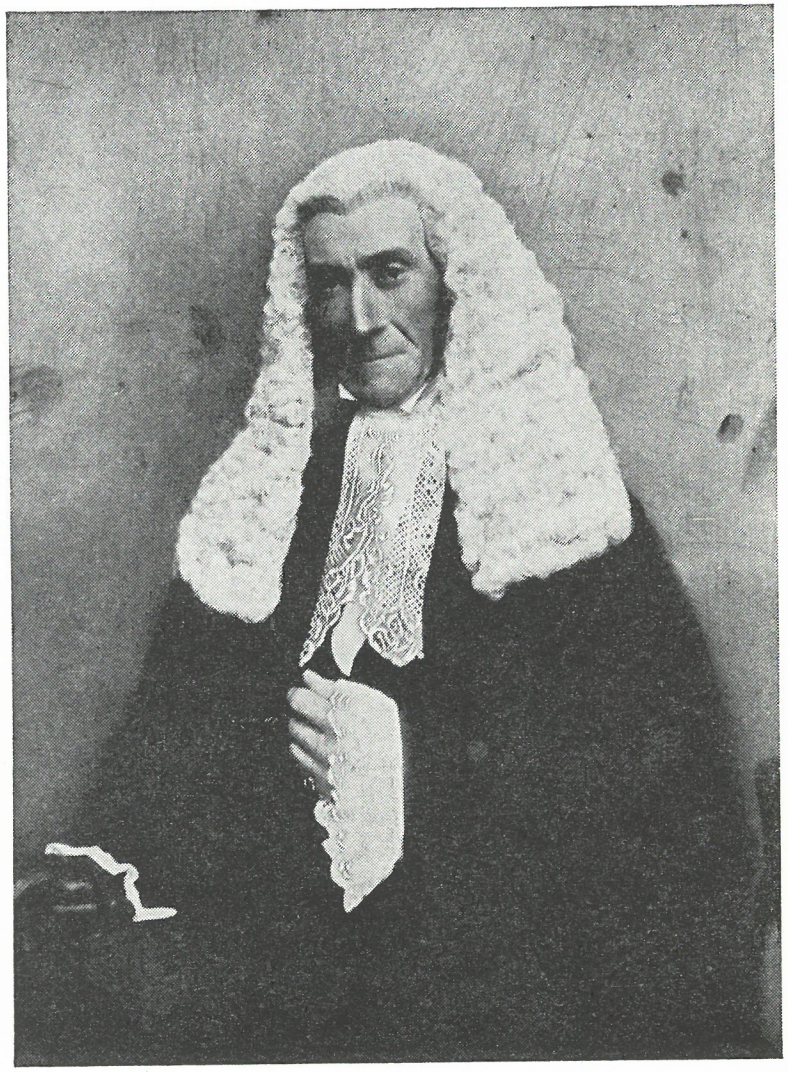

John Hubert Plunkett as President of the Legislative Council, 1857.
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An Architect of Freedom

John Hubert Plunkett in New South Wales
1832–1869

JOHN N. MOLONY

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The Law of the White Man

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

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

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

him possessed in equal measure by few others in the colony. He looked long at Jackey and then asked him what jury he wished to be tried by. Jackey replied 'black-fellows'. This the court was not empowered to grant, the limit of choice being between a military and a civil jury. Jackey was then shown a soldier in uniform and he promptly said 'no soldier', so a civil jury was empanelled. Forbes was pleased when Plunkett recommended mercy for Jackey. The Chief Justice extended mercy and took the occasion to remark that other cases had arisen before him in which Aborigines had been hanged for an infringement of 'our laws'. He then observed, perhaps unmindful of Jackey's manifest disabilities before the legal system, that 'It was . . . as much for the benefit of the black as the white portion of the community, that the protection of the law should be equally afforded them; it was a reciprocal protection, founded on the dictates of policy, justice and humanity'.[2]

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

[2] Ibid., 12 August 1834.

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

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

> it is in the order of nature that, as civilization advances, savage nations *must* be exterminated . . . the Major was not to suffer his party to be sacrificed out of deference to the opinions of associated political and humbugging maniacs and hypocrites who write and prate of matters of which they know nothing whatever.[5]

The 'maniacs and hypocrites' had been readily identifiable as Bourke and those who thought like him, including Plunkett.

If the legal issue was still clouded the practical issue was even more difficult. It was one thing for the men in Downing Street like Glenelg and James Stephen, the Under-Secretary of the Colonial Office, to hold to exalted views on the human dignity of the Aboriginal; it was another for the government officers in Sydney to afford them the protection from the moral or physical

[3] Plunkett's opinion in N.S.W. Attorney-General's Office Correspondence 1831-40, pp. 22-4, ML.
[4] *SH*, 16 May 1836 and C. H. Currey, *Sir Francis Forbes*, pp. 470-1. Murrell and his companion were found not guilty.
[5] *SH*, 26 December 1836.

dangers that contact with a white civilisation made inevitable. At the same time it was almost impossible to ensure that white settlers, rapidly extending the limits of settlement beyond the boundaries legally established, would be protected from the ravages that the Aborigines not only perpetrated against their flocks, but at times against their lives and personal property. It was in this context of ideals and practical realities that the conflict between the races took place, and it is only in this context that it can be understood.

The whole question of the protection of the Aborigines had been discussed by a select committee of the House of Commons in 1836. Its purpose was to consider the measures to be adopted in order to secure to the Aborigines, 'the due observance of Justice and the protection of their rights, to promote the spread of Civilization among them, and to lead them to the peaceful and voluntary reception of the Christian Religion'. As a result of the efforts of the English humanitarians a system of protectors was set up with G. A. Robinson as Chief Protector together with four assistants.[6] The *Herald* wanted to know what was all this nonsense about the arrival of a protector for the Aborigines. A protector for the white man was what was needed. The editor had recently spoken to a gentleman with a sheep and cattle station who had declared that he would shoot Aborigines as he would wild beasts if he detected them in spearing and carrying off his sheep and cattle, which they had been in the habit of doing. This was an attitude with which the editor was inclined to agree.[7] Soon afterwards there was a protest against the expenditure of colonial revenue for the Protectorate. Glenelg had made it clear that the cost was to be borne locally and he expected 'cheerful co-operation' in such an important matter.[8] One response was clear.

