in Australia: The Development of Australian legal/historical scholarship", (2010) 34 *Australian Bar Review,* pp 109-148. See, also, Michael D. Kirby, "Alex Castles, Australian Legal History and the Courts" (2005) 9 *Australian Journal of Legal History*, p 1.

hero without blemish,[17] Professor A. G. L. Shaw in his *Heroes and Villains in History*,[18] although not placing the Governor in the latter category, at least questioned the justification for the laudatory and adulatory terms of Roger Therry's inscription upon the plinth of Bourke's statue outside the State Library of New South Wales in Sydney.[19] The interpretations and conclusions expressed in that inscription are by their very nature subjective. If such contemporary views and judgments often need to be approached with caution, how much more caution must be exercised in considering the interpretations and conclusions of historians who approach these topics generations or even centuries later? Professor Shaw has appropriately recalled "what Lytton Strachey mischievously declared was the 'first requisite of the historian --- ignorance, which simplifies and clarifies, which selects and omits.' "[20]

Objective facts about historical persons, their characters and achievements, should be presented, and from those objective facts proper conclusions should be drawn. That appears to have occurred only rarely when Irishmen have been considered by modern Australian historians. Few have approached the subject with such a degree of scholarship and intellectual integrity as two Irishmen for each of whom Australia became a temporary home. One was an academic and a former spy, whilst the other was his country's first Ambassador to Australia. Yet in their writings J. J. Auchmuty and T. J. Kiernan each gave consideration to the role of

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[17] Hazel King, "Aspects of British Colonial Policy, 1825-1837, with Particular Reference to the Administration of Major-General Sir Richard Bourke" (unpublished DPhil thesis, University of Oxford, 1959); Hazel King, "The Humanitarian Leanings of Governor Bourke", *Historical Studies, Australia and New Zealand*, Vol. 10 (1961), p 19; Hazel King, *Richard Bourke* (London, 1971).

[18] A. G. L. Shaw, *Heroes and Villains in History: Governors Bourke and Darling in New South Wales* (Sydney, 1966). The various arguments regarding Bourke's liberal attitudes, real or only perceived, in his administrations in the Cape of Good Hope and in New South Wales are considered in Zoe Laidlaw, "Richard Bourke: Irish Liberalism Tempered by Empire", being Chapter 4 in David Lambert and Alan Lester (eds.), *Colonial Lives Across the British Empire: Imperial Careering in the Long Nineteenth Century* (Cambridge, 2006). See, also, Mark Francis, *Governors and Settlers: Images of Authority in the British Colonies, 1820-1860* (Basingstoke, UK, 1992), pp 83-97; J. Ridden, "Making Good Citizens: National Identity, Religion and Liberalism Among the Irish Elite, c 1800-1850" (unpublished PhD thesis, King's College, London (1998)), pp 282-283.

[19] See Chapter 4 n 45. The inscription upon the plinth of the statue is set forth in Appendix C.

[20] Lytton Strachey, *Eminent Victorians* (London, 1918), Author's Preface, quoted in Shaw, *op. cit.*, n 18, p 6.

his countrymen in the development of Australia in a more perceptive and scholarly fashion than that manifested by many Australian historians.[21]

Until the present thesis there has not been a study of Irish lawyers as a professional group in Australia. A scholar embarking upon this study is confronted by many difficulties, especially on account of the want of primary sources. Apart from Thomas Callaghan in his Diary,[22] and Dowling,[23] Darley[24] and Glynn[25] in letters to their respective families, few of the Irish lawyers left records of their professional lives in the Antipodes. Some deliberately destroyed their written memories, lest they be criticised by future generations. Higinbotham specifically directed that his personal papers be destroyed upon his death, without being read or examined by anyone but his wife. The reason, according to Morris, was that Higinbotham "was shocked at the indiscreet revelations in some modern biographies".[26] Accordingly,

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[21]James Johnston Auchmuty, *Irish Education: A Historical Survey* (Dublin, 1937), Chapter IV (pp 68-123); J. J. Auchmuty, "The Biographical Approach to History", *Journal of the Royal Australian Historical Society*, Vol. 46, Pt. 2 (June 1960), p 97; J. J. Auchmuty, "Problems of Nineteenth Century Biography: Wyse, Acton, Lecky" (lecture delivered to the Australian Humanities Research Council, 4 November 1963), Melbourne, *Australian Humanities Research Council Annual Report*, No. 8, 1964; J. J. Auchmuty, "The Anglo-Irish Influence in the Foundation of Australian Institutions", *University of Melbourne Gazette*, Volume 5, No. 3, 26 May 1969; Kenneth R. Dutton, *Auchmuty: The Life of James Johnston Auchmuty (1909-1981)* (Mount Nebo, Queensland, 2000); Kenneth R. Dutton, "Auchmuty, James Johnston (1909-1981)", ADB, Volume 17, p 41; T. J. Kiernan, *A Convict Newspaper in Tasmania* (Canberra, 1952); T. J. Kiernan, *The Irish Exiles in Australia* (Dublin, 1954); T. J. Kiernan, *Transportation from Ireland to Sydney: 1791-1816* (Canberra, 1954); Michael Kennedy, "Kiernan, Thomas Joseph ("Tommy"; "T. J.") (1897-1967)", *Dictionary of Irish Biography*, Volume 5, p 177. The subject of Kiernan's *A Convict Newspaper in Tasmania* was the newspaper *The Irish Exile and Freedom's Advocate* (extracts wherefrom appear in Kiernan's work). As to that curious publication, a convict newspaper published weekly in Hobart from 26 January 1850 to 12 April 1851, of which the editor was Patrick O'Donohue, one of the Irish Exiles transported to Tasmania for his involvement in the 1848 uprising, see (in addition to Kiernan's work) Ross and Heather Patrick, *Exiles Undaunted: The Irish Rebels Kevin and Eva O'Doherty* (St Lucia, Queensland, 1989), pp 71-73; J. M. Bennett, *Reluctant Democrat: Sir William Denison in Australia 1847-1861* (Leichhardt, NSW, 2011), p 90.

[22] Diary of Thomas Callaghan (State Library of New South Wales, Mitchell Library, MSS 2112, Box 1, Item 2); J. M. Bennett (ed.), *Callaghan's Diary* (Sydney, 2005). See Chapter 4, n 1 regarding the Diary in manuscript and the published work.

[23] Anthony Dowling, *Fortis et Egregius or Dowling of Ballyroan* (Sydney, 1996); J. M. Bennett, *Sir James Dowling, Second Chief Justice of New South Wales, 1837-1844* (Leichhardt, NSW, 2001). See Chapter 2, notes 56 58; Chapter 4, n 1. See, also, the memoirs of Sir James Dowling's son, James Sheen Dowling, *Reminiscences of a Colonial Judge* (ed., Anthony Dowling) (Sydney, 1996).

[24] J. M. Bennett, *Sir Frederick Darley, Sixth Chief Justice of New South Wales, 1886-1910* (Leichhardt, NSW, 2016). (See Chapter 2, text to notes 78, 79).

[25] Gerald O'Collins, SJ (ed.), *Letters from Irish Australia* (Sydney, Belfast, 1984) (See Chapter 7, text to notes 80f).

[26] Morris, *op, cit.*, n 8, p ix.

substantial reliance upon contemporary newspapers and secondary sources has been necessary in the researching and the writing of this thesis.

Repulsion and Attraction

The reasons for the questions "Why did Irish lawyers leave their homeland in the nineteenth century?" and "Why were the Australian colonies, especially New South Wales and Victoria, their destinations of choice?" may be considered in the context of repulsion and attraction[27] (on occasion more colloquially referred to as "push and pull" factors). The concept of repulsion, relating to the departure of Irish lawyers from their homeland, depended on Irish circumstances --- legal, social, economic, religious --- which all professional men in that country, not merely lawyers, encountered and which in the case of lawyers tainted their practices. In the late eighteenth and the early nineteenth centuries Ireland's population increased exponentially, a fact reflected in the large number of well educated, upper-middle class young men who, unless they were eldest sons entitled to inherit family estates, were obliged to find a career in one of the already over-crowded professions.

For Catholics, only towards the end of the eighteenth century were they enabled to enter the professions or the armed services. Violence was then prevalent throughout Ireland, especially in Dublin. Many of those young men, be they Catholic or Protestant, decided that they had better prospects overseas. For lawyers, there was too little professional work available for too many legal practitioners. Thus there was an impetus for their departure to destinations where they hoped to achieve greater professional security and success in a less crowded professional environment, and possibly a more tranquil personal lifestyle. Those material and professional circumstances with which they were confronted in their homeland may be regarded as the repulsion element.

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[27] "Without Contraries is no progression. Attraction and Repulsion, Reason and Energy, Love and Hate, are necessary to Human existence" (William Blake, *The Marriage of Heaven and Hell - The Argument* (ed. Michael Phillips) (Oxford, 2011), p 61 at p 62).

The concept of attraction in this context comprised the reasons why particular destinations were chosen. Those reasons included prospects of professional advancement, chain migration, an agreeable climate, an English speaking population, personal security. As has been observed in Chapter 3, reasons for the popularity of the Australian colonies as destinations for Irish lawyers included their entitlement to automatic admission to the profession in Australia, and the fact that the legal principles upon which Australian legal practice was founded were identical to those in Ireland. There by the nineteenth century the principles of the English Common Law had universal application. That source of attraction contrasted with the need to learn new laws, such as in parts of Canada and elsewhere in the British Empire.

An outstanding example of the attraction concept was the career of Frederick Darley. He was encouraged by optimistic professional prospects held out for him by Sir Alfred Stephen, the Chief Justice of New South Wales, and by family connections of his fiancée (soon to be his wife) with the Colony.[28] Darley's experience was not isolated. Often a young professional man's decision to depart Ireland and establish himself in a new country resulted from a combination of repulsion and attraction elements. For example, Thomas Callaghan, a generation earlier than Darley, was pessimistic about his prospects at the Irish Bar (the repulsion element), but he already had an elder brother residing in New South Wales (the attraction element, which in Callaghan's case was also another instance of chain migration). Whether by attraction or repulsion, opportunities in Australia for Irish lawyers were far greater than those available had they stayed in Ireland.

Demographics

The arrival in Australia of a significant number of Irish lawyers from the mid-nineteenth century not only increased the numerical size of the colonial legal profession, but also altered the character of that profession. That is, the English component of the profession (which, until then, had comprised almost the entirety of the colonial lawyers) was diluted by the

[28] See Chapter 2, text to notes 70, 71.

arrival of Irish lawyers, who brought with them their own national attitudes towards the administration of the law and court procedures, as well as towards the colonial society into which they had entered. The arrival and continuing presence of Irish lawyers affected and altered not merely the composition but also the character and complexion of that colonial society, as well as of the Administration, the Courts and the Legislatures of the Australian colonies, where often those lawyers soon became leading and influential citizens (such as Plunkett and Therry, and, later, Martin and Darley, in New South Wales; Barry, Stawell, Molesworth, Gavan Duffy, Cuthbert, O'Loghlen in Victoria; Glynn in South Australia; Hackett in Western Australia).[29] This was despite a certain lack of enthusiasm for the Irish in some official circles (for example, Callaghan's opinion expressed to Plunkett, " ... considering the general feeling towards Irishmen here"; correspondence from Gipps to La Trobe regarding William Jeffcott, " ... although an Irishman").[30]

Despite the significant numerical and proportional Irish component of lawyers, judges and legislators in New South Wales and Victoria, there was soon an almost complete coalescence of those Irishmen with their non-Irish (mostly English) colleagues. There was no separation, either voluntary or compulsory, between the Irish lawyers and their non-Irish brethren. Partly through necessity, partly on account of aspects of their national character, Irish lawyers were soon assisting their fellow countrymen, both professionally and, often, materially. Considerations of nationality frequently outweighed those of religion, especially when prejudices against Irishmen of either religion arose. At least until the latter part of the nineteenth century, Irish lawyers in Australia were largely bonded by their common Irish birth, rather than separated by religious differences between Catholics and Protestants. Nevertheless, on occasion, there was a degree of separation between the Catholic Irishmen and their non-Catholic Irish colleagues, although that was largely a result of the religious bigotry which became more pronounced as the nineteenth century advanced --- bigotry often embraced by Catholics with no less enthusiasm than that directed against them. As has been observed in Chapter 4, by the end of the nineteenth century the character of St Patrick's Day

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[29] See Chapter 7, also Chapter 4.

[30] Chapter 4, text to notes 2, 3.

had changed from being a day of celebration for all Irish in Australia, whatever their religion, to a religious festival reserved for Catholics.[31]

Not only Irish lawyers, but the generality of the Irish emigrés who came to Australia in the nineteenth century swiftly integrated with the settlers who were already established in those colonies. This integration should be contrasted with the situation in America. Irish immigrants to America during the same period largely concentrated in three geographical locations, being the cities of New York, Boston and Philadelphia. Although in Ireland most of those immigrants had been near destitute peasant farmers, when they came to America they did not choose to locate themselves in regional areas where they could pursue their previous rural occupations. They chose to live almost exclusively in the foregoing three cities, residing in garrets and cellars, and where the menfolk mainly followed the occupation of policemen and the womenfolk were employed as domestic servants. For many generations there was little integration between the Irish immigrants to America and the other citizens of the United States. As the legal historian, F. W. Maitland, observed, "The Irish in North America have a ... most unfortunate habit of regarding themselves as part of the Irish nation"[32] (with the concomitant that they did not regard themselves as part of the American nation).

The situation in Australia was entirely different. The Irish newcomers did not concentrate in any particular geographical areas (although, like most other immigrants, they favoured the eastern colonies in preference to South Australia and Western Australia), and settled not only in the chief cities but also in rural districts. Neither did they confine themselves to one or two occupations. When Irish lawyers began to arrive, the barristers, understandably, established themselves in the capital cities, where the Courts were located, and accompanied the judges on circuit throughout the colonies. The solicitors, however, did not confine themselves to those cities, and many soon established themselves in regional centres. That was especially so in such locations as Ballarat and Bendigo in Victoria and in Kalgoorlie and Coolgardie in Western Australia during the respective goldrushes in those colonies.

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[31] Chapter 4, text to notes 155f.

[32] *The Collected Papers of Frederic William Maitland* (ed. G. H. A. L. Fisher), 3 volumes (Cambridge, 1911), Volume III, p 292.

But it was not only in their geographical dispersal throughout the Australian colonies that the Irish arrivals differed from their counterparts in America. In Australia they swiftly integrated with the communities already established throughout the colonies. They did not confine themselves, as did the German immigrants to South Australia in the 1840s or the Chinese miners in the gold diggings of New South Wales and Victoria throughout the 1850s and 1860s, to association with their own countrymen. That integration by the Irish was facilitated by the absence of any language barrier, such as that encountered by the Germans and the Chinese.

With the exception of a few "birds of passage" who stayed in the Australian colonies only briefly, most of the Irish emigrés intended that their destination in the Antipodes should be their home for the remainder of their lives. It was rare for them to return to their native land. Even when, after a successful professional or public career in Australia, an Irishman decided to leave his adopted country, it was uncommon for him to spend his retirement in the land of his ancestors. Croke was one of the few. The retirement destinations of Therry, McCreight, Gavan Duffy and Wrenfordesley have been noticed in Chapter 7.

In Australia even the first generation of Irish settlers of the professional classes were soon becoming leading members of their communities, frequently representing regional areas in the colonial Legislatures, or becoming mayors, Justices of the Peace and leading citizens in local townships. They often achieved professional, political and social preferment that they could not have hoped for in their native land. For example, whilst Parliamentary seats would rarely have been available to solicitors in Ireland, Irishmen, including many solicitors, were notable in the colonial Legislatures, especially in Victoria.

In the second half of the nineteenth century each of the six Speakers of the Victorian Legislative Assembly was Irish born, as were three out of every four Attorneys-General and Solicitors-General in that colony. As journalists and newspaper proprietors, Irishmen, and often Irish lawyers, exercised considerable influence upon local affairs, especially in New South Wales and Victoria. The youthful James Martin, as editor of the *Atlas* in the mid-1840s, was a continuing thorn in the side of Governor Gipps and Governor FitzRoy, as well as of other public figures in the Colony (including Chief Justice Stephen and the Anglican Bishop

William Broughton). Half a century later in Western Australia there was the outstanding example of John Winthrop Hackett, who, through his control of the newspaper, the *West Australian*, was probably second only to John Forrest as the most influential citizen of that colony. Hackett's enduring and greatest memorial was the University of Western Australia (where generations of young men and women acquired free tertiary education throughout more than half of the twentieth century), far surpassing in importance the transient significance of his self-constituted role as a power behind the throne in the Broome-Onslow imbroglio of the late nineteenth century.

The consequences of Irish lawyers establishing themselves in the Australian colonies were largely subjective, being essentially consequences to individual Irish lawyers --- greater prospects of professional success in the Antipodes, rather than in their native Ireland, such professional success usually leading to social and financial achievement, and frequently to offical or political preferment. For that reason, considerable emphasis has been given in this thesis to biographical information regarding the lives of individual Irish lawyers in the Australian colonies.

The objective consequences were of little significance in Ireland, mainly being the removal, to a slight extent, of pressure on an over-crowded legal profession. In Australia those consequences were somewhat greater --- increasing the size of the already existing legal profession. There were some consequences of a procedural and tangential nature (such as visual courtroom arrangements, professional attire in court, the appointment of permanent Crown Prosecutors), but few of a substantive nature. Whilst Sir Gerard Brennan characterised the Irish contribution to Australian law as "significant yet indefinable",[33] Professor Castles considered that "Irish influence on the evolution of Australian law cannot really be quantified. Historically, it has tended to be subsumed within the general spectrum of the hegemony of law in the English tradition."[34]

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[33] Sir Gerard Brennan, "The Irish and Law in Australia", *The Irish Jurist* (1986), p 95.

[34] Alex C. Castles, "Now and Then: Irish Connections with Australian Law", (1992) 66 *The Australian Law Journal*, p 532.

