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POLITICAL OR PROFESSIONAL HONOURS: QUEEN'S COUNSEL IN AUSTRALIA, 1839-1875

THE position of Queen's Counsel in the colonial legal profession has generally only been considered as a matter incidental to the history of the legal profession. For the most part the existence of the position has been seen as a sign of adherence to English traditions in new colonial conditions. The small but important body of literature on the early Australian history of Queen's Counsel has generally been written from a viewpoint primarily concerned with the legal activities and professional role of those lawyers on whom the honour was conferred. This traditionalist approach is open to question. An alternative analysis, to be advanced in this paper, is that the original adoption of the institution of Queen's Counsel in the Australian colonies was essentially a political decision made for political reasons, and that the selection of the early candidates for the receipt of the honour was equally a political matter. In neither aspect did issues relating to the strictly professional role of silks as leaders of the practising profession carry much weight.

OF QUEEN'S COUNSEL

What are "Queen's Counsel"? Queen's Counsel[1] (or King's Counsel when the sovereign is male) are, or are supposed to be, senior barristers whose professional standing has been officially recognised by the the sovereign. The conferment of the honour is referred to as 'taking silk' because a QC wears a gown of silk, as opposed to the 'stuff' gown of the ordinary barrister. Once appointed as a QC, a barrister was entitled to sit 'within the bar' the physical divider which normally separated counsel and judge. The QCs collectively derived from this the collective name 'the inner bar'. Not all QCs were in fact leaders of their profession. In England in the nineteenth and earlier twentieth centuries, a barrister-politician who attained either of the offices of Attorney-General or Solicitor-General

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1 Hereafter, "QC".

without having taken silk would have that distinction awarded and become a QC, regardless of the extent of his practice at the bar. It is one thesis of this paper that the adoption and functioning of the institution of Queen's Counsel in Australia can only be understood by bearing this very political aspect in mind.

Queen's Counsel first appeared in England in Tudor times, where they formed a rival elite to the established order of the 'serjeants'; senior counsel from whom, at that time and for many centuries after, the royal judges were drawn. Over time, the rank of King's or Queen's Counsel first rivalled, and then surpassed serjeanty as a distinction, so that by the nineteenth century the latter remained significant only as a formality to be observed in the appointment of judges. A silk selected for judicial office would be admitted to the 'order of the coif' or serjeants just before elevation to the bench.

The appointment as a QC carried with it some obligations which could, at times, be onerous. In English professional etiquette, a QC could not appear in court without a junior counsel;[2] nor could he accept a brief to appear against the Crown, whether in a civil or a criminal case, without a special licence from the Crown. The increased cost of employing a QC was considerable, and some found their practice deserting them. There were also restrictions on the scope of practice, as QCs were not to appear in cases in the inferior courts before magistrates or Justices of the Peace. In England, where a successful leading counsel could expect to be constantly engaged in the superior courts, this was perhaps less of a sacrifice; in the colonies, where superior court business was less of a staple, the loss of inferior court work could deter leading members of the bar from taking silk.

Why, then, was the honour keenly sought? Two reasons stand out. The first is that becoming a QC was seen from early days, as it still is, as a mark of public recognition of the barrister's professional status. Few, if any, professions would find their leading practitioners to be people of such humility or retiring disposition as to find the conferral of a public mark of distinction unwelcome!

More prosaically, in the nineteenth century, becoming a QC carried a significant practical advantage in some forms of court proceedings, an advantage which took some of the gamble out of taking silk. In the course

2 At an additional fee which in time came to be two-thirds that of the QC's - whether that level of fee became standard in Australasia is not known.

of legal proceedings, there existed a myriad of matters requiring court orders. Many were only of procedural significance, but all had to be completed in accordance with the formal nineteenth century rules of procedure. But since then, as now, the judges were normally unable to deal with all the matters for which their consideration was sought, some mechanism was needed to award priority to some cases. For centuries there were some kinds of proceedings in which the mechanism was the simple, if indiscriminate, one of calling on counsel in order of seniority, if more than one sought audience. Counsel normally took their seniority from the date of admission to the bar, but Queen's Counsel automatically took priority over ordinary barristers, even those admitted much earlier.[3] From this rule of priority derives the term sometimes used for the document appointing a QC; a 'patent of precedence' - a royal conferral of a position superior to ordinary barristers. In matters where speedy audience was important, and many litigants thought their cases were of this nature, there was therefore a real advantage in briefing a QC; an advantage which could be the basis for further professional success. This practical significance of precedence at the bar was lost with the inception of prior listing of cases in the latter part of the nineteenth century in England, though whether there was ever any parallel practical benefit to silks in the colonies is not known.