> Let the sentimental crew at home who
> 'Sit by the fire, and presume to know
> What's done i' the Capitol',
> defray the cost of 'Protectors of the Aborigines', if they are really so much enraptured with their sable proteges.

[6] See *HRA* (1), XIX, p. 792 and Glenelg to Gipps, 31 January 1838, ibid., pp. 252-5.
[7] *SH*, 8 August 1838.
[8] Glenelg to Gipps, 31 January 1838, *HRA* (1), XIX, p. 254.

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

It was left, however, to 'A Grazier on the Murrumbidgee' to enunciate the most forthright views on the Protectorate and its intended charges. He signed himself 'Anti-Hypocrite' and said that the whole thing was a waste of money because 'the aboriginals of my native country are the most degenerate, despicable and brutal race of beings in existence . . . a scoff and a jest on humanity . . . Any attempt to civilize the Aboriginals of New Holland is futile and vain . . . they will and must become extinct'. At least two fellow citizens were shocked. In their opinion such a mentality was the precise one that caused wanton murder of the Aborigines, and unless action was soon taken their blood would be upon the whites. The Reverend Mr Saunders at a meeting of the Aborigines Protection Society said that the *Herald* was an 'advocate of murder', while Lancelot Edward Threlkeld, the energetic Congregationalist missionary, said that 'he was bound to state that the Editors of newspapers stood charged with criminality before God' because they inflamed people to exterminate the Aborigines.[10]

Gipps and his Executive Council spent a good deal of time in early 1838 discussing the various outrages perpetrated both on and by the Aborigines. In his despatches he enumerated cases of both, and drew particular attention to a 'collision' that had taken place between a party of mounted police under Major Nunn and a tribe of Aborigines, in which some of the latter lost their lives.[11] Plunkett had suggested that an inquiry be held into the circumstances surrounding the case; the Council agreed with his suggestion but the inquiry eventually came to nothing as too long a period elapsed after the affair.[12] At the same time the

[9] *SH*, 5 September 1838.

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

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

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

Council considered the matter of deaths by violence amongst the Aborigines generally and concluded,

> As human beings partaking of one common nature, but less enlightened than ourselves, as the original Possessors of the soil from which the wealth of the Colony has been principally derived, and as subjects of the Queen . . . [they] have a right to the protection of the Government and the sympathy and kindness of every separate individual.[13]

As a result it was decided to issue regulations in the form of a government notice requiring that there be an inquiry into the violent death of any Aboriginal at the hands of a white man, in the same way as that held in the located parts of the colony when the death of a white man occurred through violence or suddenly.[14] This decision took place on 6 April 1838, but before the promulgation of the notice word was received that three men had been 'barbarously murdered' by natives in the north, and eight men belonging to a party of sheep and cattle drovers of George Faithfull were similarly killed whilst taking flocks and herds to Port Phillip. The Executive Council met and decided to defer the notice 'until the excitement which has been caused by the loss of Human Life . . .' had abated.[15]

By July the situation had reached the stage at which Gipps had to admit that the calls on the services of the mounted police had become so constant, consequent upon repeated 'outrages', that he was not even able to spare the necessary men required as witnesses in the Nunn case. In the vicinity of Port Phillip, and on the road leading to it, the attacks of the Aborigines caused those interested in settling that part of the colony to request that Gipps 'levy war against the Blacks' or allow the enrolment and arming of a militia for that purpose. He refused to do either, and indicated little sympathy with the owners of the flocks who

> for the sake of obtaining better pasturage for . . . [them], will venture with them to such a distance from protection, [that] they must be considered to run the same risk as men would do, who

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

[14] Ibid., Minutes 23 and 24, 27 March, 6 April 1838, NSWA 4/1520.

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

> were to drive their sheep into a Country infested with wolves, with this difference however that, if they were really wolves, the Government would encourage the shepherds to combine and destroy them, whilst all we can now do is to raise, in the name of Justice and humanity, a voice in favor of our poor savage fellow creatures, too feeble to be heard at such a distance.[16]

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

It was precisely at this time that 'At length the settlers were compelled to take the law into their own hands and defend themselves', as Alexander Harris saw it a decade later.[17] The exact manner of their handling of the law was not at the time clear to Gipps except that, from a report, he feared that 'in this case twenty two human beings, including several women and children, have been deliberately put to death by a large party of white men, . . .'. He informed Glenelg, laid the letter from his informant, Frederick J. Foot, before the Executive Council, and concurred that Edward Denny Day, Police Magistrate at Muswellbrook, 'should be directed to proceed with as little delay as possible to the vicinity of the scene of these inhuman transactions, and there to institute a strict Inquiry into the circumstances, and apprehend all Parties concerned in it, or suspected of being so'.[18] The name of the place at which the 'transactions' in question occurred was Myall Creek.

Day proceeded to the cattle station of Henry Dangar which lay on the banks of Myall Creek, about 350 miles north-west from Sydney. There he apprehended eleven men, all convicts or expirees, though the twelfth who was known to have taken part in the massacre, John Fleming, a native of the colony, escaped. Day brought them to Sydney, where Plunkett sent them for trial on 15 November on an information containing nine counts. 'The first four Counts charged them in various ways with the murder of an Aboriginal Black named Daddy . . . the five other Counts . . . with the murder of an Aboriginal male Black, name unknown'.[19] The men were tried before Dowling and a civil jury

[16] Gipps to Glenelg, 21 July 1838, *HRA* (1), XIX, pp. 508-11.
[17] Alexander Harris, *Settlers and Convicts*, p. 388.
[18] Gipps to Glenelg, 21 July 1838, *HRA* (1), XIX, pp. 508-11, and Minute 33 of Executive Council, 7 July 1838, NSWA 4/1520.
[19] Gipps to Glenelg, 19 December 1838, *HRA* (1), XIX, pp. 700-4.

and all pleaded not guilty. Dowling told the jury to dismiss from their memories anything they had heard or read and to arrive at their conclusions by '*evidence* alone'.[20] This was probably wise advice, because the *Herald* had requested jurors 'not to convict persons on charges originating in collisions with the blacks, except upon the most conclusive evidence of wanton cruelty'.[21]

The actual crime, as outlined by Plunkett, was naked in its simplicity. About fifty Aborigines—men, women and children, belonging to the reputedly inoffensive Myall tribe—had been living on and about the Dangar station for some weeks, neither provoking nor being provoked. In the afternoon of 9 June 1838, a Saturday, they were surrounded, to the number of about thirty, roped, led away and shot. For reasons requiring no elaboration two young women were spared, one child was saved by a stockman and two other boys escaped to a nearby creek bed. An attempt was made on the following day to burn the remains. The event was witnessed by a lame Aboriginal who had remained hidden behind a tree, but his evidence was not used given the then state of the law that did not allow evidence to be taken from those having no religious beliefs.[22] Harris described it as 'a formal execution' for the outrages committed by the blacks.[23] No evidence was submitted that the Aborigines in question had ever been party to any outrages.