The number of Irish who emigrated to Australia in the nineteenth century was very small compared to those who remained in Ireland, and also was very small compared to those who emigrated to other destinations, especially to America (where there was a positive discouragement of Irish lawyers from entering the legal profession). For most Australians in the nineteenth century Ireland was a place of familiarity, often the place of their birth or ancestry. In Ireland, however, Australia was of little importance, and was largely unknown, except to those who had kinsfolk there.

Neither should it be overlooked that, whilst Ireland and its children made a significant contribution to the development of Australia, there was very little similar contribution by Australians (hardly any by Australian lawyers) to the development of Ireland. Probably the only instance of note is that of Sir Charles Gavan Duffy, whose eldest son of his second marriage, Sir Frank Gavan Duffy, became Chief Justice of the High Court of Australia, whilst of his third marriage his son George (who grew up in France, not in Australia) became President of the High Court of Ireland.

In Their New Home

By way of parallel to the famous aphorism of Sir Henry Maine ("... [S]ubstantive law is secreted in the interstices of procedure"[35]), it may be said that the consequences of the presence of Irish lawyers in colonial Australia have resulted from and been manifestations of the personalities and achievements of those individual lawyers --- men who held judicial or political office or who exercised influence as leaders in their local community or in colonial society generally, or as landowners, business entrepreneurs or newspaper editors or proprietors.[36] For that reason scholarly and objective biographical information concerning those Irishmen acquires great significance. However the reader, no less than the writer, of such biographies should constantly exercise the principle recognised by Justice Felix Frankfurter of the United States Supreme Court, that

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[35] Sir Henry Maine, *Ancient Law and Custom* (London, 1883), p 389.

[36] Biographical details of noteworthy Irish lawyers in the Australian Colonies are set forth in Appendix A.

> The excellence of a biography is hardly to be measured by the extent to which it echoes a reader's opinion. A biography is to be judged by the insight it gives into the complexities of character, not the satisfaction it affords the reader's presuppositions.[37]

Occasionally, important social or administrative reforms in the Colonies, be they in organised religion (such as the New South Wales *Church Act* of 1836 (7 *Will.* IV, No. 3)) or education (the National Schools System in New South Wales),[38] or a new system regarding title to real property, were achieved by Irishmen, especially by Attorney-General Plunkett (aided by Governor Bourke) in the two former, and by Robert Torrens in the lastmentioned. But in the main Irish lawyers in professional practice, even when they were members, or even ministers, in the colonial Parliaments (as many were), were content to apply the legislation enacted by those Parliaments, and were rarely legislative reformers. Darley and Higinbotham did, however, take a positive interest regarding divorce and women's property rights;[39] but the efforts of Hearn to codify the laws of Victoria did not achieve fruition. Often the significance of Irish lawyers in the advancement of nineteenth century colonial society was less direct or discernible, but no less influential or pervasive. That was especially so in the administration of justice, many Irishmen practising before Courts presided over by Irish judges, and administering statute law enacted by Legislatures many of whose members were of Irish birth or parentage. Similarly, public opinion was often influenced, even guided and directed, by newspapers owned or edited by Irish lawyers (such as Wentworth and Martin in Sydney, Cuthbert in Ballarat, Casey in Bendigo, Glynn in Kapunda, Hackett in Perth).

In the practice of their profession and in the courts the impact of those Irish newcomers was largely in procedure and form, rather than in matters of substance, whilst in the Legislatures it resulted from individual personalities and their inherited Irish characteristics. The latter included kindness, generosity, loyalty to their fellow countrymen, compassion and support for the underdog (often directed to the Indigenous population), ambition, hot-headedness, impetuosity, assertiveness, aggressiveness, a readiness for denunciation (both

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[37] Letter of 27 December 1948 from Felix Frankfurter to Charles Fairman, reproduced in (1949) 24 *Indiana Law Journal*, pp 367-369, quoted in James A. Thomson, *op. cit.*, n 7, p 380.

[38] See Chapter 4, text to notes 38-39.

[39] Chapter 7, text to n 92.

oral, especially in Parliament, and in the print media), oratorical skill before juries rather than scholarly legal argument in litigation. Proceedings in the courts and in the legislatures would have been far less colourful --- indeed, far less entertaining --- without the Irish participants.

In an age when all criminal trials and most civil cases were heard before juries, the robust attitude of Irish barristers to litigation and the manner in which they conducted their cases allowed them a scope for their forensic talents which would not have been available a century later. In an era of great public oratory the outstanding orators in the nation were Irish barristers and politicians such as James Martin and William Bede Dalley.

Even in official positions (such as the Vice-Regal offices held by Bourke in New South Wales and MacDonnell in South Australia, or the offices of Premier occupied by Gavan Duffy, O'Loghlen and Shiels in Victoria, and Martin and, temporarily, Dalley in New South Wales) the achievements of Irish lawyers were rarely of lasting substance. The achievements of Irish Chief Justices and Judges (especially Dowling, Martin and Darley in New South Wales, Stawell, Barry, Higinbotham, Irvine, and Molesworth in Victoria) mainly consisted in the swift and efficient disposal of cases coming before them, in circumstances noteworthy for heavy judicial workloads and the limited resources, physical and administrative, available to them. The power and influence of Irish lawyers as newspaper editors or proprietors (such as Wentworth, Martin and Deniehy in New South Wales, Cuthbert in Victoria, Glynn in South Australia, and especially Hackett in Western Australia) were probably of greater and more lasting significance.

In their own profession, as practitioners and as Judges, most of the Irish lawyers were competent, if not outstanding, although several attained the highest offices (such as Dowling, Martin and Darley as Chief Justices of New South Wales, Stawell, Higinbotham and Irvine as Chief Justices of Victoria, Fleming as Chief Justice of Tasmania, Wrenfordsley as Chief Justice of Western Australia, Higgins on the High Court of Australia). Very few (possibly, only Wrenfordsley) brought disrepute upon the offices they held.

Despite any perceived limitations on their brilliance as jurists, there is no doubt that the Irish lawyers who attained high judicial office in Australia were staunch upholders of the Rule

of Law. An outstanding instance arose out of the application of the New South Wales statute, the *Influx of Chinese Restriction Act*, 1881 (45 *Vic.*, No. 11), when the rights of the underdogs (here Chinese immigrants) were under threat from unconstitutional conduct by the New South Wales Government. In 1888 unsuccessful attempts by the Government of Sir Henry Parkes, to prevent the disembarkation of Chinese passengers in Sydney, some of whom had previously worked on the goldfields, resulted in a confrontation between the Executive and Judicial arms of Government. The Full Court of the Supreme Court (comprising two Irish judges, Darley, the Chief Justice, and Mr Justice Foster), in *Ex parte Lo Pak*,[40] found in favour of the Chinese applicant. In rejecting the Crown's submissions that the police had acted pursuant to superior orders, Foster said, "That might be a good return in an autocratic State like Russia, but in a country governed by free institutions it cannot for a moment be listened to ...". [41] When the Government refused to comply with the Court's decision in that case and in a similar case, *Ex parte Leong Kum*,[42] Darley, again presiding over the Full Court, observed in *Ex parte Woo Tin*[43] that the Court had already laid down the relevant law. In a clear rebuke to Parkes, Darley continued,

> everyone in this colony, no matter how high his position, or how low, was bound by that declaration, and bound to scrupulously obey the law as declared ...
> No sovereign, no matter how tyrannically inclined, no Government, however unconstitutional its acts, has ever ventured to act in open opposition to, and in disregard of, the law, when that law was once pronounced by the duly constituted authorities.[44]

Those were indeed fearless statements by an Irishman upholding the Rule of Law in Australia.[45] Of the blunt refusal by Parkes and his Government to follow the orders of the

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[40] (1888) 9 NSWLR (L) 221.

[41] Note 40, at 248.

[42] (1888) 9 NSWLR (L) 250.

[43] (1888) 9 NSWLR (L) 493.

[44] Note 43, at 495.

[45] See J. M. Bennett, *Colonial Law Lords* (Sydney, 2006), pp 27-36; J. M. Bennett, *Sir Frederick Darley, Sixth Chief Justice of New South Wales 1886-1910* (Leichhardt, NSW, 2016), pp 220-228.

Supreme Court it has been said that "[t]he rule of law was defied more blatantly over this episode than at any time since the rebellion of 1808".[46]

Maurice Healy concluded his reminiscences of legal, especially barristerial, practice in Ireland towards the end of the nineteenth century by saying,

> If the Irish Bar was a corporate body; if the soul of that body must, even in Ireland, be considered incorporate, it nevertheless had the gift of showing itself, not as a ghost, but as a conscience.[47]

For the ever-increasing numbers of Irish lawyers in colonial Australia another body was assumed, being tough, vigorous, robust, ambitious and ever optimistic --- qualities essential in their new homeland --- whilst still retaining much of that soul and conscience which Healy recognised in the legal profession of Ireland. However, as the nineteenth century advanced, lawyers and other professional men from Ireland had totally coalesced in no more than a generation with the colonial community as Australians --- not as Irish Australians. This coalescence was in contrast to the situation observed by such visitors to Australia in the mid-nineteenth century as the distinguished Austrian violinist and musical composer Miska Hauser, whose letters to his brother in Vienna revealed that much of the Australian population regarded themselves as if they had never left their homelands, but were still Europeans merely transplanted to a new geographical location.[48] By the early twentieth century the population of Australia had ceased to be defined or qualified --- if it ever had been --- by countries of origin or ancestry, especially England, Ireland or Scotland, and had become a nation consisting only of Australians. At the outbreak of the First World War there were outright declarations from those with Irish nationalist affiliations for support of Australia's participation in the War. W. M. Hughes, Prime Minister throughout most of that War,

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[46] G. D. Woods, *A History of Criminal Law in New South Wales: The Colonial Period 1788-1900* (Leichhardt, NSW, 2002), p 2.

[47] Maurice Healy, *The Old Munster Circuit: A Book of Memories and Traditions* (London, 1939), p 287.

[48] Miska Hauser, *Letters from Australia 1854-1858* (translated [from the German] by Colin Roderick; edited, with introduction and notes by Colin Roderick and Hugh Anderson) (Red Rooster Press, Australia, 1988; printed Maryborough, Victoria), especially Letter 2, from Sydney, 20 December 1854, pp 5, 7.

recognised the cohesion in his nation when he said, “The gravest crisis of our history is faced by a united people”.[49]

That coalescence of the Irish into the generality of the Australian population was reflected in the coalescence of Irish lawyers into the Australian legal profession. By the end of the colonial era probably the only characteristic which differentiated Irish lawyers from their non-Irish brethren was the distinctive speech accent, the Irish brogue. Although certainly far from universal among upper-middle class professional men, there were several individual instances (Michael Lavan in Western Australia was one) where the Irish brogue could still be heard in Australian courts well into the twentieth century. In every other respect there was total professional coalescence of Irish lawyers with their non-Irish colleagues. The achievements and influence of those Irishmen who had left their homeland for the Australian colonies were essentially those of the sum of a large number of individuals, rather than of a distinct national group.

[49] Ernest Scott, *Australia During the War* (Sydney, 1936), p 24.

APPENDIX A

EXPLANATORY INTRODUCTION TO APPENDIX A

An outline and description of the careers and achievements of each of the Irish lawyers who came to the Australian colonies in the 19th century would result in a "wilderness of single instances",[1] each in the nature of a potted biography, inappropriate in the present thesis. However, the presence of the Irish lawyers in Australia, and the consequences of such presence, cannot properly be considered without information regarding the personal and professional lives and backgrounds of those men. It should not be overlooked that more than two centuries ago Dr Johnson observed, "Biography is, of the various kinds of narrative writing, that which is most eagerly read, and most easily applied to the purposes of life".[2] Thus Appendix A contains details of the professional and official career of each of about 200 noteworthy Irish lawyers in colonial Australia. For each such lawyer the Appendix provides the following information (if known): date and place of birth, parentage, education, academic and professional qualifications and admissions to practice, both in Ireland and in Australia, together with any public or official positions held by him in the Australian colonies.

A blank box in the Appendix spreadsheet indicates either that that box is not relevant to the subject lawyer (for example, he did not hold any public or official position in Australia; or, having come to Australia as a child, he was not educated in Ireland, or did not qualify as a lawyer in Ireland); or that the information appropriate to that box is not known or cannot be obtained in respect to the subject lawyer.

For barristers the ultimate recognition of professional achievement was a judicial appointment. Until the second half of the nineteenth century, when salaries began to be provided for politicians who were not ministers, wage-earners and the working-class self-

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[1] Alfred Lord Tennyson, "Aylmer's Field".

[2] Samuel Johnson, *The Idler*, No. 84, 14 November 1759.

employed could not afford to enter Parliament. Thus it was not uncommon for barristers and solicitors, having achieved some financial security, to be elected to the colonial Legislatures. Therefore details of judicial, political and ministerial appointments have been included.

It is not merely men born in Ireland and qualified as lawyers who are a proper subject of consideration in this thesis. There were two significant groups of prominent and influential colonists who should also be considered. One such group may be described as "honorary Irishmen", the other as "honorary lawyers". The former group comprises those lawyers (usually born in Australia), one or both of whose parents were Irish born, and who regarded themselves and were generally regarded by others as Irishmen. Instances of such "honorary Irishmen" were William Charles Wentworth, Sir James Dowling, Daniel Henry Deniehy, William Bede Dalley, each of whom, although not born in Ireland, was of Irish parentage. The latter group comprises Irishmen who, without formal legal qualifications, held official positions of a legal or judicial nature. For example, Richard Robert Madden, Colonial Secretary of Western Australia, had held judicial office in Jamaica and Cuba and was appointed a Justice of the Peace in Western Australia. A considerable number of appointments as Police Magistrate were of men without formal legal qualifications.

To disregard either of the foregoing categories would give an incomplete and inaccurate picture of the Irish character and complexion of lawyers, the legal profession and the administration of justice in 19th century Australia.

Further, several persons named in this Appendix do not fall strictly within any of the foregoing categories. Nevertheless, it is considered appropriate that they should be included in Appendix A. (Throughout the 19th century only men could be lawyers in Australia. That situation changed as the 20th century advanced, and women increasingly entered the legal profession, and then the Judiciary. One Irish woman, Anne Beatson, who had arrived in Australia in the 1853, was appointed a Justice of the Peace in Queensland in the early 20th century, and as such occupied judicial office. She also has been included in this Appendix.)

Abbreviations appearing in Appendix A

A-G	Attorney-General
AJ	Acting Judge
Adv	Advocate
Adv-Gen	Advocate-General
asp	attorney, solicitor and proctor
att	attorney
barr	barrister
BC	British Columbia
Ch	Court of Chancery
ChQS	Chairman of Quarter Sessions
CJ	Chief Justice
CL	Crown Lands
Cmr	Commissioner
Cnty Ct	County Court
Col Sec	Colonial Secretary
CP	Crown Prosecutor
CP (I)	Court of Common Pleas in Ireland
Cr Slcr	Crown Solicitor
Ct	Court
Cwlth	Commonwealth
Dist Ct	District Court
E	Easter Term
Exch	Court of Exchequer
Exec Cl	Executive Council
Fed Conv	Federation Convention
GI	Gray's Inn
HK	Hong Kong
IT	Inner Temple
Jge	Judge

JP	Justice of the Peace
KC	King’s Counsel
KI	King’s Inns, Dublin
LA	Legislative Assembly
LC	Legislative Council
LI	Lincoln’s Inn
Lieut-Gov	Lieutenant-Governor
M	Michaelmas Term
Min	Minister
M in Eq	Master in Equity
MLC	Member of Legislative Council
MLA	Member of Legislative Assembly
MHA	Member of House of Assembly
MP	Member of Parliament
NSW	New South Wales
NZ	New Zealand
Plt	Parliament
PM	Police Magistrate
QB	Court of Queen’s Bench
QC	Queen’s Counsel
Qld	Queensland
SA	South Australia
Sec	Secretary
S-G	Solicitor-General
slcr	solicitor
Sp Ct	Supreme Court
T	Trinity Term
Tas	Tasmania
TCD	Trinity College, Dublin (University of Dublin)
UK	United Kingdom of Great Britain and (Northern) Ireland
Univ	University
VDL	Van Diemen’s Land

V-P	Vice-President
Vict	Victoria
WA	Western Australia

APPENDIX A

REGISTER OF NOTEWORTHY IRISH LAWYERS IN COLONIAL AUSTRALIA

Name	Birth	Education and Irish Admission	Australian Admission	Official Positions	Death
ABBOTT Robert Palmer	1830 Son of Thomas Abbott of Broadford, Co Clare, policeman, and Eleanor née Kingsmill.	Family arrived Sydney Jan 1838 as assisted immigrants.	NSW slcr 1854 Practised in Armidale late 1860s.	NSW Plt (MLA 1872-1877, 1880-1882; MLC 1883-1888).	31 Oct 1901.
ADAMSON Travers	6 Aug 1827. Eldest son of Travers, of Cam Park, Westmeath, and Fanny Jane née Curtis.	TCD (BA 1847) Irish Bar 1850.	Arrived Melbourne 1852; Bendigo gold diggings (without success). Vict Bar, 24 Nov 1852.	CP, 1854-Mar1858, 14 Jan 1867-Feb 1883 Vict Plt (MLA 1856-). S-G 27 Oct 1859-5 Mar 1860.	4 Apr 1897, Eastbourne, England.
ANDERSON Robert Sterling Hore	1821. Third son of Robert Anderson of Articlave, Co Derry, farmer, and Elizabeth née Caldwell.	Belfast Academy TCD (BA 1845). KI E 1845. Slcr, Ch, 18 Mar 1848; Att QB, Exch, E 1848; att CP, E 1850. Practised Dublin, 1846-1854.	Arrived Melbourne 10 Jun 1854. Admitted asp Vict 4 Sept 1854.	JP. Vict Plt (MLA 1858-1864; MLC 1866-1883). Min of Justice, Mar-Oct 1883.	26 Oct 1883.
ANDERSON William Gustavus		Att, Exch T 1830. Departed Ireland 31 May 1853.	Arrived Melbourne 17 Sep 1853. Admitted asp Vict 5 Dec 1853.		
ARMSTRONG John		Att, QB, CP and Exch, T 1820. Slcr, Ch, 28 Aug 1830. Practised at 8 Inns Quay, Dublin until 1852.	Arrived Vict, 21 Jan 1853. Admitted asp Vict, 4 April 1853.		