The exact nature of a 'patent of precedence' was not established for many years. The debate turned on whether the grant of silk was the conferral of an 'honour' or an appointment to an office. If it was an 'honour,' then it was in the hands of the Queen, and so colonial governments could not appoint as they chose. If it were an appointment, there was then clear power to appoint. In the case of colonies with self-government, the British authorities felt it wrong to intervene in the appointment of QCs. The British view appears in an annotation to the Governor's despatch announcing the creation of the first South Australian silks, where it is minuted that "in the case of colonies with responsible Governments, the appointment of Queen's Counsel should rest with the Governors" so that any sign of approval of such appointments by the British authorities would be "consistent with the system of complete non-intervention with the acts of the local government in such cases".[4] It does, however, seem that the Colonial Office did consider it appropriate to consider the merits of applications from colonies not yet so constitutionally advanced. One example is the application by Field, mentioned later; a second is the

3 QCs themselves were ranked by seniority of their appointments as QCs.

4 Daly to Cardwell: Public Record Office, London (hereafter PRO), CO 13/117, Despatch no 15, folio 133ff, 4 March 1865.

application for silk for the Western Australian lawyer George Walpole Leake, where the Colonial Office stipulated that any application must be supported by the local Attorney-General.[5] Leake's patent of precedence was the first to be issued to an Australian barrister under the royal sign manual. This was in itself a reflection of the then unusual constitutional position of Western Australia.[6]

The question of the basis for colonial appointments was ventilated again in the 1890s, following a controversy in South Australia over the application made by HE Downer in 1890 for silk. Downer was not then in active practice at the bar, instead holding the office of Commissioner of Insolvency. Silk was refused, ostensibly on that basis. However as Thomas Playford, the then Premier, was violently opposed to Downer, both politically and personally, the refusal of silk became a controversial public issue. The then Attorney-General, Robert Homburg, then put forward the view that all appointments of Queen's Counsel in the colony, and hence in other colonies, were invalid because the governors of the colonies had never been given an express power to confer them, a power which would have been needed if the patent of precedence as a QC was conceived to be the award of an honour.[7] This question was then canvassed with the Imperial authorities who sought opinions from the Chief Justice of South Australia and other colonies. A majority[8] were of the view that appointment as a QC was appointment to an office, and therefore one to which the Governor could appoint under his ordinary powers.[9]

THE FIRST SENIOR COUNSEL

It appears that the first counsel to be recognised as deserving of a special sumptuary status was WC Wentworth, whose leadership of the Sydney bar

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5 Kimberley to Weld: PRO, draft in CO 18/176, despatch no 5, 27th August 1873.

6 See the annotations to the draft warrant: PRO, CO 380/121, folio 145ff, undated.

7 I am indebted for the foregoing account of this incident to an unpublished work by Loughlin *South Australian Queen's Counsel 1865-1972* (B A Hons Thesis, University of Adelaide 1974) pp15-19. Way and Griffith relied on the decision of the Supreme Court of Canada in *Lenoir v Ritchie* (1875) SCR 575.

8 Chief Justices Sir Samuel Way of South Australia and Sir Samuel Griffith of Queensland supporting such appointments, Sir John Madden of Victoria contra.

9 See Way to Griffith, Dixson Library, in SW Griffith papers, file MSQ 188, 25 October 1892, and anonymous memorandum, dated 20 August 1892, Queensland State Archives, in File JUS/W. Madden's opinion is printed in SA, Parl, *Papers* [1891] Vol 4 No 188.

was apparently recognised by his colleagues in 1835.[10] However Wentworth was not appointed as a Queen's Counsel, an appointment which required the exercise of the royal prerogative. As Dr Bennett has established, the first barrister in Australia to be given an official patent of precedence was John Hubert Plunkett in 1856.[11]

But Plunkett's appointment was not the first occasion on which application had been made for an official patent of precedence. If there ever was any official application made on Wentworth's behalf, it has not yet come to light. There is a good chance that any such an application would have been unsuccessful, despite the merits of Wentworth's case. A leading official in the Colonial Office was reluctant to see the full panoply of the English bar introduced into colonial courts. This is made clear by the reasons for refusal given when the first traceable formal application for silk was received by the London authorities. Governor Franklin of Tasmania forwarded for the opinion of the Colonial Office a letter from a Tasmanian barrister, one Fielding Browne who sought a patent of precedence at the Tasmanian bar.[12]