The accused made no defence except that 'Daddy's' remains could not be identified with certainty: they rested on evidence given as to their characters and they did not plead any extenuating circumstances. After their apprehension, but before the trial, £300 had been subscribed towards their defence at a meeting at Patrick's Plains presided over by Robert Scott, landholder and magistrate. He arranged for William Foster, à Beckett and Windeyer to defend them while Plunkett and Therry prosecuted. He also visited them in prison and advised them not to 'split among themselves, saying that there was no direct evidence against them, and that, if they were only true to each other they

[20] J. Dowling, Proceedings of the Supreme Court of N.S.W. 1838, vol. 156, p. 87, NSWA 2/3341.
[21] *SH*, 14 September 1838.
[22] See the account of the trial in *Australian*, 17 November 1838, *SH*, 19 November 1838 and in G. B. Barton papers, 'History of Australasia', Part II, vol. 4, MS. 128, Dixson Library.
[23] Harris, *Settlers and Convicts*, p. 388.

could not be convicted'. Plunkett informed Gipps of these proceedings and Scott told Gipps before the trial that he regretted his actions as he did not then know the full facts. He then took as active a part as he could in the defence. Gipps later omitted his name from the New Commission of the Peace issued in December. The Colonial Office considered that Gipps would have failed in his duty had he not removed Scott from the Commission because 'The station, which he held in Society, made it the more necessary to mark the disapprobation of the Government of his conduct'.[24]

As stated, the defence offered on behalf of the accused by their counsel was simply that there was no case as 'there is no proof that the body of a Black man named *Daddy* has been found, and for anything that appears to the contrary he is still alive . . .'.[25] Dowling summed up and made it clear that the whole argument rested upon identity—namely that the jury had to be satisfied that one of the bodies in question was Daddy's, or that any of the bodies were those who had been 'taken away by the prisoners'.[26] The all white, male jury retired for fifteen minutes and then returned a verdict of not guilty.[27] Dowling did not record his reaction so there is no way of knowing whether he was as clearly astonished as Judge Willis had been a few days before when a verdict of not guilty had been reached in five minutes in the case of a white man indicted for shooting an Aboriginal.[28] Plunkett, however, reacted with alacrity and applied to have the prisoners remanded on other charges, and there is no evidence to suggest that he acted on any but his own initiative in the course he took. The *Herald* stated that 'There is, positively, a *black fever* abroad—a nasty epidemic *black* disease' which resulted in '*inequality* of justice . . . to the blacks and whites', in favour of the blacks. A week later it asked: 'are the lives of men who may be innocent, to be placed in jeopardy, day after

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

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

[26] Ibid.

[27] *Australian*, 17 November 1838.

[28] *SH*, 9 November 1838.

day, to suit the caprice of any Attorney-General' and warned that 'The settlers WILL set the Government at *defiance*, by taking the law into their own hands—by executing *summary justice*' unless the Aborigines are restrained.[29]

Plunkett proceeded, however, but this time only laid an information against seven of the eleven in the hope that the other four would be called in favour of their companions as witnesses, and possibly incriminate themselves, or that they would turn Queen's evidence and assist the prosecution. The charge in this instance consisted of twenty counts upon five of which they were accused of having murdered a child; five others referred to a male child, five more to a female child, and the last five gave the name of the male child as Charlie. The same counsel, 'three of the ablest Counsel at the Bar' defended them.[30] Burton was on the Bench and he prepared well for the trial as proved by his extensive notes on murder, malice, and aiding and abetting, all amounting to six pages in his own hand, drawn from various authors.[31] The trial began on 26 November but was adjourned to the 27th on the plea of à Beckett. On that day a demurrer was entered against the first five charges on the grounds that no child had been sufficiently identified and as a consequence the trial could not legally proceed. A plea of *autre fois acquit* was made against the next five charges which contended that they had already been acquitted of that offence at their first trial. To the other ten charges they pleaded not guilty.[32] Plunkett did not contest the demurrer, but Burton rejected it declaring that there was sufficient certainty in the description of the child. Plunkett joined issue on the *autre fois acquit* plea and a jury, empanelled to try it, rejected it.[33] As a consequence the prisoners were tried on 29 November and found guilty on the first five charges, but acquitted on the others, strangely enough on the grounds that there had not been sufficient proof that the name of the child in question was Charlie.[34] The seven men were brought before

[29] Ibid., 19, 26 November 1838.

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

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

[32] Ibid., p. 28.

[33] Ibid., pp. 28-46.

[34] Ibid., pp. 47-107.

the three judges on 5 December when both the demurrer and *autre fois acquit* were further considered and rejected by the Bench. Burton reviewed the facts of the case 'in order that they [the public] may see what offence it is for which you are about to offer up your lives'. They were then condemned to be hanged.[35] Two days later the Executive Council met and 'The Right Reverend the Lord Bishop [Broughton] having retired' Gipps, Thomson and Riddell confirmed the sentence of death, after hearing the opinions of Dowling and Burton.[36]

In the meantime the *Herald*, in particular, kept its sights trained on Plunkett. He was accused of placing the prisoners '*twice* in jeopardy on the same *charge*', he was told that 'the only dignified course to him is to resign, if he would avoid the mortification of a removal upon the public petition of the Colonists', and he was threatened that a public petition would be got up against him to the Secretary of State on the grounds that responsibility for the colony ought to be in the hands of 'those who have the greatest *stake* in the Colony'. When he asked for an attachment against two publicans, who had allegedly publicly threatened some of the jurors in the trial, he was told that 'it is quite plain that he is not fit to exercise the extensive powers with which he is invested', and Gipps was warned not to stain the honour of the colony by hanging the condemned men, because, while the murder of white men went unavenged 'it is nothing less than legal murder' to hang whites.[37]