Name	Birth	Education and Irish Admission	Australian Admission	Official Positions	Death
ATKINSON William David	1839. Son of Miles Atkinson of Larne, Co Antrim, woollen draper.	Ed Larne. KI E 1845. Att QB, T 1850. Slcr, Ch. Practised at Larne, County Antrim, until Feb 1853.	Arrived Vict 29 May 1853. Admitted asp, Vict, 5 Dec 1853.		
BAGOT John Tuthill	15 Jan 1819. Second son of Charles Bagot, JP of Kilcoursey House, King's County, and Anne née Tuthill.	TCD (BA 1839) Irish Bar M 1843.	Arrived SA 1850. SA Bar 1852. Practised in Adelaide.	SA Legislature (LC, Light, 1855-1856; MHA, Light, 1857-1864; MLC, 1866-1870). S-G Aug-Sep 1857. A-G Sep-Oct 1868.	13 Aug 1870.
BARKER William	ca. 1824, Ireland.		Arrived Sydney. Articled to James Norton, Senior, 1846. Admitted slcr, NSW, 3 May 1851.		Jan 1879.
BARRY, Sir Redmond	7 Jun 1813. Third son of Major-General Henry Green Barry of Ballyclough, Co Cork, and Phoebe née Drought.	Private academy, Cork Harbour; Bexley, Kent, England. TCD (BA 1837) Irish Bar 1838.	Arrived Sydney 1 Sep 1839. NSW Bar 19 Oct 1839. Arrived Melbourne 13 Nov 1839. Practised at Melbourne Bar.	Cmr of Crt of Requests, 2 Jan 1843. S-G, Vict, 1851. Jge, Sup Ct of Vict, Jan 1852 - 23 Nov 1880.	23 Nov1880.
BARTON George Elliott	15 [or 20] May 1826 [or 1829]. Only son of James Mundy Barton, slcr, Dublin, and Anne née Mathews.	TCD (BA 1848) Irish Bar 1849.	Arrived Melbourne Oct 1853.	Vict Plt (MLA, North Melbourne 1859-1862). Departed Vict for NZ 1862. NZ Plt, 1878-1879. Jge, NZ Native Land Court and Validation Crt 1890s.	May 1903.

Name	Birth	Education and Irish Admission	Australian Admission	Official Positions	Death
BEATSON Anne	May 1849, Co Clare. Daughter of Andrew Purcell, farmer.		Arrived Brisbane 1853 on *John Fielding.* Settled with husband in Maryborough Nov 1886.	JP 20 Feb 1932 (first woman JP in Maryborough).	6 Apr 1940.
BELCHER Joseph William	1784 Second son of William Belcher of Kells, Co Meath, innkeeper, and Anna née Morris.	KI 1807. Slcr, Dublin.	Arrived Melbourne Mar 1842. Practised as slcr, Melbourne		1865
BENNETT John Barter	c. 1824, Cork. Youngest son of Henry Bennett of Cork, solicitor, and Kate née McCarthy.		Arrived Melbourne 1842. Articled to John Duerdin. Admitted att NSW, for Port Phillip District 1847. Practised in Collins Street, Melbourne, senior partner in Bennett, Attenborough, Wilks & Nunn.	Vict Plt (MLC, Southern Province, Nov 1856- May 1863). President, Law Institute of Victoria 1860-1862.	19 May 1887, London (having retired from Melbourne to London 1885).
BILLING Richard Annesley	7 Oct 1815, Edinburgh. Second son of Captain William Billing, 1st Foot Regiment, and Anna Maria née Walsh.	TCD (BA M 1836). Irish Bar M 1839. Practised Dublin until 1856, on account of ill health, departed for Victoria.	Arrived Melbourne Oct 1856. Vict Bar Oct 1856. Leader, Equity Bar. QC 1878. Lecturer in Law, Univ of Melbourne from Feb 1858.	Cnty Crt Jge 18 Apr 1882-21 Jun 1882.	21 Jun 1882.
BINDON Samuel Henry	27 Sep 1811 [or 1812]. Eldest son of Samuel Bindon of Waterpark, Co Clare, and Eliza née Massey [or Massy].	TCD (BA 1835) Irish Bar 1838. Practised in Dublin.	Arrived Victoria 1855. Vict Bar May 1855.	Vict Plt (MLA, Castlemaine, Nov 1864-Oct 1868). Min of Justice 18 Jul 1866-6 May 1868. Acting Cnty Crt Jge 1859. Cnty Crt Jge 12 Apr 1869-1 Aug 1879.	1 Aug 1879.

Name	Birth	Education and Irish Admission	Australian Admission	Official Positions	Death
BLAKE Isadore John	25 Oct 1811. Eldest son of John Blake of Weston, Co Dublin, and Charlotte née Blake.	TCD E 1832 Irish Bar E 1834.	NSW Bar 29 Mar 1854. Practised in Qld 1865-1868. QC Qld 1868.	NSW Plt (MLC Mar 1858; MLA 25 Apr 1860-9 Jul 1861). Jge, NSW Dist Ct 25 Jul 1861-1865. Dep Jge, Circuit Ct, Rockhampton, Qld 1873. Jge, Central Dist Ct, Qld.	10 Oct 1882.
BLAKENEY Charles William	8 Jul 1806 [or 1802]. Eldest son of Reverend Thomas Blakeney, of Holywell, Co Roscommon, and Alicia née Newcome.	TCD M 1833 (did not graduate). Irish Bar H 1836.	Arrived NSW 1859. NSW Bar 7 Feb 1859. Settled Brisbane mid-1859.	Qld Plt (MLA, Brisbane, May 1860-1 Dec 1865). First Jge of Western Dist Ct 1 Dec 1865-Aug 1875.	12 Jan 1876.
BLOOD-SMYTH John Lowe	21 Feb 1858. Fourth son of Matthew Blood Smyth, barrister, JP, of Castle Fergus, Co Clare, and Mary née Vincent.	TCD (BA, LLB 1879). Irish Bar 1880.	Qld Bar 1883.	Registrar, Sup Ct Qld, at various locations.	28 Aug 1904.
BOURKE, Sir Richard	4 May 1777. Son of John Bourke of Drumsally, Co Limerick, and Anne née Ryan.	KI 1796 Univ of Oxford (BA 1798).		Governor of NSW Dec 1831-Dec 1837.	13 Aug 1855.
BRENAN John Ryan	1798 (?). Eldest son of John Brenan, gentleman, of Limerick, and Maria née Ryan.	Carlow College KI M 1818 Practised as an attorney.	Arrived Sydney Jun 1834. slcr, Sydney, 1834-1835.	Coroner, Sydney 1835. PM, Sydney 1839-1844	5 Jun 1868.

Name	Birth	Education and Irish Admission	Australian Admission	Official Positions	Death
BREWSTER Edward Jones	30 Oct 1812. Eldest son of Edward Brewster, French Street, Dublin, slcr, and Sarah née Gray.	TCD (BA 1835, MA 1842, LLB and LLD 1882) Irish Bar M 1837.	To Melbourne 1838. NSW Bar Feb 1839. To Oxford 1853, where ordained an Anglican priest 1853.	Ch QS and Cmr of Ct of Requests, Melbourne (£350 p.a.) 1838-1840. NSW Leg Cl (for Port Phillip District), 1 Jan 1846-1 Feb 1848.	17 Mar 1898.
BRIDE Thomas Francis	1 Oct 1849. Son of Henry Nelson Bride, of Cork, and Ellen née Bourke.		Arrived Melbourne as an infant. St Patrick's College, East Melbourne. Univ of Melbourne (BA 1873; LLD 1879).	Librarian, Public Library of Victoria, Aug 1881-1895. Curator of Deceased Estates, 1895-Nov 1909.	7 Apr 1927.
BROWNE Thomas Harvey	15 Dec 1867, Darling Point, Sydney. Only son of Thomas Harvey Browne, grazier, of Sydney, and Matilda née Rigney.	St Ignatius College, Riverview, Sydney. Stonyhurst College, England. KI M 1889. TCD (BA, LLB 1893, LLD).	NSW Bar 24 Nov 1893.		22 Oct 1914.
BUTLER Edward	1823. Son of Michael Butler of Co Kilkenny, farmer, and Mary née Joyce.		Arrived Sydney May 1853 NSW Bar 16 Oct 1855. QC Nov 1873.	CP 1857. NSW Plt (MLC Sep1861- 1863; MLA 13 Dec 1869-1877). A-G May 1872-Nov 1873.	9 Jun 1879.
BYRNES Thomas Joseph	11 Nov 1860, Brisbane. Son of Irish immigrants Patrick Byrnes and Anna née Tighe.		Bowen Primary School; Brisbane Grammar School. Univ of Melbourne (BA 1882, LLB 1884). Vict Bar 8 July 1884. Qld Bar 5 Aug 1884.	Qld Plt (MLC 12 Aug 1890-13 Mar 1893; MLA 29 Apr 1893-27 Sep 1898). S-G 1890-1893. A-G Mar 1893-27 Sep 1898. Premier 13 Apr-27 Sep 1898.	27 Sep 1898.

Name	Birth	Education and Irish Admission	Australian Admission	Official Positions	Death
CALLAGHAN Thomas	18 Sep 1815. Youngest son of Malachi Callaghan, of Dublin, merchant.	TCD (BA 1836). Irish Bar Dec 1837.	Arrived Sydney Feb 1840. NSW Bar 13 Feb 1840.	CP, 25 Jan 1845-1858. JP 11 Aug 1845 Jge, Dist Ct NSW, 22 Dec 1858-28 Nov 1863.	28 Nov 1863.
CARLOS Joseph	1867, Ireland.	TCD (MA).	NSW Bar 28 Oct 1895. Lecturer, Latin and Greek, Univ of Sydney.	Chairman, Industrial Boards.	31 Mar 1917.
CASEY James Joseph	25 Dec 1831. Son of James Casey of Tromroe, Co Clare, landowner, and Maria née Coffey.	Galway College.	Arrived Melbourne 1855. Vict Bar 1865.	JP, Vict 1861. Vict Plt (MLA 1861-Feb1880). Min of Justice Jul 1868. S-G 1869. Cnty Crt Jge, 24 Apr 1884-1900.	5 Apr 1913, St Kilda.
CHAMBERS Charles Henry	1795, Londonderry. Eldest son of David Chambers (the Elder), attorney, Belfast, and Margaret née Mann.	Armagh School. KI E 1813.	Arrived Sydney 8 Mar 1822. Admitted practitioner, NSW, 15 Mar 1822.		1 Apr 1854.
CHAMBERS David (the Elder)	1774. Son of Reverend Joseph Chambers, Co Antrim, and Margaret née Mann.	Att Exch, H 1804.	Arrived Sydney 1839.		24 Apr 1849.
CHAMBERS David (the Younger)	1803, Londonderry. Third son of David Chambers (the Elder), slcr, of Belfast, and Margaret née Mann.	Dungannon School. KI H 1820. Att, Exch.	Arrived Sydney 22 Nov 1830. Slcr, NSW 1831.	Under Sheriff 10 Mar 1833. Cr Slcr 24 Jan 1834.	9 Feb 1848.

Name	Birth	Education and Irish Admission	Australian Admission	Official Positions	Death
CHAMBERS Henry	1809. Fifth son of David Chambers (the Elder) of Dublin, att, and Margaret née Mann.	KI T 1829. TCD (BA 1830).			27 Sep 1834.
CHAMBERS Hugh John Lecky	26 July 1821, Cashelhoe. Sixth son of David Chambers (the Elder), of Magherafelt, Co Derry and Belfast, slcr, and Margaret née Mann.	Royal School, Dungannon. KI T 1837.	Arrived Sydney 1839.		14 Aug 1893.
CHARTRES George	Son of George Chartres, physician, Dublin, and Letitia née Booker	KI. Attorney, E 1805, practised in Dublin	Jul 1811 arrived Sydney (convicted of fraud, 14 Jul 1810, sentenced to 7 years transportation). 22 Dec 1817 departed Sydney.		
CHOMLEY Arthur Wolfe	4 May 1837. Fifth son of Reverend Francis Chomley, vicar of Wicklow, and Mary Elizabeth née Griffith.	Arrived Melbourne with widowed mother and brothers, Feb 1849.	St Peter's College, Eastern Hill. Univ of Melbourne. Vict Bar 8 Jul 1863.	Sec, Crown Law Dept, Vict. Feb 1862. CP Jul 1870-Jul 1885. Cty Ct Jge, Jul 1885-Nov 1910. Acting Jge, Sup Ct May-Nov 1906.	25 Nov 1914.
CLARKE James Langton	1802. Second son of Andrew Clarke, of Belmont, Donegal.	Royal Military College, Sandhurst. Univ of Cambridge (Queens' Col) (BA 1829, MA 1833). English Bar (MT) 1835.	Arrived Melbourne 1855. Vict Bar 7 June 1855.	Cnty Ct Jge, 1858-1874. Jge, Crt of Mines 1858-1874.	16 Feb 1886.

Name	Birth	Education and Irish Admission	Australian Admission	Official Positions	Death
CLARKE Matthew John	7 Mar 1863, Downpatrick, Co Down. Eldest son of James Clarke, slcr, of Belfast, and Mary née McQuillan.	Royal University of Ireland (BA 1882). Irish Bar 1886.	Arrived Australia 1888. Tasmanian Bar. NSW Bar 8 March 1895.	Tas Plt (MHA, 20 Jan 1897-9 Mar 1900). Delegate (Tas), Federation Convention 1897-1898.	1923
COFFEY William Henry	Sep 1854, Dublin. Son of James Charles Coffey, QC (later Cnty Crt Judge, Ireland).	TCD (BA 24 June 1874).	Arrived Victoria 1874. Univ of Melbourne (BA 1876, LLB 1878). Barrister and slcr, Vict, 15 Sep 1879. Practised at Inglewood, Vict until 1884. NSW Bar 11 Feb 1884.	Registrar, Mining Warden's Ct (Beechworth, Vict), Clerk of Cts (Inglewood, Vict), 1875-1879. CP, NSW, Mar 1885. Jge, NSW Dist Ct, Western District, 1 Nov 1893-3 Nov 1899.	3 Nov 1899.
CRAWFORD George John	21 Apr 1811. Second son of Reverend George Crawford, St Anne's, Co Longford, and Mary née West.	TCD (BA 1833, LLB and LLD 1846). Irish Bar H 1840.		Jge, Sup Crt SA, Jan 1850-24 Sep 1852 (£800 a year).	24 Sep 1852.
CREAGH Patrick William	1833, Limerick. Son of Captain Jasper Creagh, 80th Regiment, Co Down.		Arrived Sydney as a youth. NSW slcr 27 Jun 1868. Practised Sydney, 1868- 1871, 1873-1913,Taree, Tamworth, 1871-1873.	Notary Public.	9 Aug 1913.
CREED John Percy	20 Aug 1861. Eldest son of Richard Creed, JP, of Cloyne House, Co Cork, and Olivia née Percy.	TCD (BA 1883) Irish Bar M 1883.	NSW Bar 21 May 1889.		

Name	Birth	Education and Irish Admission	Australian Admission	Official Positions	Death
CROKE James	19 Jun 1794. Second son of William, of Mallow, County Cork, farmer, and Anastasia née O'Flinn.	TCD (BA 1817 [or 1818]) English Bar, GI 1819. Irish Bar 1821.	Arrived Sydney 1 Sep 1839. NSW Bar 16 Sep 1839. Arrived Melbourne 13 Nov 1839.	CP, Port Phillip District and legal adviser to Govt at Port Phillip (from 26 Dec 1838). S-G, Vict, 1852-1854. Returned to Ireland 1854.	
CULLEN Luke Michael	Son of William Cullen, attorney, Dublin.	Oscott College. KI E1842. Irish Bar.	Barrister, SA 3 March 1850.		
CUTHBERT Sir Henry	29 Jul 1829, Boyle, County Roscommon. Eldest son of John Cuthbert, of Parsonstown, excise officer, and Elizabeth, née Headen.	Drogheda Grammar School. KI M 1846. Slcr Ch 1853.	Arrived Melbourne 1854 Admitted slcr 1854 Practised at Ballarat. Proprietor *Ballarat Times*, Buninyong Gold Mining Co.	Vict Plt (MLC Sep 1874-5 Apr 1907). Min of Justice Feb 1886-Nov 1890. S-G Sep 1894-1899. QC 1899.	5 Apr 1907.
DALLEY William Bede	5 Jul 1831, George Street, Sydney. Son of John Dalley, storekeeper, and Catherine née Spillane (each Irish born; each arrived as a convict).	St Mary's Seminary, Sydney. Sydney College.	NSW Bar 5 July 1856. QC 1877.	NSW Plt (MLA Dec 1856-Feb 1860, 1862-1864; MLC 1870-1873, 1875-1880). S-G Nov 1858-Feb 1859. A-G 1875-1876, 1877, 1883-1885. Privy Counsellor 1886 (Australia's first).	28 Oct 1888.
DALTON James Joseph	6 Feb 1861. Second son of James Dalton of Orange, NSW, and Margaret née Collins.	KI E 1885.	NSW Bar 26 Aug 1893.	UK Plt (MP, Nationalist, West Donegal, 1890-1892).	