Browne put his case thus. He had been called to the English bar in 1810 and then in 1815 became Solicitor-General in Grenada. In 1817 he was appointed Attorney-General of that colony, a position which he held until 1829, when he resigned because of the obstructive practices of Jeffery Hart Bent, then Chief Justice in Grenada. Browne stated that he had been given a Patent of Precedence at the Grenada bar by the then Governor after his resignation from office. Despite that he left Grenada for Tasmania in 1829, to find only three other barristers who had been admitted in the United Kingdom.[13] The remainder of the Tasmanian bar were 'attorneys' who were allowed dual practice in Tasmania, and who took precedence by date of admission to that bar. Browne therefore was, despite his English admission and years since call, the most junior counsel at the Tasmanian bar, a position he felt most keenly.

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10 Bennett, *A History of the New South Wales Bar* (Law Book Co, Sydney 1969) p236.

11 Bennett, "Of Silks and Serjeants" (1978) 52 *ALJ* 264 at 270-271, supplementing and correcting the account given in his *A History of the New South Wales Bar* (Law Book Co, Sydney 1969). I am indebted to Dr Bennett's writings at various points for information regarding early Australian silks.

12 Franklin to Normanby: PRO, CO 280/109, despatch no 18, 3 August 1839. Tasmania was then of course known as Van Diemen's Land.

13 Of these, two were the Attorney-General and the Solicitor-General.

Browne's request was, perhaps not surprisingly, turned down. Franklin gave as his view that there were

> several members of the profession, who were called to the bar in England, some of nearly equal standing with Mr Browne, who have for many years been practicing in the Supreme Court of this Colony. These gentlemen, I think, might reasonably complain were their positions to be affected by Mr Browne being given precedence over them. I may also state that it is my opinion that it would not be desirable to interfere with the rule, established for many years, for the regulation of the bar of this Colony.[14]

Nor, a most important factor, did the Chief Justice support any such appointment. Thus the merits were against Browne.

But the grounds for refusing his request were not restricted to the merits of the application. James Stephen, Under-Secretary in the Colonial Office in London, took issue with the principle of colonial QCs altogether. He minuted on Franklin's despatch that even if there had been support from the Governor and Chief Justice:

> I would observe that the English system of selecting particular barristers to precede the list by virtue of Appointments from the Crown is one of the contrivances which a powerful Body of men such as the Barristers of this Kingdom are always prompt to invent for their common interest without much regard for the interests of the rest of society.[15]

Stephen took the view that the rule requiring a QC to be assisted by a junior was simply a device to protect weaker counsel who would not otherwise get work. The rule was, in his opinion, both inconvenient and creative of extra expense for litigants. As such, he believed it should not be extended to the colonies.

In the early 1850s the issue again arose when suggestions were made, both formally and informally, that the rank be created in Australia. The formal suggestion came from that peripatetic colonial lawyer and jurist Henry

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14 Franklin to Normandy, PRO, CO 280/109, despatch no 18, 3 August 1839.

15 Minute by J F Stephen, 24 January 1840 on Franklin to Normanby: PRO, CO 280/109, 3 August 1839.

Chapman in a letter to the Secretary of State for the Colonies, the Duke of Newcastle.[16] Chapman's letter requested that the British authorities consider either authorising or instructing the Australian Governors to introduce the rank of Queen's Counsel. The bulk of the letter argues for its introduction on the basis that such an institution was necessary in the interests of the bar, particularly of those counsel senior in call to the actual leading practitioners. Chapman's argument was that lawyers who might be good juniors but were not in demand as leaders lost the opportunity of practice. Conversely, the public lost the chance to hire junior counsel who were more competent than those they might otherwise get. Chapman then turned to the comparative argument, pointing out that "In Canada it has been the custom for many years to appoint Queen's Counsel, and I believe the same practice prevails in the other North American colonies,"[17] but there were none in Australia.