As before the trials, so also after their condemnation to death, there was considerable activity on behalf of the seven prisoners. Three petitions were presented to the Executive Council once it was known that the executions were to go ahead. The first came from eleven jurors in the original trial. They stated that it was their opinion that the seven men condemned in the second trial had been found not guilty on the same count in the first. They asked that the prisoners be at least given the 'benefit of appeal to the fountain of Mercy . . . Her Majesty'. The second petition came from ten of the jurors in the second trial who thought that 'the ends of justice have been satisfied by . . . [the prisoners'] condemnation and long imprisonment', whilst the third came

[35] *SH*, 7 December 1838.
[36] Executive Council Minute 49, 7 December 1838, NSWA 4/1520.
[37] *SH*, 5, 7, 10, 14 December 1838.

from Sydney, Parramatta and Windsor and was signed by about 450 people. It began badly by referring to the men as being 'now under sentence for the alleged murder of an aboriginal child to the authorities unknown . . .' and spoke of 'no direct evidence being furnished of their guilt'. It contrasted them with the Aboriginal murderers who 'have not been brought to justice' and pleaded for their lives.[38] The Executive Council met on 14 December and, having considered the pleas, rejected them as they offered 'no reasons for altering the decision'.[39] When Gipps wrote to Glenelg a few days later he mentioned the last petition 'not very numerously signed' but omitted to mention the more significant petitions from the jurors.[40] In any case it was too late to mention petitions that, perhaps, ought to have been given greater consideration because the execution had taken place the day before when all the criminals 'behaved in a very proper manner, and were very attentive to their religious duties'.[41] Furthermore Gipps probably knew that in Glenelg he was dealing with a person who thought that everyone should clearly understand that the government 'will not shrink from enforcing the Law against all those who, not for the purpose of self-defence but wantonly, commit acts of violence or aggression against the aboriginal inhabitants'.[42] It was perhaps ironical that Glenelg wrote that sentence three days after the execution took place, unaware both of the degree to which the law had been enforced and of the extent to which the lesson had been borne in upon the inhabitants of New South Wales.

In the opinion of Alexander Harris the hanging of the men of Myall Creek resulted in the use of poison to get rid of 'the most troublesome of a tribe' because firearms were not favoured any longer. He thought that the men were 'hanged for what they had been taught was perfectly lawful by their masters; and some

[38] Enclosures A 1, 2, 3 to Minute 51 of Executive Council, 14 December 1838, pp. 694-703, NSWA 4/1445.
[39] Executive Council Minute 51, 14 December 1838, NSWA 4/1520.
[40] Gipps to Glenelg, 19 December 1838, *HRA* (1), XIX, pp. 700-4. An examination of the signatures to the petition in NSWA reveals no name known to me from other sources, which perhaps indicates that those who had so strenuously fought on behalf of the condemned men gave up after the second trial. There is only one magistrate, J. Maxwell, amongst the names.
[41] *SH*, 19 December 1838.
[42] Glenelg to Gipps, 21 December 1838, *HRA* (1), XIX, pp. 706-7.

of these masters [were] magistrates of the territory'; that it was a case of 'The sacrifice of these seven men's lives to the protection theory', and that after a period of ferocity 'the original and customary course of things was permitted to return'.[43] As for Plunkett, looked upon by many as the instigator and perpetrator of a crime more enormous than Myall Creek, he was a deluded 'liberal' and an 'unconscious instrument'. 'J.H.B.' wrote in the form of a petition to Gipps regarding the Attorney-General. He said that the act of the men was not wilful murder, as they did not know that it was murder to kill Aborigines, and, therefore, Plunkett had no right to prosecute for murder. He held 'immutably his opinion that the aforesaid J. H. Plunkett Esq. Attorney-General, is in the position of a man who had already committed one great wrong . . . and does most respectfully and most strenuously pray, *that the aforesaid J. H. Plunkett Esq. may be immediately removed from his office, before the occurrence of any additional error*'. The *Herald* mildly commented that this subject 'at present, possesses a great share of public interest'.[44] But Plunkett may have felt consoled later when he heard Dowling say to the other men who could not be brought to trial because the material witness Davy could not be instructed due to his inability to give evidence, 'If any barbarizing delusion has pervaded the hard hearts of those who have presumed to set up a distinction between God's creatures; I trust that the delusion is now finally dispelled'.[45] He may even have been strengthened to read a later letter which stated that the shepherds in the Murray district were now uncertain how to deal with marauding Aborigines because 'they all have a palpably manifest dread of Her Majesty's Attorney-General'.[46]

The case excited a great deal of interest, not only in the colony but in England also. Then, as later, it was frequently seen out of its general context of the conflict of two civilisations, and whilst the emphasis was placed on a wanton act of murder on the one hand, or a necessary act of reprisal on the other, the essential issues were clouded by sentiment, bitterness and misunderstanding. As an event in colonial history Myall Creek passed into the

[43] Harris, *Settlers and Convicts*, pp. 381-99.
[44] *SH*, 17, 26 December 1838 and 7 January 1839.
[45] Ibid., 15 February 1839.
[46] Ibid., 2 August 1839. Unsigned letter dated 4 July 1839.

pages of officialdom, criminology and folklore.[47] It did little, perhaps, to lessen the tensions between the white and Aboriginal inhabitants of the colony. On the contrary it probably served in the minds of many to heighten those tensions. It cast a shadow over the theory of the Protectorate that, despite its patronage and bureaucracy, may have helped to bring another aspect of white civilisation to the Aborigines than the ones to which they had become accustomed. One thing of lasting benefit only came from Myall Creek: henceforth all were aware that there was equality before the law for the white and the black inhabitants, in so far as the sacredness of human life was concerned. For that one thing, at least in its application in the colony, Plunkett was chiefly responsible. That, in the eyes of some, equality seemed for a period to have favoured the Aboriginal, was perhaps a reflection of no more than a minimal attempt to redress a balance that had long been lacking. In the long run adequate protection was available to the white settlers who rapidly passed over the land, whilst the Aborigines withdrew in their remnants to areas where few white men ever came to prey or be preyed upon. Years later historians were to look upon Gipps as the central figure in the attempt to apply the law to white and black alike.[48] Contemporaries saw Plunkett as the responsible agent and as a result 'He was detested by the squatters . . .' but Mrs Campbell Praed proclaimed: 'All hail to thee, Plunkett! Had there been more like thee, the national conscience would have less cause for reproach'.[49]