Name	Birth	Education and Irish Admission	Australian Admission	Official Positions	Death
d'ARENBERG Frederick Augustus Abeltshauser	1850, Dublin. Second son of Reverend Ignatius George Abeltshauser d'Arenberg, Professor of French and German, TCD, and Rector of Derralossary, Co Wicklow.	TCD (BA 1873, MA 1876).	Arrived Adelaide 27 Feb 1879. Lecturer in Law, Univ of Adelaide, 1897-1919 (also Registrar, member of Senate). Practised in Adelaide ca. 1909-1923.		3 Oct 1923.
DARLEY Sir Frederick Matthew	18 Sep 1830, Dublin. Eldest child of Henry Darley of Wingfield, Bray, County Wicklow, officer in the Irish Court of Chancery, and Maria Louisa née West.	Dungannon College, County Tyrone. TCD (BA 1851, LLD (Honorary) 1903). Irish Bar 18 Jan 1853. Practised on Munster Circuit.	Arrived Australia Apr 1862. NSW Bar 2 Jun 1862. QC 2 Apr 1879.	NSW Plt (MLC 13 Oct 1868-Dec1886). V-P, Exec Cl 1881. CJ 7 Dec 1886-4 Jan 1910. Lieut-Gov 1891-4 Jan1910. Privy Counsellor 20 Nov 1905.	4 Jan 1910, London.
DEASE Christopher John Nugent	Second son of Oliver Dease, of 1st Garrison Battalion, afterwards of Dublin, surgeon, and Anne née Nugent.	Edworthstown. KI E 1834. Apprenticed to Francis Marmion, H 1842.	Slcr NSW. Practised Yass 1860s - c. 1872; Kempsey c. 1872-1884.		26 Jul 1884, Kempsey, NSW.
DENIEHY Daniel Henry	18 Aug 1828, Sydney. Only son of Henry Deniehy, produce merchant, and Mary née MacCarthy, (each an Irish born convict, arrived in Australia Aug 1820 and Aug 1824 respectively).		Articled to N. D. Stenhouse, Sydney. Slcr, 3 May 1851 (practised, Sydney, Goulburn). Author of "a bunyip aristocracy", 15 Aug 1853.	NSW Plt (MLA, Argyle, 13 Feb1857-11 Apr 1859; East Macquarie May-Nov 1860).	22 Oct 1865, Bathurst.

Name	Birth	Education and Irish Admission	Australian Admission	Official Positions	Death
DIGBY Everard William	3 Jun 1854, Drumdaff, Co Roscommon. Eldest son of George Digby, JP, landowner and farmer, and Catherine née Hawkes.	Stonyhurst College, Lancashire. TCD (BA 1878, BEng 1879). Irish Bar Nov 1880.	Arrived Australia Nov 1881. NSW Bar Nov 1880. Practised at NSW Bar 1882-Nov 1889, 83 Elizabeth Street, Sydney. Admitted slcr NSW 29 Nov 1890, practised 1892-1922.	Editor, *Australian Men of Mark.*	18 Aug 1922.
DILLON John	Dublin.	Apprenticed July 1816 to John Dillon, then to Charles Dillon, then Michael Fox E 1819. Admitted slcr.	Slcr NSW 1 Mar 1833. Charge of accessory before fact of murder. Discharged debtor's prison 23 Feb 1838. Partner with Norcott d'Esterre Parker 1845-1846.		
DILLON John Moore	1810. Eldest son of Luke Dillon, of Parliament Street, Dublin, and Bridget née Lynch.	KI E 1829. Att Ireland.	Slcr NSW 31 Mar 1839.	Cr Slcr for Criminal Business, 1839-1859.	22 Oct 1873.
DOWLING Sir James	25 Nov 1787, in London. Third son of Vincent Dowling of Queen's County, and Elizabeth née Andrews, of Burton-on-Trent, Co Lincoln (England). Resident in Dublin 1789-1801.	English Bar (MT) 5 May 1815 Practised London, Home Circuit (and as a court reporter).		Jge, Sup Ct of NSW, 25 Feb1828-1837 CJ, NSW, 1837-27 Sep 1844.	27 Sep 1844.

Name	Birth	Education and Irish Admission	Australian Admission	Official Positions	Death
DUNNE Joseph Henry	12 Feb 1826. Only son of Joseph Henry Dunne, of Williamstown Avenue, Co Dublin, merchant, and Catherine née Ferguson.	TCD (BA 1847). Irish Bar T 1849. Said to have been private secretary to Daniel O'Connell.	Arrived Melbourne early 1854. Vict Bar 24 Aug 1854. Practised at Ballarat. Resumed practice at the Bar 1876.	CP, Ballarat, Melbourne. Cty Ct Jge 16 Nov 1872-1876.	12 Dec 1877.
DUFFY Sir Charles Gavan	12 Apr 1816. Son of John Duffy of Monaghan, shopkeeper, and Ann née Gavan.	KI 1839.	Arrived Melbourne 1856. Vict Bar.	UK Plt (MP 1852-1855). Vict Plt (MLA 1856-1880). Premier Jun 1871-Jun 1872. Speaker, LA, 1877-1880.	9 Feb 1903, Nice, France.
DUFFY John Gavan	15 Oct 1844. Son of [Sir] Charles Gavan Duffy, of Dublin, and his first wife Emily née McLauglin.	St Laurence O'Toole's Seminary, Dublin; Stonyhurst College, England.	Arrived Melbourne 1856. Univ of Melbourne (did not graduate). Slcr, Vict 1876.	Vict Plt (MLA, 1874-1886, 1887-1904). Various ministries.	8 Mar 1917.
DWYER Jeremiah	1844. Son of John Butler Dwyer of Tipperary, contractor, and Elizabeth.	Arrived Victoria 1854 St Patrick's College Univ of Melbourne (BA 1869, MA 1875).		CP. Vict Plt (MLA May 1877- Nov (?) 1879).	13 Jan 1883.
DWYER Sir Walter	27 Aug 1875. Third son of Walter Dwyer, contractor, of Carrick-on-Suir, and Mary née Hartrey.	Univ of London (external student, BA 1906).	WA Bar 1907. Practised at Boulder, Kalgoorlie, Perth (from 1910).	WA Plt (MLA, Perth, ALP, 1911-1914). First Jge of WA Ct of Arbitration 1926-1945.	22 Mar 1950.
EAGAR Edward	Ca. 1787. Second son of Richard Eagar of Ardra, Co Kerry, and Frances née Eagar.	Killarney. KI May 1804.	Arrived Sydney 1811 (convicted of uttering a forged bill, death sentence commuted to transportation for life).		

Name	Birth	Education and Irish Admission	Australian Admission	Official Positions	Death
ELLIS George Ashe		KI H 1808. Apprenticed to John Allen. Att Ct of Exch, Feb 1822; att QB, CP M 1840; slcr Ch, 6 Nov 1840. Practised Dublin until Mar 1854.	Arrived Melbourne (after some time in London), 6 Oct 1855. Lived as a private gentleman until admitted asp Vict, 8 Dec 1856.		
EMERSON John Jervis	Second son of Michael Emerson, of Dublin, merchant, and Margaret née Atkin.	Apprenticed to Hercules Atkin. Att Exch M 1818; slcr Ch 28 Jan 1832; att QB, C PT 1841. Practised at Gorey, County Wexford until Jan 1852.	Arrived Melbourne 25 Jul 1855. Asp Vict 4 Sep 1855.		
FAUCETT Peter	29 Sep 1813, Dublin. Son of Peter Faucett, blacksmith, of Ballyconnell, Co Cavan, and Catherine née Cook.	TCD (BA 1840). Irish Bar 1845.	Arrived Sydney 1852 NSW Bar 29 Dec 1852.	NSW Plt (MLA 7 April 1856-4 Oct 1865, discontinuously; MLC 9 Apr 1888-22 May 1894). S-G, 16 Nov 1863-2 Feb 1865. Jge, Sup Ct 4 Oct 1865-8 Feb 1888.	22 May 1894.
FAUSSET Charles	Son of Charles Lisbofin Fausset, JP, of Enniskillen, County Fermanagh.	KI M 1837. Att, QB H 1843; slcr Ch 4 Dec 1851. Practised at Enniskillen, County Fermanagh and at 103 Middle Abbey Street, Dublin until Feb 1853.	Arrived Victoria 20 Jul 1853, then employed as a gold miner and Post Office clerk. Asp Vict 4 April 1854 (moved by Richard D. Ireland).		

Name	Birth	Education and Irish Admission	Australian Admission	Official Positions	Death
FINN Peter Thomas	1827/1828, Ireland.	Queen's College, Galway.	Arrived Victoria 1850s. Univ of Melbourne (BA 1858, MA 1874). Vict Bar 1859. Practised Melbourne, Ballarat. Then Invercargill, NZ 1876-c. 1890; Melbourne, Ballarat, Geelong.	Vict Plt (MLA, Avoca, 25 Jul 870-16 Mar 1871).	1 Apr 1911.
FITZGERALD Edward		Slcr Ireland c. 1840-1850.	Slcr SA 1850-1852. Arrived Victoria Apr 1852. Gold digging 1852-1853. Slcr 1853.		
FITZGERALD John		Practised as att in Ireland c. 1840-c. 1863 (then commercial employment).	Arrived Melbourne Sep 1871. Asp Vict Sep 1872.		
FITZGERALD Nicholas	7 Aug 1829, Galway. Sixth (or eighth) son of Francis Fitzgerald, of Galway, and Eleanor née Joyes.	TCD, 14 Oct 1845 (did not graduate). Queen's College, Galway 1849. KI H 1849.	Arrived Melbourne 1859.	JP 1853. Vict Plt (MLC, North-Western Province, 1864-1906; Ch of Committees 1903-1906).	17 Aug 1908.
FLANAGAN John	Ca. 1810. Son of Michael Flanagan of Maghera, Co Clare, farmer, sometime land agent.	Monastery, Thurles. KI M 1845. Att QB, CP, Exch T 1850; slcr, Ch 30 Jan 1852. Departed Ireland Sep 1855.	Arrived Vict 5 Dec 1855. Employed as assistant to Samuel Munckley South, slcr. Admitted asp Vict 4 Apr 1856 (referees included John Leslie Foster and John O'Shannassy). Practised Kyneton.		

Name	Birth	Education and Irish Admission	Australian Admission	Official Positions	Death
FLEMING George Toutcher	1834, Haverford West, Wales. Of Irish heritage, being a lineal descendant of Lords of Slane, County Meath.		Arrived Sydney 1851. Slcr, NSW, 8 Oct 1863. Practised Albury 1863-1912.		28 May 1912.
FLEMING Thomas Somerville		Att QB M 1817; att CP, Exch, slcr Ch, 1817. Departed Ireland Aug1855.	Arrived Vict 17 Nov 1855. Employed by Messrs. Hines & Sandwell, attorneys. Asp Vict 4 Dec 1855.		
FLEMING Sir Valentine (Edwin)	13 Nov 1809, Ashby-de-la-Zouch, Leicestershire , England. Son of Captain Valentine Fleming, of Tuam, Co Galway, Army officer, and Catherine née Gowan.	TCD (BA 1832). English Bar (GI), 21 Jan 1834.	Arrived Tasmania 25 Mar 1842. Tasmanian Bar 4 June 1842.	Cmr of Insolvent Estates. S-G 1844-1851. A-G 1851-1854. CJ 7 Aug1854-4 Feb 1870. Acting CJ 13 May 1872-May 1874.	21 Oct 1884, Reigate, Surrey, England.
FOOTT George	Third son of Michael Foott of Cork, attorney, and Mary née Foott.	KI E 1838. Att QB T 1843; slcr Ch 29 Jun 1843. Departed Dublin Jul 1863.	Arrived Vict Oct 1863. Asp Vict 8 Apr 1864.		

Name	Birth	Education and Irish Admission	Australian Admission	Official Positions	Death
FOSTER John Leslie Fitzgerald Vesey	19 Aug 1818. Second son of John Leslie Foster MP, Baron Irish Ct of Exch, and Hon Letitia Vesey née Fitzgerald.	KI H 1835 (apparently did not graduate). TCD (BA 1839).	Arrived Australia 1841.	NSW Leg Cl (Prt Phillip representative 1846-1848, 1849-1850). Colonial Secretary Vict 20 Jul 1853-May 1854. Acting Administrator Vict May-Jun 1854. Vict Plt (MLA, Williamstown, 1856-1857). Departed Australia 1857.	3 Jan 1900, South Kensington, London.
FOSTER William John	13 Jan 1831 at Rathescar, Co Louth. Son of Reverend William Henry Foster of Loughgilly, County Armagh and Catherine née Hamilton (niece of Duke of Wellington).	Cheltenham College, England. TCD (did not graduate).	Arrived Vict 1852 (worked on goldfields), back to Britain, returned to Vict 1854, then to Sydney. NSW Bar 13 May 1858. QC 1886.	CP 1859-1862, 1864-1870. NSW Plt (MLC 1877-1880; MLA 1880-1883, 1885-1888). A-G 1877-1878, 20 Jan 1887-18 May 1887; Min of Justice 1881-1883. Jge, Sup Ct, 14 Feb 1888-1894.	16 Aug 1909.
GEOGHEGAN Henry	1821-1822. Son of Thomas Geoghegan of Great Britain Street, Dublin, merchant, and Eliz née Clements.	KI 1838. Att QB, CP, Exch 1843; slcr Ch 16 Jun 1843. Practised in Dublin (Upper Bernard Quay) until Sep 1855.	Arrived Vict 18 Dec 1855. asp Vict 4 Apr 1856 (moved by R. D. Ireland).		14 Nov 1856, St Kilda, Melbourne.
GIBSON Frederick William	1857, Dublin. Son of William Frederick Gibson, civil servant, and Eleanor Anne née Manifold.		NSW Bar 31 Jul 1882. Associate to Sir William Windeyer J.	Jge, Dist Ct, North-Western District, 1 Jan 1892-1914.	Oct 1914.

Name	Birth	Education and Irish Admission	Australian Admission	Official Positions	Death
GIBSON Joseph	Son of Reverend John Duff Gibson, of Ballywalter, Co Down, Presbyterian Minister.	Kircubbin. KI E 1845. Att QB, CP, Exch 10 Jun 1850; slcr Ch 4 March 1854. Practised in Ireland until Jan 1858. Travelled, then employed by William Leeds, slcrs, Belfast.	Arrived Melbourne 16 Sep 1864. Asp Vict 9 Dec 1864 (moved by Robert Molesworth).		
GLYNN Patrick McMahon	25 Aug 1855. Third son of John McMahon Glynn, merchant, of Gort, Co Galway, and Ellen née Wallsh.	The French College (later Blackrock College) 1869-1872. TCD (BA 1878, LLB Dec 1883). Irish Bar Apr 1879.	Arrived Australia 1880. Vict Bar 1880. SA Bar 21 Jul 1883. NSW Bar 18 Feb 1890. KC 1913.	SA Plt (MHA, 1887-1890, 1895-1896, 1897-1901). A-G, SA, 1899. Delegate to Fed Conv 1897-1898. Cwlth Plt (MHR, Angas, 1901-1919). A-G 1909-1910; other ministries.	28 Oct 1931.
GORE Robert Corbet	8 Nov 1813. Second son of Reverend Thomas Gore, Rector of Mulrankin, Co Wexford, and Elizabeth Margareet née Corbet. Younger brother of St George Richard Gore.	TCD (BA 1834) Irish Bar.	Arrived Sydney Nov 1841. NSW Bar 12 Feb 1842.		11 Mar 1847.

Name	Birth	Education and Irish Admission	Australian Admission	Official Positions	Death
GORE St George Richard	26 Mar 1812, Dublin. Eldest son of Reverend Thomas Gore, rector of Mulrankin, Co Wexford, and Elizabeth Margaret née Corbet. Elder brother of Robert Corbet Gore.	TCD (BA 1831, MA 1834). Irish Bar.	Arrived Sydney Feb 1840. NSW Bar 1 Apr 1840.	Qld Plt (MLA, 20 May 1860-Jan 1862; MLC 3 Jul 1863-16 Aug 1871). Various ministries.	16 Aug 1871.
GRACE William	ca. 1805. Third son of Pierse Grace of Ballytarsney, Co Tipperary, farmer, and Mary née Meagher.	Privately taught. KI E 1822. Att QB M 1828.	Asp NSW 1833-1848. Asp, NZ 7 Sep 1848-1852. Arrived Vict 17 May 1852. Asp Vict 4 Jun 1852 (moved by William Foster Stawell, A-G).		
GRANT, James	24 June 1853. Second son of Edward Grant, merchant, of Carndonagh, Co Donegal, and Mary née McConalogue.	Irish Bar 1883.	NSW Bar 4 Aug 1891.		
GRAY Moses Wilson	1813. Son of John Gray of Claremorris, Co Mayo, and Elizabeth née Wilson.	Cork. Hazelwood School, Edgbaston, England. TCD (BA 1835). Irish Bar 1845. Michigan Bar.	Arrived Melbourne 1856 (in company with Charles Gavan Duffy). Vict Bar.	Vict Plt (MLA 1860-1862). Dunedin (NZ) Bar 1862. Dist Jge, Otago (NZ) 1864-4 Apr 1875.	4 Apr 1875.

Name	Birth	Education and Irish Admission	Australian Admission	Official Positions	Death
GUNN William	1800, Newry, Counties Armagh and Down. Son of Lieutenant William Gunn, 72nd Regiment, and Margaret née Wilson.	Second Lieutenant, Bourbon Regiment 1815.	Arrived Tasmania 24 Dec 1822, per *Shelton.*	PM (Launceston) Aug 1850-10 Jun 1868.	10 Jun 1868.
HACKETT Charles Prendergast	28 Feb 1818, Dublin. Only son of John Hackett, of Stratford Place, Westminster, England, and Eliza née Disney.	TCD (BA 1840). Irish Bar E 1842.	Arrived Victoria 1854 (after 4 years in India).	PM (Castlemaine, Melbourne). Cnty Ct Jge 1868-1 Jul 1882.	1889
HACKETT Sir John Winthrop	4 Feb 1848, Bray, Co Wicklow. Eldest son of Reverend John Winthrop Hackett of 72 Harcourt Street, Dublin and Jane Sophia Monck née Mason.	TCD (BA 1871, MA 1874). Irish Bar M 1874.	NSW Bar 7 Jun 1875. Vict Bar. WA Bar.	WA Plt (MLC Dec 1890-19 Feb 1916).	19 Feb 1916.
HAMILTON Edward Blayney	1 Jan 1845. Eldest son of Reverend Edward James Hamilton of Desertmartin, Co Derry, and Georgina Susan née Hart.	TCD (BA 1868). Irish Bar 1869.	Arrived Vict c. 1874. Vict Bar 1875.	Acting Cnty Crt Jge 17 May 1887-10 Apr 1888. Cnty Ct Jge, 10 Apr 1888-10 Sep 1904.	10 Sep 1904.
HANDY John Killeen	1834 Westmeath. Son of Patrick Handy and Catherine née Killeen.	Ordained Catholic priest 28 Mar 1857. Served as such in California, USA.	Priest, Sydney 1 Feb 1862-Jan 1863. Left Church and later was excommunicated. Univ of Melbourne 1863-1865. Practised as lawyer in Qld.	CP, Qld 1865-1866. Qld Plt (MLA, Mitchell, 18 Jun 1870-4 Sep 1871; Brisbane, 27 Jan 1872-14 Nov 1873).	24 Jan 1874.

Name	Birth	Education and Irish Admission	Australian Admission	Official Positions	Death
HARNEY Edward Augustine St Aubyn	31 Aug 1865, Dublin. Fifth son of Richard Harney, JP, of Killoterin House, Co Waterford, and Ann née King, of County Tipperary.	St Vincent's College, Castlenock; Jesuit College, Clongowes Wood. TCD. Irish Bar. English Bar (GI) 1906. KC (England), 1920.	Arrived WA 1896. WA Bar Jul 1897. Practised Coolgardie with brother Francis Samuel Harney, later Perth. KC (WA) 1905. Departed WA for UK 1906.	First editor, Western Australian Law Reports. Cwlth Plt. (Senator, WA, 1901-31 Dec 1903). UK Plt (MP, Liberal, South Shields, Nov 1922-17 May 1929).	17 May 1929.
HARNEY Francis Samuel	Son of Richard Harney, JP, of Killoterin House, County Waterford, and Ann née King, of Co Tipperary; brother of Edward Augustine St Aubyn Harney.		Arrived WA 1896. Practised as slcr at Coolgardie, for a time with brother Edward Harney.	WA Plt (MLA, Coolgardie), 1897.	
HEARN William Edward	21 Apr 1826, Belturbet, County Cavan. Second son of Reverend William Edward Hearn, of Killargue, Co Leitrim, later, of Kildrumferton, Co Cavan, and Henrietta Alicia née Reynolds.	Portora Royal School, Enniskillen. TCD (BA 1847, MA, LLD 1863). Irish Bar M 1853.	Arrived Melbourne 1855. Vict Bar 1860. QC 1886.	Vict Plt. (MLC Central Province Sep 1878-23 Apr 1888). Univ of Melbourne (Professor 1855-1873; Dean, Faculty of Law 1873-1888; Chancellor May-Oct 1886).	23 Apr 1888.

Name	Birth	Education and Irish Admission	Australian Admission	Official Positions	Death
HIGGINS Henry Bournes	30 Jun 1851. Second son of Reverend John Higgins of Newtownards, Co Down, and Anne née Bournes.	Wesleyan Connexional School, Dublin.	Arrived with family Melbourne 12 Feb1870. Univ of Melbourne (LLB 1874, MA 1876). Vict Bar 1876. NSW Bar 25 Apr 1898. KC (Vict) 1903.	Vict Plt (MLA, Geelong, Sep 1894-1900). Delegate to Fed Conv 1897-1898. Cwlth Plt (MHR, North Melbourne, 1901-1906). A-G Apr-Aug 1904. Justice, High Crt of Australia Oct 1906-13 Jan 1929. President, Crt of Conciliation and Arbitration 1907-1920.	13 Jan 1929.
HIGINBOTHAM George	19 Apr 1826, Dublin. Son of Henry, merchant, and Sarah, née Wilson.	Royal School, Dungannon. TCD (BA 1849, MA 1853). English Bar (LI) 6 Jun 1853.	Arrived Melbourne 10 Mar 1854. Vict Bar 27 Mar 1854.	Vict Plt (MLA, Brighton, May-July1861, Apr 1862-Jan 1876). A-G 27 June 1863-May 1868. Jge, Sup Ct 19 Jul 1880-24 Sep 1886. CJ 24 Sep 1886-31 Dec 1892.	31 Dec1892.
HORGAN John William	15 Jul 1834. Macroom, Co Cork. Son of John Horgan, shopkeeper, and Elizabeth née Murphy.	Dr Moynihan's Collegiate School, Cork. KI E 1856. Slcr 1861. Honorary Secretary, Cork Law Society.	Arrived Sydney 1875. NSW slcr 25 Mar 1876. Practised West Maitland 1876-1878, Wagga Wagga 1879-1880. To Perth 1881.	WA Plt (MLC, Perth, 28 May 1888-22 Jan 1889).	8 Jul 1907.
HUSTLER William	ca. 1813.	Irish Bar 27 Jan 1836.	NSW Bar 16 Sep 1839.	Acting Sheriff, NSW, Oct 1841-Jul 1843 (£1000 p.a.).	Jun 1845 (*aet.* 32).
IRELAND Richard Davies	27 Oct 1815. Only son of Captain James Stanley Ireland, of Galway, and Matilda L. née Davies.	TCD (BA 1837). Irish Bar M 1838.	Arrived Melbourne 1852. Vict Bar 1853. QC Vict 1863. NSW Bar 26 Jun 1867.	Vict Plt (MLA 1857-1868). S-G 1858-1859. A-G 1860-1861.	11 Jan 1877.

Name	Birth	Education and Irish Admission	Australian Admission	Official Positions	Death
IRVINE Sir William Hill	6 Jul 1858, Dromalane, Newry, Co Down. Sixth of seven children of Hill Irvine, farmer and linen manufacturer, and Margaret née Mitchel.	Royal School, Armagh. TCD (BA 1879, LLD (Honorary) 1904). KI 1879.	Arrived Melbourne 1879. Univ of Melbourne (MA 1882, LLB 1884, LLM 1886). Vict Bar 8 Jul 1884. KC 23 Oct 1906.	Vict Plt (MLA, Lowan, 1894-1906). A-G 1899-1900, 1902-Sep 1903. Premier 1901-Feb.1904. Cwlth Plt (MHR, Flinders, Dec 1906-1918). A-G Jun 1913-Sep 1914. CJ, Vict, 9 Apr 1918-30 Sep 1935.	20 Aug 1943.
JEFFCOTT Sir John	1796. Eldest son of William Jeffcott, of Tralee, Co Kerry, merchant, and Harriet Jane née Hoare. Elder brother of Sir William Jeffcott.	TCD (BA 1821, MA 1825). English Bar (IT), Feb 1826. CJ, Sierra Leone and The Gambia, 1830. Mar 1834 acquitted of murder (arising from duel, 11 May 1833).		Appointed Jge, Sup Ct SA, Mar 1836, arrived 21 Apr 1837.	12 Dec 1837.
JEFFCOTT Sir William	7 Sep 1800. Youngest son of William Jeffcott of Tralee, Co Kerry, and Jane née Hoare [or Hore]. Younger brother of Sir John Jeffcott.	TCD (BA 1826). English Bar (GI) 1825. Irish Bar 1828. Practised Dublin 1828-1843, 1845-1849.	Arrived Sydney Jun 1843.	Jge, Sup Ct of NSW, resident at Port Phillip, Jun 1843-Dec 1844. Recorder, Singapore and Malacca 1849-22 Oct 1855.	22 Oct 1855.
JONES Edward Richard Neynoe Gore	14 Nov 1849, Ballincar, Drumcliffe, Co Sligo. Son of John Sheridan Gore Jones, barrister, and Elizabeth Gillman née Nagle.		Family arrived in Queensland c. 1860.	Qld R-G's Office, Master of Titles.	19 Nov 1936.

Name	Birth	Education and Irish Admission	Australian Admission	Official Positions	Death
JONES John Sheridan Gore	20 Sep 1819. Eldest son of John Gore Jones, of Johnsport, Co Sligo, and Letitia E. née Sheridan.	TCD (BA 1842) Irish Bar M 1843.	Arrived Queensland c. 1860.	Qld Plt (MLA 1862-1863, 1865-1866). CP 1865-1868.	27 Feb 1868.
KEENAN Sir Norbert Michael	31 Jan 1864. Eldest son of Sir Patrick Joseph Keenan of Delville, Glasnevin, Dublin, and Elizabeth née Quinn.	Downside School, Somerset, England. TCD (BA M 1889). Irish Bar E 1890.	Arrived WA 1895. Practised as slcr Kalgoorlie 1895-1905, as barrister Perth from 1905. KC 1908.	WA Plt (MLA Oct 1905-Oct 1911, Apr 1930-Mar 1950). A-G May 1906-May 1909; other ministries.	24 Apr 1954.
KELLY William	1813(?). Eldest son of Andrew Kelly of Camp Hill, Co Sligo, merchant, and Anne née Madden.	Belfast Institute E 1842. JP, County Sligo.	Arrived Port Phillip 30 Apr 1854. Gold diggings and other activities. Departed Melbourne Dec 1857.		4 Mar 1872, Boulogne-sur-Mer, France.
KINCHELA John	8 Nov 1773. Second son of John Kinchela of Kilkenny, merchant, and Rosina née Connell.	Kilkenny College. TCD (BA 1796, LLB and LLD 1808). Irish Bar Nov 1798. Advocate, Irish Prerogative Courts.	Arrived Sydney Jun 1831.	A-G NSW (£1200) from Aug 1830. Acting Jge, Sup Ct Apr 1836-Sep 1837. Dep Commissary, Crt of Vice-Admiralty Sep 1837-Nov 1840. M in Eq (£800) Nov 1840- Sep 1841.	21 Jul 1845.
KING Henry Edward	9 Jun 1832. Son of John Wingfield King of Kilmallock, Mount Coote, Co Limerick, and Alicia née Coote.	College School, Gloucester, England.	Arrived Sydney 1852, then to Qld, 1852. Surveyor 1862. Qld Bar 7 Sep 1886.	Qld Plt (MLA, 1870-1873, 1874-1883; Speaker, LA, Jul 1876-Nov 1883). CP, Dist Ct 30 Jul 1890-6 Jan 1910.	5 Feb 1910.

Name	Birth	Education and Irish Admission	Australian Admission	Official Positions	Death
KINGSBURY John James	1854. Dublin.	TCD (qualified 1878, BA and MA 1887).	Arrived Melbourne 1878; Brisbane 1881. Qld Bar 1895.	JP Nov 1888. Qld Plt (MLA, North Brisbane 1893-1896). CP 1899. President, Qld Irish Association.	2 Aug 1939.
LAVAN Michael Gibson	23 May 1875. Eldest son of Martin Lavan, clerk, of Portumna, Co Galway, and Harriet née Gibson.	Royal Univ of Ireland (BA). TCD (LLB). Irish Bar T 1896.	WA Bar Sep 1898. KC 1930.		17 May 1937, Perth.
LAURANCE Thomas Clarke	27 May 1831, Cork. Son of merchant, shipowner.	Slcr, Ireland 1853. Minister, Wesleyan Church 1856.	Arrived WA 1864 Slcr 1873. Appeared pro bono for Aborigines. To Victoria 1886.	Practised as Wesleyan minister in Ireland, WA, Tasmania, Victoria.	5 Nov 1916, Melbourne.
LEEPER Alexander	3 Jun 1848, Dublin. Son of Reverend Alexander Leeper, DD, and Catherine née Porter.	TCD (BA, LLB 1871, MA 1875, LLD 1884)		Principal (later Warden), Trinity College, Univ of Melbourne 1876-Mar 1918.	6 Aug 1934.
LITTLE Robert	17 Nov 1822. Son of Patrick Little of Dungiven, Co Derry, officer of Excise, and Mary Anne Little.	Newtownlimavady. Att and slcr, Ireland, 1844-1845.	Arrived Sydney 23 Jun 1846. NSW slcr 8 Aug 1846. Removed to Brisbane Dec 1846, practised as slcr.	First Cr Slcr, Moreton Bay (then Qld) 1 Apr 1857- 1885 (£500 p.a.), right of private practice. First President, Qld Law Society 1873-1880.	17 Jan 1890.
LYHANE Cornelius	13 Apr 1871. Youngest son of Cornelius Lyhane, gentleman, of Lackadune, Macroom, Co Cork, and Catherine née Kelleher.	Royal Univ of Ireland (BA, LLB, LLD). Irish Bar T 1899.	Arrived WA ca. 1899. WA Bar. Practised in Perth, then Kalgoorlie.		

Name	Birth	Education and Irish Admission	Australian Admission	Official Positions	Death
LYNN Adam Loftus	9 Apr 1795. Inyard, County Wexford. Third son of John Lynn and Wilhelmina née Glascott.	Educated Waterford. LL M 1812. Slcr 1817.	Arrived Sydney 30 Sep 1850. Slcr NSW 28 Dec 1850; Vict 1851. Pioneer slcr in Ballarat, from 1 May 1853.		17 Sep 1878, Ballarat.
MACARTNEY Sir Edward Henry	24 Jan 1863, Holywood, Co Down. Youngest son of William Isaac Macartney, formerly Comm of Police, Ceylon, and Henrietta née Dare.	Holywood, Enniskillen, Greenhill, Dublin.	Arrived Brisbane Mar 1883. Qld slcr 1891. Resumed legal practice after parliamentary career.	Qld Plt (MLA 24 Nov 1900-1908, 1909-9 Oct 1920). Sec for Public Lands 7 Feb 1911-11 Dec 1912. Agent-General for Qld in London 1929-1931.	24 Feb 1956.
McCAY Sir James Whiteside	21 Dec 1864, Ballynure, Co Antrim. Eldest of 10 children of Reverend Andrew Ross Boyd McCay (1837-1915), Presbyterian minister, and Lily Ann Esther Waring née Brown.		Arrived Vict as an infant, 1865. Castlemaine State School, Scotch College, Melbourne. Univ of Melbourne (BA 1892, MA 1894, LLB 1897). Slcr 1897. Practised at Castlemaine 1897-1905, then in Melbourne.	Vict Plt (MLA 1895-1899). Cwlth Plt (MHR, Corinella, 29 Mar 1901-12 Dec 1906). Min for Defence 18 Aug 1904-5 July1905. Senior commands, Australian Army, WWI.	1 Oct 1930.
McCREIGHT John Foster	7 Aug 1826. Eldest son of Reverend James McCreight, of Keady, Co Armagh, and Eliza née Foster.	TCD (BA M 1850). Irish Bar 9 Nov 1852.	Arrived Melbourne 1853. Vict Bar 29 Sep 1853. Departed Victoria 1859, for Canada. Arrived Victoria, BC 1860. Bar of Vancouver Island 26 Jun 1860. QC, BC, 2 April 1873.	Vict, CP 1855-1858. Leg of BC Oct 1871-1875. A-G 20 July 1871-23 Dec 1872. First Premier of BC 13 Nov 1871-23 Dec 1872. Jge, Sup Ct of BC 26 Nov 1880-1897.	18 Nov 1913, Hastings, Sussex, England.

Name	Birth	Education and Irish Admission	Australian Admission	Official Positions	Death
McDERMOTT Townsend	12 Oct 1818. Third son of William McDermott of Dublin, solicitor, and Ellen née Garde.	TCD (BA 1840). Irish Bar 1840.	Arrived Melbourne 1853. Vict Bar 1854. NSW Bar 27 Mar 1877.	Vict Plt (MLA, Ballarat East, 1874-1877). S-G 31 Jul 1874-7 Aug 1875.	21 Jan 1907, Ballarat.
MacDEVITT Edward O'Donnell	11 Apr 1841. Sixth son of Daniel MacDevitt of Glenties, Co Donegal, and Mary née O'Donnell.	KI M 1875.	Qld Bar 20 Feb 1864. NSW Bar 29 Dec 1865. Practised Dublin 1874-1890, Melbourne 1890-1896, Kalgoorlie 1896-1898.	Qld Plt (MLA, Sep 1870 - Aug 1874). A-G, 1872-1874. Legal Assistant, Irish Land Commission 1881-1889.	4 Feb 1898, Melbourne.
MacDONNELL Sir Richard Graves	3 Sep 1814 Eldest son of Reverend Dr Richard MacDonnell, of Dublin, Fellow (later Provost) of TCD, and Jane née Graves.	TCD (BA 1835, MA 1836, LLB 1845, LLD 1862). Irish Bar H 1838.		CJ, The Gambia 20 Jun 1843-Oct 1847. Governor, The Gambia 1 Oct 1847-1852. Governor, SA, Jun 1855 - Mar 1862.	5 Feb 1881.
McDONOGH Maurice Travers	ca. 1824. Son of Laurence McDonogh [or McDonough], physician, Parsonstown, Co Offaly.	TCD 17 Jun 1840.	Vict Bar 1853. Practised Back Creek, Lamplough (during gold rushes).	Edited final volume of *Practice Cases* (Melbourne, 1847).	5 May 1861, Back Creek, Victoria.
MacDOWELL Edward	1798. Son of John Macdowell, of Marlton, near Wicklow, merchant.	TCD (did not graduate). English Bar (MT) 1824.	NSW Bar 24 Dec 1831. VDL Bar 1832.	Arrived VDL1833. S-G, Jan 1833-Sept 1837. A-G, Sep 1837-Jul 1841. Cmr, Insolvency Ct 1845. Cr Slcr, 1854-1855.	24 Apr 1860.