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

[47] See: *Despatches relative to Myall Creek* – ordered to be printed 12 August 1839, *House of Commons Papers* 526; *Extracts from the Papers and Proceedings of the Aborigines Protection Society*, No. 1, May 1839, pp. 41-52; Camden Pelham, *The Chronicle of Crime*, pp. 472-4; *Australia*, 'A Full and Particular Report of the Trial of Eleven Men for the . . . Murder . . . of Twenty Eight Individuals', copied from *Sydney Gazette*, 15 November 1838; C. H. Chomley, *Tales of Old Times*, pp. 35-54.
[48] See Bill Wannan, *Very Strange Tales: The Turbulent Times of Samuel Marsden*, pp. 191-2; S. K. Barker, 'The Governorship of Sir George Gipps', *RAHSJ*, vol. 16, p. 255; S. H. Roberts, *The Squatting Age in Australia 1835-1847*, pp. 405-6.
[49] Mrs Campbell Praed, *My Australian Girlhood*, pp. 16-17.

up to the pressures brought to bear on him, especially in 1838. It was precisely in his capacity as a public servant that he had been viciously attacked so frequently throughout the year, and the very office he held of Attorney-General required him to act in one field in a manner with which he did not agree, but about which he could not argue. In England itself the very nature of the Grand Jury was under question at the time, and it was scarcely to be expected that Downing Street would contemplate experimenting with an office, in a colony, that was not proving completely satisfactory at home.[50] The *Australian* was opposed to a Grand Jury here on the grounds that its members might be inclined to shield a 'brother Justice' or a 'respectable friend' whereas,

> We . . . declare that, in our opinion, no body of men, of however ancient an order—however *gratuitous*, or even expensive to themselves, their services may be—could have done the duties which devolved on Mr. Plunkett with more honour and impartiality, or with equal skill and discrimination.[51]

But to the *Herald* this was the very crux of the matter. It held that whilst the emancipist and liberal element in the society was prepared to grant to former convicts the right to sit on juries, and to one 'irresponsible' public servant the right to send men for trial—a right which he allegedly used for political purposes at times—that same element was not prepared to recognise the integrity of the men who were the very essence of the society, financially and socially.[52] The fact that Plunkett was regarded as the prime instigator in the Myall Creek case, in which men of 'integrity' had done their utmost to deflect the application of the law, did not endear him to those who saw themselves as the very bulwark of colonial society.

Given the attitude adopted in London it is understandable that Gipps remained concerned about the Aboriginal question. Downing Street continued to impress upon him that he could not 'over-rate the solicitude of H.M. Government on the subject of the Aborigines' and he did his utmost to translate that

[50] *Australian*, 9 February 1838.
[51] Ibid.
[52] *SH*, 24 December 1838.

solicitude into reality.[53] Yet his attempts were thwarted at levels from which he could well have hoped to receive support. The exclusives combined with the squatters to cast doubts on his policy at every turn. When he finally brought out the long delayed Notice on the Aboriginals on 21 May 1839 it was attacked because it contained a section proclaiming it as an offence for a white man to keep a black woman. Plunkett was convinced that such a practice contributed very materially to the conflict between the two races, and he was clearly recognisable as the 'over paid Whiggling', the 'Whiggish pluralist' who inspired the prohibition.[54] As Attorney-General, however, he was more concerned with the legal difficulty into which he constantly ran of convicting Aborigines for crime upon the whites, or vice versa, because he could not bring Aborigines into court as witnesses. In May 1839 he reported that he had five of them in gaol awaiting trial for murder and stealing but, because of the lack of an interpreter and the inadmissibility of Aborigines' evidence, he could not proceed. He finally went ahead with the case in August, but only on the charge of stealing, for which they were found guilty. He was unable to proceed with the murder charge through lack of evidence.[55]

In May 1839 the Reverend William Watson was examined before the Executive Council. He had had a great deal of experience with the Aborigines and he said that 'the blacks are capable of learning anything as quickly as the whites' and were therefore capable of giving evidence before the courts. He asserted that they were 'not generally speaking given to falsehood, unless from some powerful motive'.[56] In July 1839 the Committee of the Aborigines Protection Society sent a letter to Normanby signed on its behalf by John H. Tredgold. In part it read,

> It is evident that the rejection of the Evidence of these Natives renders them virtually outlaws in their Native Land which they have never alienated or forfeited. It seems to be a moral impossibility that their existence can be maintained when in the state of

[53] Russell to Gipps, 21 December 1839, *HRA* (1), XX, pp. 439-41.
[54] *SH*, 31 May 1839.
[55] Ibid., and 19 August 1839. See also Barry Bridges, 'The Aborigines and the Law: New South Wales 1788-1855', *Teaching History*, vol. 4, pt 3, pp. 40-71.
[56] Evidence of Rev. William Watson, 28 May 1839. Enclosure 3 to Executive Council Minute 18, 1839, pp. 115-19, NSWA 4/1446.

> weakness and degradation, which their want of civilization necessarily implies; they have to cope with some of the most cruel and atrocious of our species, who carry on their system of oppression with almost perfect impunity so long as the Evidence of Native Witnesses is excluded from Our Courts.[57]

The grounds upon which the Aborigines, whose very tribal and social existence revolved around their concept of an ancestral dream time, were excluded was the alleged lack on their part of a belief in an after-life. Thus they were deemed unable to take an oath binding them to tell the truth. On 20 September Plunkett took the plunge and brought in a bill to allow Aborigines to give evidence in the courts. He admitted, unwisely, that 'it was the greatest departure from the rules of English evidence ever attempted' but he hoped that it would be passed, as it was imperative for the sake of both Aborigines and whites that their evidence be taken.[58] The Legislative Council was competent to take action in the matter because Normanby had left to it the whole question of evidence by Aborigines, although he thought that 'the ultimate remedy must at the same time be unceasingly sought in an improved system of moral and religious instruction'.[59] In this he was following the opinion transmitted to London by Burton who was prepared to admit statements by Aborigines as evidence 'where the matter at issue is of minor consideration'. But for other matters of higher importance he thought that 'no alteration in the Law should be made'.[60]

Plunkett managed to steer his 'preposterous' bill through the Council but a clause was added to it, at the request of Dowling, that it take no effect in the colony until it had been approved by the Queen. Dowling was 'friendly to the measure' but without the clause he 'would otherwise have felt himself, as probably would also his brother Judges, compelled to remonstrate against the act as repugnant to the Laws of England'.[61] With these animadversions Gipps transmitted the Act, 3 Vict., No. 16, to London. It is scarcely surprising that it was never seen by the

[57] Tredgold to Normanby, 30 July 1839, *HRA* (1), XX, pp. 303-4.
[58] *SH*, 23 September 1839, reports LC.
[59] Normanby to Gipps, 17 July 1839, *HRA* (1), XX, pp. 242-3; Normanby to Gipps, 31 August 1839, ibid., pp. 302-3.
[60] Burton to Labouchere, 17 August 1839, ibid., pp. 304-5.
[61] Gipps to Normanby, 14 October 1839, ibid., p. 368.