Name	Birth	Education and Irish Admission	Australian Admission	Official Positions	Death
MACOBOY Michael Francis	29 Sep 1811. Eldest son of David Macoboy (1777-1846) of Cork, merchant, and Hannah née McMahon.	TCD (BA E 1842). Irish Bar T 1844. Formerly an att.	Arrived Victoria 1855. Practised as slcr.	Cnty Crt Jge, Vict 7 Jan 1858-29 Jan 1872.	Mar 1872.
McFARLAND Alfred	24 Apr 1824. Fourth son of John McFarland, of Greenfield, Co Derry, merchant linen bleacher, and Anne née Heuston.	Foyle College, Belfast Academy. TCD. Irish Bar E1847. Practised Dublin and North-East Circuit.	NSW Bar 8 Apr 1861. Practised 1861-1865, 1891.	WA, Jge, Civil and Criminal Crts 1857-1861. NSW, Ch Cmr of Insolvent Estates. Jge, Dist Crt Dec 1865-1891.	11 Mar 1901, Sydney.
McFARLAND John	20 Feb 1838, Omagh, Co Tyrone. Second son of Patrick McFarland and Rebecca née McCrae.		Arrived Melbourne *aet* 15 with parents 1853. Victorian Grammar School, Melbourne. Univ of Melbourne (BA 10 Apr 1858, MA 14 Apr 1860). Vict Bar 1862.	Cnty Ct Jge Vict 29 Jun 1882-6 Apr 1884. Jge Ct of Mines 24 Jul 1882-6 Apr 1884.	6 Apr 1884.
MacGINLEY John Joseph	1879 [or 1875], Garrowcannon, Co Donegal.		Arrived Qld with family 1886. Qld Bar, but practised little.		1940, Brisbane.
McHUGH Alfred		Irish Bar.	NSW Bar 18 Aug 1898.		
McKEAN James	24 Apr 1832, Belfast. Son of Reverend David McKean and Sarah née Smith.		Arrived Victoria c. 1854. Slcr 1863, practised in Melbourne.	Vict Plt (MLA Feb 1866-Jan 1871, May 1875-Jun 1876 (expelled), May 1880-Feb 1883). Minister 1869-1870.	12 Jun 1901.

Name	Birth	Education and Irish Admission	Australian Admission	Official Positions	Death
MACKIE William Henry	17 Nov 1799, Cochin, India. Son of William Frederick Mackie, surgeon, East India Company, and Elennora née Hamilton.	Londonderry; Twickenham, England. Cambridge (Trinity) (BA 1821). IT Nov 1822 (but not called to the Bar).	Arrived WA Oct 1829.	JP (WA) 9 Dec 1829. Ch QS (£290 p.a.) 1829. Advoc-Gen, 1831- Jun 1834. Cmr of Civil Crt Jun 1834. Leg Cl, Exec Cl, 1831. Resigned all official positions 1857.	24 Nov 1860.
MADDEN Sir Frank	29 Nov 1847, Cork. Third son of John Madden, att (from 1848), and Margaret Eloise née Macoboy. Younger brother of [Sir] John Madden.	Educated London (where father practised from 1850); Marist College, Beauchamps, Normandy, France; St Patrick's College, East Melbourne.	Arrived with family Melbourne Jan 1857. Articled to father. Slcr 1869. Founder of firm Madden & Butler. President, Law Institute of Victoria 1886-1887.	Vict Plt (MLA 1894-1917; Speaker, LA 1904-1917).	17 Feb 1921.
MADDEN Sir John	16 May 1844, Cloyne, Co Cork. Eldest son of John Madden, att (from 1848), and Margaret Eloise née Macoboy. Eldest brother of [Sir] Frank Madden.	Educated London (where father practised from 1850); Marist College, Beauchamps, Normandy, France; St Patrick's College, East Melbourne.	Arrived with family Melbourne Jan 1857. Univ of Melbourne (BA 1864, LLB 1865, LLD 1869). Vict Bar 14 Sep 1865.	Vict Plt (MLA 1874-1875, 1876-1883). Min of Justice 1875, 1880. CJ, 10 Jan 1893-10 Mar 1918.	10 Mar 1918.
MADDEN Richard Robert	22 Aug 1798, Wormwood Gate, Dublin. Twenty-first, and youngest, child of Edward Madden, silk merchant, and Elizabeth née Corey.	Medical practitioner (apprenticed at Athboy, County Meath); St George's Hospital, London. MD, FRCS. Held judicial office in Jamaica, Cuba 1835-1839.	Arrived WA 1847.	Col Sec, WA 1847-1850. Exec Cl 1847-1850. Acting Governor 1847.	5 Feb 1886, Dublin.

Name	Birth	Education and Irish Admission	Australian Admission	Official Positions	Death
MARTIN Sir James	14 May 1820. Eldest child of John Martin, of Midleton Co Cork, castle steward, and Mary née Hennessey.		Arrived Sydney 6 Nov 1821. Sydney Academy, Sydney College, 1833-1836. Slcr 10 May 1845. NSW Bar 11 Sep 1856. QC 12 Nov 1857.	Leg Cl 1847-1856 NSW Plt (MLA 1856-1873). A-G, Aug-Oct 1856, 1857-1858, 1863-1865. Premier 16 Oct 1863-30 Jan 1865, 22 Jan 1866-28 Oct 1868, 16 Dec 1870-13 May 1872. CJ, 19 Nov 1873-4 Nov 1886.	4 Nov 1886.
MARTLEY James Frederick	2 Oct 1822. Eldest son of John Martley QC, of Dublin, and Isabella Jane née Hopkins.	TCD (BA 1843) Irish Bar H 1847.	Arrived Melbourne 1856. Vict Bar. NSW Bar 1 June 1866.	Vict Plt (MLA, Maldon, Mar 1860-Jul 1861). S-G Mar 1859-Nov 1860. CP (Melbourne).	11 Dec 1873.
MARTYN Matthew Joseph	31 May 1814. Only son of Christopher, of Low Park House, Co Galway, and Catherine Frances née Molony.	TCD M 1838. Irish Bar T 1843.	Arrived Adelaide 1850. Practitioner, SA 6 June 1853. Subsequently returned to Ireland.		Before Jan 1874.
MEAGHER Thomas Francis	Eldest son of Thomas Meagher of Wexford, and Alicia née Gann.	Clongowes College, Ireland. Stonyhurst College, England. Irish Bar M 1843.			1 Jul 1867.
MITCHEL John	3 Nov 1815, Camnish near Dungiven, Co Derry. Son of Reverend John Mitchel, of Newry, Co Armagh. and Mary née Hazlett.	TCD, 4 Jul 1831 (did not graduate). KI E 1836.		Arrived Hobart Apr 1850 (sentenced to transportation 14 years for treason felony, 1848). Departed VDL Jun 1853.	20 Mar 1875

Name	Birth	Education and Irish Admission	Australian Admission	Official Positions	Death
MOLESWORTH Hickman	23 Feb 1842, Dublin. Elder son of [Sir] Robert Molesworth, barrister, and Henrietta née Johnston.		Arrived Australia with family 1852. Univ of Melbourne. Vict Bar 1864.	Cnty Ct Jge Dec 1883-18 Jul 1907. Jge Insolvency Ct 1886-18 Jul 1907. Acting Jge Sup Ct 1891.	18 Jul 1907.
MOLESWORTH Sir Robert	3 Nov 1806. Only son of Hickman Blayney Molesworth of Dublin, slcr, and Wilhelmina Dorothea née Hone.	TCD (BA 1826, MA 1833). Irish Bar 1828.	Arrived Adelaide 1852, Melbourne 1853. Vict Bar 1853.	Acting CJ of Vict 1853; 1 Jul 1885-1 May 1886. S-G, 4 Jan 1854-17 Jun 1856. Jge, Sup Ct 17 Jun 1856-1 May 1886. Chief Jge, Crt of Mines.	18 Oct 1890.
MOORE George Fletcher	10 Dec 1798. Second son of Joseph Moore, of Bond's Glyn, Donemana, County Derry, gentleman, and Anne née Fletcher.	Foyle College, Londonderry. TCD (BA 1820). Irish Bar practised on North-west Circuit.	Arrived WA Oct 1836.	Cmr Civil Crt, 17 Feb 1832-1834. Advoc-Gen 1834. Acting Col Sec Jul 1846- Mar 1848. Leg and Exec Cls, from 1834. Resigned all offices 1852, while on leave in Ireland.	30 Dec 1886, Kensington, London.
MOORE James	13 Jan 1807, Dublin. Third son of George Moore QC, MP, LLD, of Kilbride, Co Wicklow, and Elizabeth née Armstrong.	TCD (BA 1828, MA 1832). Irish Bar E 1830 (did not practise). Univ of Cambridge (Gonville and Caius College, MA 1854).	Arrived Melbourne 1840.	JP, Vict.	6 Oct 1895.

Name	Birth	Education and Irish Admission	Australian Admission	Official Positions	Death
MOORE Richard Albert	19 May 1848, Ireland.	Educated for the Army.	Arrived Qld 1878.	PM (Charleville, Mackay, Warwick, Toowoomba) 1884-1916. Active in military Volunteer Corps, becoming Colonel.	29 Aug 1919, Brisbane.
MOORHEAD Frederick William	27 Sep 1864. Seventh son of M. J. Moorhead, MD, FRCSI, of Tullamore, King's County, and Julia née Humphreys	TCD (BA, LLB, 1885). Irish Bar T 1887.	Arrived WA 1889.	City Slcr, Perth. A-G 1901. Jge, Sup Ct Apr 1902.	Nov 1902.
MORIARTY Abram Orpen	1830, Co Cork. Son of Merion Marshall Moriarty and Anne née Orpen.		Arrived Sydney Jan 1843.	Cmr CL, New England and Macleay 1857. PM Armidale 1857. NSW Plt (MLA New England and Macleay Feb-Oct 1858). Chief Cmr CL 1860-1870. Other public appointments.	22 May 1918, Goulburn.
MULLEN William Henry	1831, Co Cork.		Arrived Victoria *aet* six. Educated in Sydney. Articled, ultimately to J. H. V. Turner, of Maitland. Slcr, NSW, 29 Oct 1853. Practised in Maitland 1853-1904.	Foundation Mayor, West Maitland.	1904

Name	Birth	Education and Irish Admission	Australian Admission	Official Positions	Death
NASH Richard West	1808, Dublin. Eldest son of Reverend Richard Herbert Nash, of Moyle House, Co Tyrone, and Sarah née West. Brother-in-law to John Schoales.	TCD (BA and MA Nov 1832). 1847) Irish Bar M 1836.	Arrived WA1839. Practised in Perth.	Advoc-Gen 1841, Nov 1846-Jan 1849 (when he departed WA for London).	22 Dec 1850, Norwood near London.
NEEDHAM-WALKER George	15 Dec 1845, Termonfeckin, Co Louth. Son of Thomas George Walker, Lieutenant in 75th Regiment of Foot, and Sarah Catherine née Needham.	Said to have attended (and been expelled from) TCD. Officer, Royal Navy. Ostrich farming in South Africa, 1880s.	Arrived Qld Jan 1884. Clerk, Qld Public Service (Justice Dept) from 21 Sept 1886.	CPS, various regional locations. PM, Bowen, Mar 1909-1916 (although without legal qualifications).	27 Aug 1921.
NEWTON Hibbert Henry	7 Aug 1824. Eldest son of Hibbert Newton of Ballinglen, Co Wicklow, and Dorothea née Gildea.	TCD (BA 1845) Irish Bar M 1845.	Arrived Melbourne Apr 1853. Vict Bar 1854.	Vict Plt (MLA 1859-1861). Postmaster-General 29 Oct-26 Nov 1860.	30 May 1890.
NOLAN James Frederick	7 Dec 1827. Second son of Daniel Nolan of Dublin, slcr, and Alicia née Wilson.	TCD (BA 1845). Irish Bar E 1855.	Arrived Melbourne 1859. Vict Bar 1859.	CP. Cnty Ct Jge 1870-1886.	1906, England.
O'BRIEN Daniel Joseph		Slcr QB.	Practitioner, SA, 21 Sept 1850.		5 Jan 1888, Dublin.
O'HILLEREN Daniel			NSW Bar 2 June 1894.		

Name	Birth	Education and Irish Admission	Australian Admission	Official Positions	Death
O'LOGHLEN Sir Bryan	27 Jun 1828, Dublin. Third son of [Sir] Michael O'Loghlen, barrister, and Bidelia née Kelly.	Oscott College, Birmingham, England. TCD (BA, 1836) Irish Bar E 1856.	Arrived Melbourne Jan 1863. Vict Bar 1862.	CP, Apr 1863. Land Tax Cmr, 1876-1877. Vict Plt (MLA, Feb 1878-Oct 1900, discontinuously) ; A-G Mar 1878-Feb 1880, 1894. Premier, A-G, Treasurer, 9 July 1881-8 March 1883. UK Plt (MP, Clare, 1877-Apr 1879, did not take seat). QC 1879.	31 Oct 1905.
O'MARA Thomas Chrysostom	Third son of Timothy O'Mara of Tumut, NSW.	St Patrick's College, Carlow Univ of London	English Bar (MT) 26 Jan 1874. NSW Bar 4 July 1875.		
O'MEAGHER Joseph	1790, Borris, Queen's County.	Att and slcr, Irish Courts.	Slcr NSW 1853. Practised at Maitland.		1871
O'RYAN John Gabriel	1842, Tipperary.	TCD.	Arrived Australia 1873. NSW Bar 15 Jun 1876	CP, Northern Circuit.	1913
PARKER Norcott d'Esterre	10 Jun 1819, Cork. Eighth, and youngest, child of William Parker (1778-1837) and Alicia Eleanor née Somerville.	KI T 1838. Att QB, CP, Exchq, slcr Ch. Notary Public.	Arrived Australia 1844. Slcr NSW 1845. Partner John Dillon, Sydney, 14 Nov 1845-6 Mar 1846. Mid-1846 departed Sydney for HK.	Arrived HK Jun 1846. Slcr HK Jul 1846. CP 15 Oct 1846-Dec 1846, 30 Nov 1847-Sep 1849. Coroner 12 Jan 1847-Dec 1848. Piracy charge dismissed 27 Jun 1849. Departed HK for California 29 Sep 1849.	Lost at sea 1849.

Name	Birth	Education and Irish Admission	Australian Admission	Official Positions	Death
PENNEFATHER Richard William	16 Jul 1851 [or 1853], Cashel, Co Tipperary. Son of Frederick William Pennefather, lawyer, and Annie née Parsons. Descended form Richard Pennefather (1773-1859), CB of Exch (1821-1859).	Emigrated to Australia when young.	St Patrick's College, Melbourne. Univ of Melbourne (BA, LLB). Vict Bar 1876. Practised Melbourne 1876-1886, Sydney 1886-1888, Melbourne 1888-1896, Perth 1896-1901, 1902-1905.	WA Plt (MLA 3 May 1897-May 1901; MLC, North Province 15 Jan 1907-16 Jan 1914). A-G 27 Oct 1897-20 Mar 1901. Acting Jge, Sup Crt of WA, 1901.	16 Jan 1914.
PLUNKETT John Hubert	Jun 1802.. Younger of twin sons of George Plunkett of Mount Plunkett, Co Roscommon, and Ellen née O'Kelly.	TCD (BA 1823). Irish Bar H 1826.	NSW Bar 30 Jun 1832. QC (Australia's first) 6 Jun 1856.	S-G (£800) Jun 1832-Feb 1836. A-G Feb 1836-1856, 1865-1866. NSW Plt (MLC, 1857-1858, 1863-1865; President LC, 1857-1858; MLA 1858-1860).	9 May 1869.
POLLOCK Hugh	ca. 1864, Douglas, Co Cork.	TCD (BA 1885, LLB 1887)	Arrived Sydney 1886. NSW Bar 8 May 1890.	Sec and Permanent Head, A-G's Dept, NSW. S-G, 31 July 1901-6 Oct 1904. CP.	1911
POWER Francis Isidore	28 Feb 1852, South Brisbane. Third son of Michael Power, auctioneer and commission agent, and Anna Maria née Connolly. Younger brother of Virgil Power.	Brisbane. Aet. 12, Clongowes Wood College, County Kildare. TCD (did not graduate). Articled clerk, Dublin 1870-1875.	Slcr Qld 1873. Practised at Gympie.	Qld Plt (MLC 15 Jul 1901-24 Jun 1912). A-G and Min for Justice 19 Nov 1907-18 Feb 1908.	24 Jun 1912, Gympie.

Name	Birth	Education and Irish Admission	Australian Admission	Official Positions	Death
POWER Virgil	2 Aug 1849. Second son of Michael Power of Brisbane, auctioneer and commission agent, and Anna Maria née Connolly. Elder brother of Francis Isidore Power.	St Mary's College, Lyndhurst, Sydney. Clongowes Wood College, County Kildare. TCD (BA H 1871). Irish Bar 1873.	Qld Bar 26 April 1875.	CP1875-1895. Deputy Jge, Vice-Admiralty Crt 1881. Jge, Sup Crt (first resident Jge of Central District, Rockhampton) 1895-1910 First Qld born member of Sup Crt.	2 Jun 1914, Southport, Queensland.
PUREFOY William Alexander	1809, Eyre Court, Co Galway. Second son of Reverend Thomas Purefoy, of Banagher, King's County, and Alley née Hackett.	TCD (BA 1830, MA Nov 1832). Irish Bar 11 Jan 1834.	NSW Bar 16 Sep 1839.	AJ, Norfolk Island 1844. President, Crt for Trial of Disputed Elections, 1849. Chief Cmr of Insolvent Estates, 1856-1861. Jge, Dist Crt, Hunter River District, 25 Jul 1861-30 May 1867.	30 May 1867.
QUINLAN Francis	Oct 1834, Clonmel, Co Tipperary. Eldest son of Matthew Quinlan, MD, of Thurles, Co Tipperary.	Thurles College.	Arrived Vict 1853. aet. 19. Gold digging, Dunolly, Vict. Vict Bar 14 Sep 1863.	JP 11 Oct 1858. First President, Dunolly Municipal Board 19 Jun 1858. Cnty Crt Jge 3 Apr 1882- 1 May 1891.	2 Feb 1910, Clevedon, Somerset, UK.
RAYMOND Samuel	Limerick. Son of James Raymond.	TCD (BA 1830, MA 1833, LLB and LLD 1837) Irish Bar 10 Jun 1835	NSW Bar 1 Jun 1837.	Deputy Sheriff, Port Phillip District 1841. Prothonotary, Sup Ct, Sydney.	
REAL Patrick	Mar 1846. Youngest child of James Real, tenant farmer, of Pallgrean, Co Limerick, and Ellen née Donegan.		Arrived Qld (with mother and siblings) 1850. Qld Bar 8 Sep 1874.	CP. Acting Dist Crt Jge. Jge, Sup Ct 8 Jul 1890-1922.	10 Jun 1928.