Queen. Russell, constant champion of the cause of the Aboriginal, and ever forthright to impress upon Gipps his duty to improve their lot, was unable to extend his humanitarian views to the degree that he would seem to acquiesce in a matter repugnant to English law. He referred the Act to J. Campbell, Attorney-General, and Thomas Wilde, Solicitor-General, who told him not to send it forward because 'To admit in a Criminal case the evidence of a witness acknowledged to be ignorant of the existence of a God or a future state would be contrary to the principles of British jurisprudence'. They thought that the Aborigines should be sufficiently instructed in these matters beforehand, and that such would be a relatively simple matter as the rules of Law 'do not define the distinctness of Religious ideas or to what degree the belief in a future state is to be fixed to qualify a witness to take an Oath'—a lack of precision understandable amongst even the most astute of lawmakers.[62]

In his attempt to alleviate the plight of the Aborigines in this comparatively simple matter, and at the same time make it possible to bring more of them for trial for the crimes committed by them, Plunkett was unsuccessful. It is probable that had he not been so rash as to admit in public the repugnancy of the bill, and had he at the same time taken even the slightest pains to compromise and write into the bill a carefully constructed sentence indicating some attempt at 'instruction' before the witness was allowed to testify, the bill would have proved acceptable. In any case another emotion besides the reported one of clear annoyance must have been in his breast when seven Aborigines, charged in November 1840 with cattle stealing, were acquitted. They all, including one named Carbon Mark, pleaded not guilty, with the exception of Tommy Boker 'who said that the beef was good'.[63] While Plunkett was engaged in these legal transactions other segments of the community were turning their minds to the steps that ought to be taken for the moral advancement of the Aboriginal. Richard Windeyer, for example, wrote a lengthy manuscript 'On The Rights of the Aborigines of Australia' and concluded forty pages of ingenious explanation

[62] Russell to Gipps, 11 August 1840, ibid., pp. 754-6; Campbell and Wilde to Russell, 27 July 1840, ibid., p. 756.
[63] *SH*, 20 November 1840, report of Supreme Court Proceedings of 9 November 1840.

why they had no rights in the physical order—for example, to land—by stating,

> the more debased, the more vile, the more wretched we have shown the Aboriginal to be the more imperative is the duty cast upon us by fit means of education to make him conscious of the dignity, the holiness of the *Mind* he shares with ourselves.[64]

Windeyer, it will be remembered, was one of the three 'able Counsel' who defended the men of Myall Creek. Others, again, did not take so many words to reveal their attitudes. Francis Murphy, later first Catholic bishop of Adelaide, wrote to Dublin saying that 'The natives are an harmless, innoffensive [*sic*] race'. The *Herald* saw the statement, judged it as cant, and asserted that the Aborigines were 'dirty black savages'.[65]

However, the question of Aborigines' evidence arose again in 1844. Stanley had communicated to Gipps an Act of Parliament authorising the passing of laws admitting unsworn testimony in civil and criminal cases. The purpose of the Act was 'to provide for the admission of the Evidence of Aboriginal Natives'.[66] This Act was clearly the result of Plunkett's submissions on the matter whilst he was in London on leave, and he accordingly attempted to steer another bill through the Council in 1844. He pointed out that it was notorious that murder was frequently committed by both races with impunity, stemming from the lack of available evidence. The measure he proposed was, if anything, moderate in that it allowed unsworn testimony from Aborigines only as corroborative evidence to sworn testimony.[67] Plunkett himself was convinced of both the necessity of the measure and the capacity of the Aborigines to understand the morality of murder, whether committed by or against them. In the previous September he had prosecuted at the Circuit Court at Maitland where six Aborigines were found guilty of the murder of a white man and he had made a point in his plea that they understood the serious nature of their crime, although he must have been taken aback when

[64] R. Windeyer, 'On the Rights of the Aborigines of Australia', p. 44, ML.
[65] Murphy in *Freeman's Journal*, Dublin, 13 July 1839. See *SH*, 27 December 1839. All the early attempts of the Roman Catholic church to make contact with the Aborigines proved fruitless.
[66] Stanley to Gipps, 6 July 1843, *HRA* (1), XXIII, p. 9.
[67] *SMH*, 21 June 1844, reports LC.

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

The first to speak against the bill was Robert Lowe whom Gipps had appointed to the Council after the insolvency of Richard Jones had necessitated his retirement in October 1843.[69] The Governor was sanguine that Lowe would be able to offer valuable support to the government side in the Council, but it was a hope that was to be constantly misplaced. In the judgment of Lowe the bill would place the white man at the mercy 'not of man—of savage and blood-thirsty cannibals'. Mitchell and Nicholson spoke on the same side on the grounds that no Aboriginal could ever be trusted to tell the truth. It was Wentworth, however, who made the most forceful speech against the bill. He suspected the very quarters from whence the bill arose, and made it clear what quarters he meant when he said that the Myall Creek hangings were legal murder. He thought that 'the whole life and habits of these blacks were the practice of falsehood' and that 'It would be quite as defensible to receive as evidence in a Court of Justice the chatterings of the orang-outang as of this savage race, and he for one would as soon vote in favour of a Bill for that purpose as for the present measure'. Lang, who wanted to do justice to his 'sable brethren', spoke forcibly for the bill, as also did Windeyer who deemed it contrary to British justice to be against it. In the event the bill was thrown out by fourteen votes to ten and W. A. Duncan was one member of the community who saw fit to deplore the sentiments expressed by some of the speakers and to regard the loss of the bill as 'another of the many injustices which the colonists of New South Wales have to account for in [the Aborigines'] regard'.[70]

Further impetus to Plunkett's determination was given in March 1849 when word was received in Sydney that all the members of the exploratory expedition led into the Northern Territory by Edward Beasley Kennedy had been murdered by the Aborigines. The only surviving witness to the event of Kennedy's own death was an Aboriginal named Jacky Jacky, who

[68] Ibid., 18 September 1843.
[69] Gipps to Stanley, 10 November 1843, *HRA* (1), XXIII, p. 216. The Governor was at least correct in estimating Lowe as 'a man of first rate abilities and a forcible speaker', ibid.
[70] *SMH*, 21 June 1844, reports LC; *Weekly Register*, 22 June 1844.

had shown a high degree of courage and loyalty and recounted the story on his return to Sydney.[71] It was immediately stated that Plunkett would look into the matter in his capacity as Attorney-General. Plunkett made a report to the Executive Council two weeks later, in which he stated that he had examined the depositions placed before him, from which it was clear that the murderers were known to Kennedy's 'faithful companion Jacky Jacky and they have subsequently been identified by him'. He went on, 'If they had all been taken into custody at that time and were at this moment in one of our prisons they could not be prosecuted, as Jacky Jacky is not, *by our law*, competent to give evidence and no white person was present at the murderous attack'. Plunkett's conclusion was, to him, scarcely novel: 'This melancholy case furnishes an additional proof of the necessity that exists for altering the law of Evidence so as to allow the Aboriginal Natives to be competent witnesses in the Courts of Justice of the Colony'.[72]

During the following session of the Legislative Council Plunkett was mainly concerned with bills on the administration of the criminal law and defects in the administration of criminal justice. He brought in a series of bills that were mostly an attempt to bring further into line local colonial law with the developments in British law.[73] His legislation had a smooth passage until 27 June 1849 when his Aboriginal Natives Evidence Bill was read a second time. In its introduction Plunkett acted as a private member rather than an official of the government. The government had not itself sponsored the measure, perhaps in an attempt to take it out of the arena of party politics as they were understood at the time. The essence of the bill again was that the evidence of Aborigines be taken on a declaration rather than on oath, and then only as a collateral to white evidence. When it went to a vote it was lost by ten votes to nine.[74]

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

[71] *SMH*, 6 March 1849.
[72] Plunkett's opinion, 22 March 1849, Archival Estrays, List 15, Dixson Library.
[73] *SMH*, 8 June 1849, reports LC.
[74] Ibid., 28 June 1849, reports LC.

than for the sake of the white race. He said that they were being shot, poisoned and persecuted, and the only remedy was that of admitting the testimony of Aboriginal witnesses. The native police were admirable in their devotion to duty, but even they could not give evidence, and, indeed, they could be assaulted with impunity. Lowe thought that Plunkett was both 'wise and liberal', but it was better to let nature take its course and allow the whites and the blacks to 'fight it out between themselves'. He thought he discerned the influence of the humanitarians of Exeter Hall, the focal point of English evangelical movements, in such a measure. Foster said that the Aborigines were 'utterly debased a race' without any knowledge of truth or falsehood, whilst the native police were 'very good bloodhounds'; but their qualities did not extend any further than that. Wentworth also saw the hand of Exeter Hall in the bill, and gave one concept of progress with the statement that 'The civilized people had come in, and the savage must go back'. He also referred back to the 'judicial murder' of white men in the case of Myall Creek, which forced him to set his face against this present measure, taken likewise 'in pretended sympathy to these savages'. Edward Hamilton said that Plunkett stood alone as the 'prime mover' in this bill which proved 'the predilections in favour of the aboriginal natives, which his career betrayed'; thus to pass this bill would only serve to give Plunkett greater power. He had already used his authority so dreadfully in 1838, and now wanted more 'which [Hamilton] would emphatically assert would place in jeopardy the lives of the white settlers'. He referred to the 'morbid philanthropy' displayed by Plunkett whom he held solely responsible for Myall Creek, which was 'the blackest stain on the criminal calendar of New South Wales'. Cowper followed with a milder speech in which he was opposed to the bill on religious grounds because it set aside the sanctity of an oath, and also because he did not trust the evidence of an Aboriginal. Robert Fitzgerald thought, with Lowe, that it was best to let the strongest prevail and thus pleaded for the races to settle it amongst themselves without the restraining influence of law.[75]

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

[75] Ibid., 29 June 1849, reports LC.

ready to defend Plunkett, showed that they were prepared to vote for the measure, although none of them could rise to the flights of oratory of their opponents. Plunkett came to his own defence over Myall Creek by stating that he would be ashamed if he had acted in any other way because 'The English law placed every man on a level and he had only endeavoured in this Bill to prove that principle'; as he had done in the Myall Creek affair. He gave it as his opinion in reply to Cowper that 'the ends of justice would [not] sustain any serious injury if every species of oath was wholly abolished' because experience had taught him that the fear of 'temporal punishment' swayed witnesses to tell the truth, rather than their fear of eternal punishment if they lied. His last reflection, a combination of his own theological faith in man's dignity, and a prophetic utterance as to the future, was a summary of his own motivation, despite the temper of the times: 'When he . . . reflected that each of these benighted beings had a soul to be saved—that each had stamped on him the image of his Creator, he could not but believe that the treatment that had been visited on these blacks, was sufficient to call down the vengeance of Heaven'. The vote was taken with Plunkett, the Colonial Secretary, the Collector of Customs, the Auditor General, Berry, Dickson, Macintyre, Allen and Parker for the bill and Hamilton, Oakes, Lowe, Wentworth, James Macarthur, Bowman, Fitzgerald, Nichols, Icely and Cowper against it. The *Herald*, whilst it rejoiced at the rejection of the measure because the right course was to uplift the blacks rather than degrade the law by bringing it down to them, nonetheless deplored the attitude of the grazier element in the Council that virtually asked the government to 'connive at the extermination of a race'.[76]

At the next meeting of the Council, on 29 June 1849, Foster moved for a select committee to investigate the state of the Aborigines, and to look closely at the Protectorate, which he thought was both a perfect and a costly failure. He nominated Dickson, W. Macarthur, Murray and Hamilton as members. Thomson suggested that a ballot be taken, with which Plunkett agreed, saying that after all he had heard from Hamilton on the