Name	Birth	Education and Irish Admission	Australian Admission	Official Positions	Death
ROBINSON Robert Thomson	18 Jan 1867, Ballibay, County Monaghan. Son of John Robinson, bank manager and merchant, and Margaret née Thomson.		Arrived Vict 1872; WA 1878. Blackwood State School, Victoria; Prince Alfred College, Adelaide. Articled to E. G. S. Hare (Albany, WA) and Septimus Burt (Perth); Associate to [Sir] Alexander Onslow, CJ. WA Bar 1889. KC 1914.	WA Plt (MLA Canning 1914-1921). A-G 1916-1919; other ministries.	19 Sep 1926.
SAMUEL Samuel	1834-1837 Son of Saul Solomon of Dublin, jeweller, and Elizabeth née Hahnemann.	With family to Scotland, aet. 2 Educated private schools, Edinburgh. Employed as a slcr's clerk.	Arrived Melbourne 1852. Articled to F. W. Owen, of Inglewood. Admitted slcr 1865. Practised Maryborough, Hamilton. Senior partner Samuel & Horowitz.	Vict Plt (MLA, Dundas, May-Jul 1892).	27 Jul 1892.
SCHOALES John	27 Oct 1810. Third son of John Schoales, KC, of Fitzwilliam Square, Dublin, and Clementina née Archer. Brother-in-law to Richard West Nash.	TCD (BA 1831). Irish Bar T 1835.	Arrived WA (in *Ganges*) 14 Oct 1841.		
SHAW John Mackenzie	15 Jun 1820. Second son of James Shaw of Stramore House, Co Down, and Phoebe née Mackenzie.	Dungannon School TCD (BA 1843) Irish Bar M 1846.			

Name	Birth	Education and Irish Admission	Australian Admission	Official Positions	Death
SHIELS William	3 Dec 1848, Maghera, Co Derry. Son Robert Shiels, farmer, and Patricia Sarah née Kelly.		Family arrived Melbourne late 1854. Scotch College, Melbourne 1862-1866. Univ of Melbourne (LLB 1873). Vict Bar 1873.	Vict Plt (MLA, Normanby, 1880-Jun 1904). A-G 30 Oct 1890-18 Jan 1893; Premier 16 Feb 1892-18 Jan 1893. Other ministries.	17 Dec 1904.
SLATTERY Thomas Michael	17 Dec 1844, Greenane, Co Tipperary. Son of Edmund Slattery, police officer, and Alice née Walsh.		Arrived in Australia with parents 1849, first to Ipswich, Qld, then to Sydney 1852. St Mary's Seminary, Sydney. Slcr 1875. NSW Public Service 1864-1880, then private practice.	Chief Clerk, Prothonotary, Sup Crt of NSW. NSW Plt (MLA, Boorowa, 29 Nov 1880-1 Jan1895; MLC 12 Jun 1900-13 June 1905). Min of Justice 2 Nov-21 Dec 1885, 17 Jan-7 Mar 1889. Other ministries.	25 Jul 1920.
SLEIGH William Campbell	1818, Dublin. Eldest son of William Willcocks Sleigh, medical practitioner, and Sarah née Campbell.	English Bar (MT) 30 Jan 1846. Serjeant-at-law, Nov 1868.	NSW Bar 8 Mar 1877. Vict Bar 21 Mar 1877. Tasmanian Bar 11 Mar 1880.	Tasmanian Plt (MHA, Apr 1880-1881)	23 Jan 1887, Ventnor, Isle of Wight, UK.
SMYTH Frederick Leopold	9 Apr 1816. Fifth (or sixth) son of Thomas Smyth of Queen Street, Dublin and Mary née Goodin.	TCD 1839 Irish Bar 1843.	Arrived Victoria 1863.	PM. CP.	
SMYTH George Allen	1814 Youngest son of Captain Elias [? Charles] Smyth, 5th Dragoon Guards, of Limerick, and Eliza Anna née Younge.	Irish Bar 1846.	Arrived Melbourne 1849 Vict Bar 1852.	Coroner 1870.	

Name	Birth	Education and Irish Admission	Australian Admission	Official Positions	Death
STAWELL Sir William Foster	27 Jun 1815. Third son of Jonas Stawell of Old Court, Co Cork, barrister, JP, and Anne née Foster.	TCD (BA H 1837; LLB and LLD 1873). English Bar (LI) M 1837 Irish Bar M 1839. Practised on Munster Circuit until 1842.	Arrived Melbourne Dec 1842. Melbourne Bar 11 Mar 1843.	A-G, Vict 1851-1857. Second CJ of Vict, 23 Feb 1857-24 Sep 1886.	12 Mar 1889.
von STIEGLITZ Frederick Lewis	13 Oct 1803. Eldest son of Baron Heinrich Ludwig von Stieglitz, of Lewis Hill, Co Armagh, and Charlotte née Atkinson.		Arrived, with two brothers, Hobart, 7 Aug 1829.	JP 1841. Tas Plt (appointed to LC 1846). Returned to Ireland 1857. JP, Counties of Armagh and Down.	14 May 1866.
SUPPLE Gerald Henry	1823 Cork. Eldest son of Thomas Supple, of Ballintemple, Cork, and Letitia Anne née Sherlock.		Arrived Melbourne 1857. Vict Bar Dec 1862. Jul 1870, convicted of murder. Death sentence commuted to life imprisonment Sep 1871 (released 5 Oct 1878).		16 Aug 1898, Auckland, NZ.
THERRY Sir Roger	22 Apr 1800. Third son of John Therry of Castle Therry, Co Cork, barrister, and Jane née Keating.	TCD (did not graduate). Irish Bar H 1825.	Arrived Sydney 4 Nov 1829. NSW Bar 17 Nov 1829.	Cmr of Crt of Requests, 1829-1844. Acting A-G, Mar 1841-Aug1843. Resident Jge, Port Phillip, 31 Jan 1845. Jge, Sup Crt 26 Feb 1846-Mar 1859.	17 May 1874, Bath, England.
THOMAS Evan Henry	1801? Co Antrim.	Uncertain whether he had any formal legal qualifications.	Arrived Hobart Aug 1822 (on *William Shand*). From 1831 he held himself out as a notary public and conveyancer for VDL and NSW, and appeared before Launceston courts.		26 Dec 1837.

Name	Birth	Education and Irish Admission	Australian Admission	Official Positions	Death
THYNNE Andrew Joseph	30 Oct 1847, Ennistymon, Co Clare. Third son of Edward Thynne, farmer, and Bridget Stuart née Fitzgerald.	Christian Brothers College, Ennistymon. Queen's College, Galway 1861.	Arrived with parents in Qld 1864. Articled to Graham Hart. Slcr Dec 1873.	Qld Plt (MLC Jan 1882-1922). A-G and Min of Justice Jun 1888-Aug 1890, Oct 1893-Oct 1894. Other ministries.	27 February 1927.
TRENCH Robert Le Poer	c. 1811. Third son of Venerable Charles Le Poer Trench of Ballinasloe, Co Galway, Archdeacon of Ardagh.	English Bar (MT) Jun 1842.	Arrived Victoria early 1850s. Vict Bar Jun 1855. QC 1878. Authority on mining law.	CPS, Kilmore, Ballarat, early 1850s. A-G (although not in Plt) Aug-Oct 1875, May 1877-Mar 1878. Cmr of Land Tax 1878. Cty Crt Jge Apr 1880-1 Jan 1886.	8 Feb 1895.
TUTHILL Ferguson Hendley	1846. Eldest son of Charles C. Tuthill, barrister, Dublin.	TCD. Irish Bar 1865. Slcr 1871.	Arrived Melbourne 1872.		Jun 1924.
VIGORS Bartholomew Urban	1817, Wexford. Son of Reverend Thomas Mercer Vigors, of Burgage, Co Carlow, and Anne, née Cliffe.	Educated Dublin. TCD (BA 1839). KI H 1836.	Arrived WA 1842 (on *Shepherd*).	Acting Adv-Gen at time of his death.	15 Mar 1854, Perth.
WALSH Charles Hamilton	ca. 1820. Son of William Walsh of Ballinamore, Co Leitrim, merchant, and Sarah née Matchett.	KI T 1837. Slcr 1842.	Arrived Australia 1848. Slcr, NSW 28 Apr 1849. Practised at Goulburn from 1849 until his death.	First Mayor of Goulburn, 1859. NSW Plt (MLA).	8 Nov 1874.

Name	Birth	Education and Irish Admission	Australian Admission	Official Positions	Death
WALSH Robert	3 Oct 1824. Third son of Michael Walsh of Mount Michael, Rathfarnham, merchant, Co Dublin, and Susanna née Cooney Bond.	Blackrock College, Dublin. TCD (BA 1847). Irish Bar 1847.	Arrived Victoria 1853. Vict Bar 1853. Practised at Ballarat. QC 1890.	Vict Plt (MLA, Ballarat East, 1871-1874). A-G, 5 Jul 1871-10 Jun 1872 CP. Acting Cnty Crt Jge 1899.	24 Aug 1899.
WELSH Thomas	Ireland			A-G, VDL 26 Nov 1841-1844.	
WENTWORTH William Charles	Aug 1790. Son of Irish born D'Arcy Wentworth and Catherine Crowley.	English Bar (MT) Feb 1822. Univ of Cambridge (Peterhouse) 1822 (did not graduate).	NSW Bar 10 Sep 1824.	NSW Leg Cl appointed 1839, elected 1843-1856, appointed 1861.	20 Mar 1872.
WILKINSON William John	1846, Castlenock, Co Cork.		Arrived Melbourne 1862 Univ of Melbourne. Slcr Melbourne, 1875 (practised as partner of John Gavan Duffy, 1876-1891.	Vict Plt (MLA, East Bourke, Apr 1889-6 Aug 1891).	6 Aug 1891.
WILLIAMS William	24 Apr 1824.		Arrived Australia c 1858. Practised as slcr Wagga Wagga from 1860, and Tumbarumba from 1886.		1900
WRENFORDSLEY Sir Henry Thomas	ca. 1826, London. Son of Joseph H. Wrenford Sly (or Wrenfordsly), of Wellington Quay, Dublin, slcr, and Louisa née Bywater.	Royal School, Portora. TCD, 1 Mar1841 (did not graduate). KI M 1842. Slcr, Ireland, 1849. English Bar (MT), 30 Apr 1863.	Vict Bar 1 Apr 1887. QC, Vict, 25 Jul 1887. NSW Bar 29 Feb 1888.	Various colonial appointments. WA, CJ, 5 Mar 1880- Jun 1883; Acting CJ, 1890-1891.	2 Jun 1908.
WRIGHT Joseph William	Ireland.	Irish attorney.	Slcr, NSW 15 Sep 1831.		

Name	Birth	Education and Irish Admission	Australian Admission	Official Positions	Death
WRIXON Sir Henry John	18 Oct 1839. Third son of Arthur Nicholas Wrixon, of Melbourne, and Maria M. née Bace.	Univ of Melbourne 1855. TCD (BA 1861) Irish Bar M 1861.	Arrived Melbourne 1850. Vict Bar 1863. QC 1890. NSW Bar 30 Aug 1875.	Vict Plt (MLA, Belfast, Feb 1868-1877; Portland, May 1880-Jul 1894; MLC 1896-Jun 1910; President, LC 1910). S-G Apr 1870-Jun 1871; A-G 1886.	9 Apr 1913.
WRIXON Arthur Nicholas	9 Jan 1811. Fourth son of John Wrixon, of Ballyclough, Co Cork, and Mary née Bentley.	Irish Bar M 1838.	NSW Bar 5 Oct 1848.	JP. Cnty Ct Jdge, Vict 1853-6 Jun 1863. Cmr of Insolvent Estates 21 May 1861-6 Jun 1863.	6 Jun 1863.

APPENDIX B

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ADMINISTRATION OF JUSTICE (COLONIES, &c.)

RETURN to Three Addresses of the Honourable The House of Commons, dated 7 and 8 June 1858, and 3 March 1859;—*for*,

(ADDRESS, 7 June 1858.)

A "RETURN of Judicial Offices, Law Offices of the Crown, and other Principal Offices connected with the ADMINISTRATION of JUSTICE in the Colonies, and in *India*; specifying the Number and Descriptions of such Offices, and the Salaries attached to each."

(*Mr. Warren.*)

(ADDRESSES, 8 June 1858, and 3 March 1859.)

A "RETURN of the Names, Salaries, Date of Appointment, and Nature of Office of all Judicial Officers, Law Officers of the Crown, and other Principal Officers connected with the ADMINISTRATION of JUSTICE in the Colonies, and specifying such Officers as shall have belonged to the Legal Profession in *England*, *Ireland* or *Scotland*, respectively."

(*Mr. Grogan.*)

Colonial Office, 15 April 1859.

CARNARVON.

Ordered, by The House of Commons, *to be Printed*, 18 *April* 1859.

Part IV.

Australian Colonies and New Zealand.

No. 32.—NEW SOUTH WALES.

RETURN of the Names, Salaries, Date of Appointment, and Nature of Office of all Judicial Officers, Law Officers of the Crown, and other Principal Officers connected with the Administration of Justice in the Colony of *New South Wales*; specifying such Officers as shall have belonged to the Legal Profession in *England, Ireland* or *Scotland* respectively.

No.	Name.	Nature of Office.	Salary per Annum. £. s. d.	Date of Appointment.	Where called or admitted.
1	Alfred J. P. Lutwyche	Attorney-general	1,500 – –	15 Nov. 1858	Barrister-at-Law, England.
2	William Bede Dalley	Solicitor-general	1,000 – –	- ditto -	Barrister-at-Law, New South Wales.
3	John Moore Dillon	Crown Solicitor for Criminal Business.	650 – –	15 May 1839	Attorney, Ireland.
4	Wm. Whaley Billyard	Crown Solicitor for Civil Business.	650 – –	14 Jan. 1850	Attorney, England.
5	Chas. Knight Murray	Parliamentary Draftsman	700 – –	28 Aug. 1856	Barrister-at-Law, England.
6	Wm. Edmund Plunkett	Secretary to Crown Law Officers	400 – –	12 Apr. 1854	
7	Sir Alfred Stephen	Chief Justice	2,600 – –	7 Oct. 1844	Barrister-at-Law, England.
8	John Nodes Dickinson	Judge	2,000 – –	13 Oct. 1844	- - - ditto.
9	Roger Therry	Judge	2,000 – –	1 Feb. 1846	- - - ditto.
10	George Hibbert Deffel	Master in Equity	1,000 – –	1 Apr. 1857	- - - ditto.
11	Samuel Raymond	Prothonotary, and Curator of Intestate Estates.	705 – –	1 Oct. 1851	Barrister-at-Law, Ireland.
12	Samuel F. Milford	Judge, Moreton Bay	2,000 – –	1 Jan. 1856 (As Judge, Sydney; transferred to Moreton Bay, 1 April 1857.)	Barrister-at-Law, England.
13	Gustavus Birch	Registrar of Supreme Court, Moreton Bay.	500 – –	1 Sept. 1857	
14	Ratcliffe Pring	Crown Prosecutor, Moreton Bay	500 – –	1 Apr. 1857	Barrister-at-Law, England.
15	Robert Little	Crown Solicitor, Moreton Bay	200 – –	- ditto -	- - - ditto.
16	W. A. Brown	District Sheriff, Moreton Bay	450 – –	1 May 1857	
17	Alfred Cheeke	District Court Judge, and Chairman of Quarter Sessions, Sydney District.	1,000 – –	21 Dec. 1858	Barrister-at-Law, England.
18	Thomas Callaghan	District Court Judge, and Chairman of Quarter Sessions, Southern District.	1,000 – –	- ditto -	Barrister-at-Law, Ireland.
19	James Sheen Dowling	District Court Judge, and Chairman of Quarter Sessions, Western District.	1,000 – –	- ditto -	Barrister-at-Law, England.
20	Henry Cary	District Court Judge, and Chairman of Quarter Sessions, Cumberland and Coast District.	1,000 – –	20 Jan. 1859	- - - ditto.
21	John F. Hargrave	District Court Judge, and Chairman of Quarter Sessions, Northern District.	1,000 – –	- ditto -	- - - ditto.
22	A. C. Maxwell	Chief Registrar, District Court, Sydney District.	500 – –	1 Feb. 1859	
23	Colin Mackenzie	Chief Registrar, District Court, Cumberland and Coast District.	300 – –	- ditto.	
24	Temple Nathan	Chief Registrar, District Court, Southern District.	300 – –	- ditto.	
25	A. D. F. Carter	Chief Registrar, District Court, Northern District.	300 – –	- ditto.	
26	T. C. Gore	Chief Registrar, District Court, Western District.	300 – –	1 Feb. 1859	
27	Edward Butler	Crown Prosecutor, District Court	500 – –	20 Jan. 1859	Barrister-at-Law, New South Wales.
28	Frederick Wm. Meymott	- - ditto - - ditto	500 – –	- ditto -	Barrister-at-Law, England.
29	William Chas. Windeyer	- - ditto - - ditto	500 – –	- ditto -	Barrister-at-Law, New South Wales.
30	John O'Neill Brenan	Sheriff, Sydney	650 – –	1 Jan. 1854	Barrister-at-Law, Ireland.
31	George Uhr	Under Sheriff, Sydney	400 – –	1 Mar. 1856	
32	William Alexr. Purefoy	Chief Commissioner of Insolvent Court.	700 – –	1 Jan. 1856	Barrister-at-Law, Ireland.
33	Edward Rogers	Clerk of the Peace, Cumberland	550 – –	1 Jan. 1839	Attorney, England.
		Clerk of the Peace, Bathurst	100 – –	1 June 1854	
		Clerk of the Peace, Goulburn	100 – –	12 Dec. 1853	
34	William Briggs	Clerk of the Peace, Maitland	100 – –	27 Oct. 1855	Attorney, England.
35	Sir William T. Denison	Vice-Admiral, Admiralty Court	- * Nil.		
36	Samuel Fred. Milford	Commissary Judge, Admiralty Court.	- * Nil.		
37	George Pownall	Registrar, Admiralty Court	- * Nil -	18 Jan. 1848	Attorney, New South Wales.
38	William Seale	Marshal, Admiralty Court	- * Nil -	20 Aug. 1855	Attorney, England.