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

matter he did not judge him as a fit person to sit on such a committee.[77] He then referred to a book, *Twelve Years Wanderings in the British Colonies from 1835 to 1847*, by J. C. Byrne, an author unknown to Plunkett. He instanced the account of Myall Creek and the subsequent trials as a 'bundle of lies', but one upon which judgments unfavourable to himself and others concerned were made.[78] Hamilton replied with the bald assertion that he personally lacked no feeling for the Aborigines, whilst Donaldson, who was not present at the previous debate rejoiced that the 'dangerous measure' was rejected. He thought that had it been passed it would have rendered the bush uninhabitable for the white man. In his view Myall Creek was no more than a stunt to 'satisfy the views of a clique at Exeter Hall' and he hoped that the Protectorate would be immediately abolished.[79] Wentworth then attacked Burton, whom he condemned as a hanging judge and a tool of Exeter Hall who had won his promotion to Madras on account of Myall Creek. But on this occasion at least Plunkett did not lack defenders. Cowper thought Plunkett had done his duty over Myall Creek, and Suttor said that he had never known of a case in which the Aborigines had been the aggressors, yet presently 'the blacks were poisoned by thousands'. He said that he would have voted for the bill had he been present at the previous debate. Darvall also regretted that he was not present as he too would have voted for the bill. He alleged that the verdict given in the Myall Creek case was, in the estimation of 'the country at large', a just one, and that Plunkett both deserved and obtained their thanks for his actions in that instance. But the opposition to the Protectorate in the Council was strong, ranging from Lowe who wanted 'these benighted tribes . . . taught how immeasurably inferior they were in every respect to civilised men' to Thomson who had come to the same conclusion as George Gipps that it was proving too costly and inefficacious to retain.[80] The Protectorate was abolished in the following year. Many more years passed before Aboriginal

[77] *SMH*, 2 July 1849, reports LC.

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

[79] *SMH*, 2 July 1849, reports LC.

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

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

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

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

With this attitude Plunkett agreed, although in the debate in 1847 he tried to make a distinction between Indians and Polynesians. The latter he was not prepared to countenance at all as immigrants, both on the grounds that they were 'cannibals' and that their introduction would, in effect, give rise to a 'slave trade'.[82] It could be argued that his rejection of them on the grounds of their alleged cannibalistic tendencies was to strengthen his argument against their introduction at all because of the danger of a slave trade developing. But his rejection of the Indians as desirable migrants reveals the other facet of Plunkett that was never far below the surface. He was both a man of the law and a public servant, and unless a situation could be securely fitted into a framework adaptable to the legal and administrative

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

[82] *SMH*, 19 May 1847, reports LC.

process Plunkett was inclined to reject it. As a result he was against the introduction of Indians because he asserted that they were always discontented with their conditions. They had a different understanding of the agreements made with them when they were back in India, and they were thus inclined to reject such agreements when they arrived in the colony. This meant that legal arguments developed, and even then, 'when the cases were called upon, they could not be entered into because the witnesses could not be sworn except upon the waters of the River Ganges with which the magistrate at Moreton Bay was unprovided'.[83] This speech was replied to in a letter from A. P. Friell, whom Plunkett had mentioned by name. He said that Plunkett was mistaken in thinking that only the Indian 'coolies' were discontented, and asserted that no Indian was ever content. Plunkett's uneasiness about the Ganges water was also baseless, as such a requirement was no longer necessary, even in India, to validate an oath. He put his finger on the basis of Plunkett's hesitancy when he asked 'will the introduction of these people give extra trouble to the authorities, or not? This is the Rubicon to be passed over.'[84] The *Herald* registered its delight that only 'free immigrants from the United Kingdom' were in favour, and that no pagans from India or 'anthropophagi' from the South Seas were acceptable.[85] A few months later Lowe initiated a debate about the possibility of a slave trade developing and referred to 'Boyd's Savages' as 'outrageous violators of the decencies of civilized life'.[86] Plunkett assured him that no such thing would be allowed, indeed could ever occur here for 'so long as the *Habeas Corpus* Act is in existence, so long as there is a magistrate to whom persons can complain of an assault or an injury, there cannot be slavery'. Despite his protestations he was clearly concerned about the possibility of slave labour and he quickly acted upon a rumour then circulating in Sydney that the South

[83] Ibid. It was at this stage that Lowe began to turn against the squatters because he saw the attempt to introduce coloured labour as a dire blow to the colony.

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

[85] Ibid., 24 May 1847.

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

Sea islanders brought into the Colony by Benjamin Boyd had been 'taken away from their native Islands against their will'. He was satisfied that in the instances in which intimidation and force were claimed, evidence existed to prove the rumours, but it was of a kind upon which he could not act legally.[87]

Some years later the question arose again with the arrival of Chinese into the colony after the discovery of gold. The matter came up in the Council where Henry Douglass moved, fruitlessly, to regulate immigration from China as European immigration would otherwise suffer. Plunkett agreed with the tenor of the bill but refused to foster it as he thought it both *ultra vires* and inexpedient. His solution was to amend the Master and Servants Act excluding Chinese from making contracts. He told several blood-curdling tales about their behaviour in the northern districts, and asserted that 'A greater curse than this species of immigration could not be inflicted on the colony'. He said that he would prefer 2,000 convicts to arrive than 500 Chinese, probably on his usual legislative grounds that long experience had taught British administrators how to handle convicts whereas Chinese were an unknown and alien element.[88]

In this whole matter Plunkett remained adamant in an opinion as little acceptable to many then as now. He refused to acknowledge that the country would benefit by the introduction of Chinese, or other coloured immigrants. He was the only officer of the government to vote for a motion of Parkes aimed at the exclusion of coloured immigrants in 1854. Plunkett said that he was glad the Boyd scheme of years before regarding the introduction of 'poor South Sea Islanders' had fallen down. As regards the Chinese his views were, if possible, hardening. He taunted the House with its refusal to allow Aborigines to give evidence by instancing a case in which a Chinese in court at Bathurst had sworn an oath by chopping the head off a cock. He said that he had proposed already a system of exclusion by disallowing agreements signed between masters and servants anterior to the arrival of the latter in the colony. If they were

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

[88] *SMH*, 24 November 1851.

signed after arrival he conceded that they then had to be treated as the native born and here again he revealed his tenacity to legal structures. Parkes's motion, as Plunkett's previous ones, was thrown out by 19 votes to 7, with Murray summing up the feelings of the squatting elements. Murray said that he had never employed a coloured man because he liked his own too well, but he would have no hesitation in so doing if want of white labour drove him to it.[89]

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

[89] Ibid., 8 July 1854, reports LC.