* Paid by fees, established by an Order of the King in Council on 27 June 1832, under authority of Act of Parliament, 2 Will. 4, c. 51.

Crown Law Offices, Sydney,
9 February 1859.

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No. 33.—VICTORIA.

RETURN of the Judicial Offices of the Crown, and other Principal Offices connected with the Administration of Justice in the Colony of *Victoria*, specifying the Number and Descriptions of such Offices, and the Salaries attached to each.

Number.	Offices.	Salary.
		£. s. d.
1	Chief Justice of the Supreme Court	3,000 – –
2	Puisne Judge	2,500 – –
3	Ditto	2,500 – –
4	Ditto	2,500 – –
5	Attorney-general	2,000 – –
6	Solicitor-general	1,500 – –
7	Master in Equity, who acts also as Chief Commissioner of Insolvent Estates.	1,500 – –
8	Prothonotary	800 – –
9	Sheriff	1,500 – –
10	Judge of the County Court and Chairman of General Sessions at Melbourne.	1,500 – –
11	Judge of the County Courts at Alberton, Belfast, Geelong, Portland, Colac, Warnambool, and Sale; Chairman of General Sessions at Alberton, Belfast, Geelong, Portland, and Warnambool; and Commissioner of Insolvent Estates for the Geelong Circuit District.	1,500 – –
12	Judge of the County Courts at Castlemaine, Kyneton, Hepburn, and Maldon; Judge of the Courts of Mines for the Mining District of Castlemaine, and Chairman of General Sessions at Castlemaine and Kyneton.	1,500 – –
13	Judge of the County Courts at Sandhurst, Heathcote, and Kilmore; Judge of the Courts of Mines for the Mining District of Sandhurst, and Chairman of General Sessions at Sandhurst and Kilmore.	1,500 – –
14	Judge of the County Courts at Carisbrook, Dunolly, Maryborough, and Avoca; Judge of the Courts of Mines for the Mining District of Maryborough, and Chairman of General Sessions at Carisbrook.	1,500 – –
15	Judge of the County Courts at Ballarat and Creswick; Judge of the Courts of Mines for the Ballarat Mining District, and Chairman of General Sessions at Ballarat.	1,500 – –
16	Judge of the County Courts at Beechworth, Benalla, and Buckland; Judge of the Courts of Mines for the Mining District of Beechworth, and Chairman of General Sessions at Beechworth.	1,500 – –
17	Judge of the County Courts at Ararat, Raglan, Hamilton, and Pleasant Creek; Judge of the Courts of Mines for the Mining District of Ararat, and Chairman of General Sessions at Hamilton.	1,500 – –
18	Crown Prosecutor at the General Sessions held at Kyneton, Castlemaine, Sandhurst, Kilmore, and Beechworth.	* 600 – –
19	Crown Prosecutor at the General Sessions held at Ballarat, Carisbrook, and Hamilton.	* 600 – –
20	Crown Prosecutor at General Sessions held at Geelong, Warnambool, Belfast, Portland, and Alberton.	* 600 – –

* These salaries are exclusive of travelling expenses.

No. 33.—VICTORIA—*continued.*

RETURN of the Names, Salaries, Date of Appointment, and Nature of Office of all Judicial Officers, Law Officers of the Crown, and other Principal Officers connected with the Administration of Justice in the Colony of *Victoria*, specifying such Officers as have belonged to the Legal Profession in *England, Ireland,* or *Scotland* respectively.

Names.	Salary.	Date of Appointment.	Nature of Office.	——
	£. s. d.			
Stawell, Sir William Foster, knt.	3,000 – –	25 Feb. 1857	Chief Justice - -	Irish Bar.
Barry, Redmond -	2,500 – –	10 Jan. 1852	Puisne Judge - -	- ditto.
Williams, Edward Eyre	2,500 – –	21 July 1852	- ditto - - -	English Bar.
Molesworth, Robert -	2,500 – –	17 June 1856	- ditto - - -	Irish Bar.
Chapman, Henry Samuel	2,000 – –	10 Mar. 1858	Attorney-general -	English Bar.
Ireland, Richard Davies	1,500 – –	10 Mar. 1858	Solicitor-general -	Irish Bar.
Wilkinson, Frederick -	1,500 – –	19 April 1852	Master in Equity and Chief Commissioner of Insolvent Estates.	English Bar.
Porter, John Alfrey -	800 – –	28 Jan. 1853	Prothonotary - -	Attorney admitted in Colony.
Farie, Claude - -	1,500 – –	2 Nov. 1852	Sheriff - - -	Not a professional gentleman.
Pohlman, Robert Williams.	1,500 – –	15 Nov. –	Judge of the County Courts and Chairman of General Sessions.	Scotch Bar.
Wrixon, A. Nicholas -	1,500 – –	23 Jan. 1853	Judge of County Courts, Chairman of General Sessions, Commissioner of Insolvent Estates.	Irish Bar.
Forbes, John George -	1,500 – –	23 Jan. 1854	Judge of County Courts	English Bar.
"		7 Jan. 1858	Judge of Courts of Mines, and	
"		23 Jan. 1854	Chairman of General Sessions.	
Skinner, Charles Bruce Græme.	1,500 – –	7 Jan. 1858	- ditto - ditto -	English Bar.
Macoboy, Michael Francis.	1,500 – –	7 Jan. –	- ditto - ditto -	Irish Bar.
Rogers, John Warrington	1,500 – –	7 Jan. –	- ditto - ditto -	English Bar.
Cope, Thomas Spencer	1,500 – –	7 Jan. –	- ditto - ditto -	- ditto.
Clarke, James Langton	1,500 – –	7 Jan. –	- ditto - ditto -	Irish Bar.
Noel, Baptist Wriothesley	* 600 – –	1 Oct. 1855	Crown Prosecutors at General Sessions. -	English Bar.
M'Creight, John Foster	* 600 – –	1 Jan. –		Irish Bar.
Atkins, John - -	* 600 – –	7 Jan. 1858		Ditto.

* These salaries are exclusive of travelling expenses.

No. 34.—TASMANIA.

RETURN of the Judicial Offices, Law Offices of the Crown, and other Principal Offices connected with the Administration of Justice in the Colony of *Tasmania*; specifying the Number and Descriptions of such Offices, and the Salaries attached to each.

Offices.	Amount of Salary.	Remarks.
	£. s. d.	
Chief Justice	1,500 – –	
Judge of Vice Admiralty Court	- - -	Duties performed by Chief Justice without additional remuneration.
Puisne Judge	1,200 – –	
Attorney-general	900 – –	
Solicitor-general	600 – –	
Crown Solicitor	300 – –	
Sheriff	- - -	Duties performed by Comptroller-general of Convicts without pay.
Commissioner of Court of Requests, Hobart Town.	300 – –	
Commissioner of Insolvent Estates, Hobart Town	- - -	The Commissioners of Insolvent Estates are remunerated by fees.
Commissioner of Insolvent Estates, Launceston		
Recorder and Commissioner of Court of Requests, Launceston.	500 – –	
Registrar of Supreme Court	600 – –	The Registrar and Clerk of the Supreme Court act as Registrar and Marshal of Vice Admiralty Court without pay.
Registrar of Vice Admiralty Court.		
Clerk of Supreme Court	450 – –	
Marshal of Vice Admiralty Court.		

RETURN of the Names, Salaries, Date of Appointment, and Nature of Office of all Judicial Officers, Law Officers of the Crown, and other Principal Officers connected with the Administration of Justice in the Colony of *Tasmania*; specifying such Officers as have belonged to the Legal Profession in *England, Ireland,* or *Scotland* respectively.

Names.	Salary.	Date of Appointment.	Nature of Office.	Whether belonging to Legal Profession in United Kingdom.
	£. s. d.			
Sir Valentine Fleming, Knight.	1,500 – –	7 Aug. 1854 14 June 1856	Chief Justice Judge of Vice Admiralty Court.	Gray's Inn.
Thomas Horne, Esq.	1,200 – –	1 Jan. 1848	Puisne Judge	Lincoln's Inn.
Francis Smith, Esq.	900 – –	First appointed Attorney-general 7 Aug. 1854; resigned Feb. 1857; and re-appointed 25 April 1857.	Attorney-general	Middle Temple.
Thomas John Knight, Esq.	600 – –	25 April 1857	Solicitor-general	Middle Temple.
William Lambert Dobson, Esq.	300 – –	Mar. 1857	Crown Solicitor	ditto.
* William Edward Nairn, Esq.	nil	7 Jan. 1856	Sheriff.	
Joseph Hone, Esq.	300 – –	1 Mar. 1825	Commissioner of Court of Requests, Hobart Town.	Gray's Inn.
Fielding Browne, Esq.	Fees	12 May 1854	Commissioner of Insolvent Estates, Hobart Town.	Middle Temple.
William Gardner Sams, Esq.	Fees	26 Mar. 1839	Commissioner of Insolvent Estates, Launceston.	
John Whitefoord, Esq.	500 – –	1 July 1857	Recorder and Commissioner of Court of Requests, Launceston.	
William Sorell, Esq.	600 – –	7 May 1824 18 April 1856	Registrar of Supreme Court. Registrar of Vice Admiralty Court.	
John Aston Watkins, Esq.	450 – –	23 Dec. 1843 18 April 1856	Clerk of Supreme Court. Marshal of Vice Admiralty Court.	

* Mr. Nairn performs the duty of Sheriff jointly with that of Comptroller-general of Convicts.

No. 35.—SOUTH AUSTRALIA.

RETURN of the Judicial Offices, Law Offices of the Crown, and Principal Offices connected with the Administration of Justice in the Colony of *South Australia*; with the Number and Descriptions of such Offices, and the Salaries attached to each.

Offices.	Amount of Salary per Annum.	Remarks.
	£. s. d.	
Chief Justice	1,500 – –	
Second Judge	1,300 – –	
Sheriff	500 – –	
Master	450 – –	
Chief Clerk and Prothonotary	400 – –	
Judges' Associate and Clerk of Arraigns	280 – –	
Attorney-general	1,000 – –	
Crown Solicitor and Crown Prosecutor	600 – –	
Commissioner of Insolvency and Special Magistrate	900 – –	
Two Special Magistrates	400 – –	each.
One Special Magistrate	375 – –	
One Special Magistrate	360 – –	
Five Special Magistrates	350 – –	each.
Three Special Magistrates	300 – –	each.
One Special Magistrate	300 – –	also Inspector of Police.

RETURN of Names, Salaries, Date of Appointment, and Nature of Office of all Judicial Officers, Law Officers of the Crown, and other Principal Officers connected with the Administration of Justice in the Colony of *South Australia*; and specifying such Officers as shall have belonged to the Legal Profession in *England, Ireland* and *Scotland* respectively.

NAMES.	Salaries.	Date of Appointment.	Nature of Office.	Officers as shall have belonged to the Legal Profession in England, Ireland or Scotland respectively.
	£. s. d.			
Sir Charles Cooper, Kt.	1,500 – –	1 Sept. 1838	Chief Justice	In England.
Benjamin Boothby	1,300 – –	25 Feb. 1853	Second Judge	ditto.
Wm. Robinson Boothby	500 – –	1 Mar. 1856	Sheriff.	
Henry Jickling	450 – –	1 Jan. 1850	Master	ditto.
Chas. Algernon Wilson	400 – –	9 Sept. 1846	Chief Clerk and Prothonotary.	
William Hinde	280 – –	1 Feb. 1853	Associate and Clerk of Arraigns.	ditto.
Richard Davies Hanson	1,000 – –	24 Oct. 1856	Attorney-general	ditto.
William Alfred Wearing	600 – –	10 April 1856	Crown Solicitor and Crown Prosecutor.	ditto.
Charles Mann	900 – –	10 April 1856	Commissioner of Insolvency and Special Magistrate.	ditto.
Charles Philip Brewer	375 – –	1 Sept. 1850	Special Magistrate.	
Richard F. Newland	400 – –	1 Nov. 1850	ditto.	
George Worthington	350 – –	27 June 1852	ditto	In England.
James W. Macdonald	400 – –	12 May 1853	ditto	ditto.
Francis Davison	350 – –	1 Jan. 1854	ditto.	
Buxton Forbes Laurie	350 – –	5 Jan. 1854	ditto.	
Andrew John Murray	300 – –	9 Feb. 1854	ditto.	
Andrew Watson	300 – –	12 Dec. 1854	ditto.	
Henry Dundas Murray	350 – –	29 Jan. 1856	ditto.	
John Stewart Browne	350 – –	12 Mar. 1856	ditto.	
Samuel Beddome	360 – –	1 Jan. 1857	ditto.	
Henry Paul Minchin	300 – –	21 Jan. 1857	ditto	
George Bate Scott	300 – –	5 Oct. 1858	ditto (Holds this office in conjunction with another).	

No. 36.—WESTERN AUSTRALIA.

RETURN of the Judicial Offices, Law Offices of the Crown, and other Principal Offices connected with the Administration of Justice in the Colony of *Western Australia*, specifying the Number and Descriptions of such Offices, and the Salaries attached to each.

Nature of Office.	Salaries.
Commissioner of the Civil Court, and Chairman of Quarter Sessions	600 *l.* per annum.
Advocate-general	400 *l.* per annum.
Crown Solicitor	250 *l.* per annum.
Official Assignee of Insolvent Estates	50 *l.* per annum.
Clerk of the Peace and Registrar Clerk of Civil Court	250 *l.* per annum.
Sheriff	200 *l.* per annum.
Commissioner of Court of Requests	25 *l.* per annum.
Two Police Magistrates, each	360 *l.* per annum.
One Police Magistrate	50 *l.* per annum.
Seven Resident Magistrates, each	200 *l.* per annum.
One Resident Magistrate	100 *l.* per annum.
One Resident Magistrate	50 *l.* per annum.

RETURN of the Names, Salaries, Date of Appointment, and Nature of Office of all Judicial Officers, Law Officers of the Crown, and other Principal Officers connected with the Administration of Justice in the Colony of *Western Australia*, and specifying such Officer as shall have belonged to the Legal Profession in *England*, *Ireland*, or *Scotland*.

Name.	Salaries, per Annum.	Date of Appointment.	Nature of Office.	Whether Member of the Legal Profession.
	£. s. d.			
M'Farland, Alfred	600 – –	February 1858	Commissioner of the Civil Court, and Chairman of the Court of Quarter Sessions.	Member of the Irish Bar.
Birnie, Richard	400 – –	August 1853	Advocate-general	Member of the English Bar.
Stone, George Fred.	250 – –	January 1852	Crown Solicitor.	
Stone, Alfred H.	50 – –	Sept. 1857	Official Assignee of Insolvent Estates.	
Ditto	250 – –	March 1832	Clerk of the Peace, and Registrar Clerk of Civil Court.	
Ditto	25 – –	April 1848	Commissioner of Court of Requests.	
Symmons, Charles	200 – –	March 1858	Sheriff.	
Yule, Thomas N.	360 – –	January 1852	Police Magistrate, Perth.	
Brown, Thomas	360 – –	April 1852	Police Magistrate, Fremantle.	
Cowan, W.	50 – –	January 1852	Police Magistrate, York.	
Camfield, Henry	*200 – –	July 1847	Resident Magistrate, Plantagenet.	
Viveash, Samuel W.	*200 – –	February 1847	Resident Magistrate, Swan.	
Harris, Jos. S.	*200 – –	August 1850	Resident Magistrate, Toodyay.	
Burges, William	*200 – –	June 1851	Resident Magistrate, Victoria.	
Eliot, George	*200 – –	Dec. 1840	Resident Magistrate, Wellington.	
Molloy, John	*200 – –	August 1830	Resident Magistrate, Vasse.	
Meares, R. G.	100 – –	Sept. 1842	Resident Magistrate, York.	
Bayly, L. J.	*100 – –	January 1858	Acting Magistrate, York.	
Murray, D. S.	100 – –	Dec. 1846	Acting Magistrate, Murray.	
Hester, Thomas	50 – –	June 1852	Acting Magistrate, Canning.	

* And forage for one horse.

APPENDIX C

The following inscription appears upon the plinth of the statue of Sir Richard Bourke located outside the State Library of New South Wales, Sydney -

THIS STATUE of LIEUTENANT GENERAL SIR RICHARD BOURKE, K.C.B.

Is erected by the people of New South Wales to record his able, honest, and
benevolent administration from 1831 to 1837.
Selected for the government at a period of singular difficulty,
His judgement, urbanity, and firmness justified the choice.
Comprehending at once the vast resources peculiar to this Colony,
He applied them, for the first time, systematically to its benefit.
He voluntarily divested himself of the prodigious influence
Arising from the assignment of penal labour, and enacted
Just and salutary laws for the amelioration of penal discipline.
He was the first Governor who published satisfactory accounts
Of the public receipts and expenditure.
Without oppression, or detriment to any interest,
He raised the revenue to a vast amount, and from its surplus,
Realized extensive plans of immigration.
He established religious equality on a just and firm basis,
And sought to provide for all, without distinction of sect,
A sound and adequate system of national education.
He constructed various public works of permanent utility.
He founded the flourishing settlement of Port Phillip.
And threw open the unlimited wilds of Australia to pastoral enterprize.
He established savings' banks; and was the patron of
The first Mechanics' Institute. He created an equitable tribunal
For determining upon claims to grants of lands.
He was the warm friend of the liberty of the press. He extended

Trial by jury after its almost total suspension for many years.
By these and numerous other measures
For the moral, religious, and general improvement of all classes,
He raised the Colony to unexampled prosperity,
And retired amid the reverent and affectionate regret
Of the people, having won their confidence by his integrity,
Their gratitude by his services, their admiration by his public talents,
And their esteem by his private worth.

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