Chapman professed to find it necessary to scrutinise applicants closely. He believed that Queen's Counsel should only include "those members of the bar who have by their talents, industry and experience secured what is called a leading practice", and in the absence of scrutiny, "the rank would be liable to be confined to political partisans only".[18] This could be avoided by requiring applicants to be formally recommended by the judges, or the Chief Justice, of the colony, but even so, there should be an ultimate discretion in the Governor to refuse silk as "there may be public reasons, and even objections of a personal nature, against the elevation of a particular individual of a character not likely to be brought before the judges".[19] Having thus far made his case entirely on matters of high principle, Chapman then pointed out the political expediency of the move:

> the judicious exercise of the prerogative in the appointment of Queen's Counsel would tend to strengthen the executive Governments now unhappily far too weak for the new responsibilities cast upon them by the introduction of representative legislatures.[20]

The minutes appended to this letter are most interesting, although it is difficult to determine by whom they were appended. Their tenor is that the possible creation of the rank of QC in Australia had already been raised

16 Chapman to Newcastle: PRO, CO 201/470, folio 175ff, 13th August 1853.
17 As above.
18 As above.
19 As above.
20 As above.

informally by Robert Lowe, then active in New South Wales politics, through his English political connections, as well as on a previous occasion which produced a minute by James Stephen, presumably the earlier-quoted minute on Fielding Browne's application. It seems that Stephen's minute had been sought without success, and only a vague and erroneous memory that such applications should have the support of the judges of the colony remained. All the officials were of the opinion that the issue of principle needed to be addressed. It was therefore referred to the consideration of Herman Merivale, Stephen's successor as Permanent Under-secretary in the Colonial Office, who was temporarily absent. The outcome, if any, of the reference is not apparent. It is possible that the outcome of the discussion on this letter was in some way made known to the Australian Governors. There is no obvious trace in the relevant indices to the Colonial Office correspondence concerning the first New South Wales silks in 1856, nor regarding the gazetting of the Victorian regulations in 1857, nor the appointment of the first QC in Tasmania in 1861. Yet there is substantial correspondence from the other colonies after that. Again, if the apparent lacuna can be remedied, the results might be informative.

As with many other barristers raising the issue of silk, Chapman's interest was not untinged by the prospect of personal advantage. His letter was written at a time when he had lost governmental office but was considering emigrating afresh, this time to Victoria to practise at the bar.[21] In such a practice he might reasonably hope either for silk for himself or for the award of it to others which would facilitate his progress as a junior. It is also possible that the considerable correspondence between Chapman's views on the procedure for appointment and the procedure eventually adopted later in Victoria is not purely coincidental, though there is no compelling evidence either way.

THE SEQUENCE OF APPOINTMENTS

As mentioned earlier, the first official silk in Australia was Plunkett in 1856 in New South Wales. His appointment apparently spurred the Victorian Government to establish regulations for the appointment of silks - but with an interesting difference in the procedure to be followed. In New South Wales, the theory was that barristers directly petitioned the Government for appointment; whereas the Victorian regulations had appointments being made on the recommendation of the Chief Justice to

21 See Spiller, "Henry Chapman: Pioneer Law lecturer at the University of Melbourne" (1989) 17 *MULR* 275 at 279.

the Governor-in-Council. This was apparently an attempt to ensure that 'purely political' appointments were not made in the manner in which they allegedly occurred under the New South Wales approach.

The Victorian model was, it is repeatedly claimed, widely followed in other parts of Australia. This statement must, like a number of others, be treated with some circumspection. Firstly, it is pertinent to note that the choice of the Victorian model was apparently supported by the Colonial Office. McPherson, the historian of the Queensland Supreme Court states that:

> Sir George Bowen, who has sought advice on the procedure to be followed, was referred to and adopted the practice then prevailing in Victoria.[22]

The position was in reality a little more complex than that. In fact, Bowen forwarded to the Colonial Office a letter from the then Attorney-General, Ratcliffe Pring, who stated that he thought the question of appointment of Queen's Counsel would arise, and requested the Governor to consider "how, upon whom and under what circumstances" the rank of Queen's Counsel should be conferred on barristers practising in Queensland, and suggesting that the Governor seek instructions from London.[23]

The Colonial Office replied that no regulations were in force but referred Bowen to the Victorian regulations, presumably as a possible guide.[24] The Queensland Government then proceeded to adopt regulations which were based on those of Victoria, but with a very significant change, a change not reflected in McPherson's account. Bowen put it thus:

> The only difference made in Queensland is that the Attorney-General and Solicitor-General of this colony may be made Queen's Counsel while holding those Offices, and not only after their retirement from them.[25]

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22 McPherson, *The Supreme Court of Queensland 1859-1960: History, Jurisdiction, Procedure* (Butterworths, Sydney 1989) p83.

23 The quotation is from Pring to Bowen 16 February 1864, enclosed with Bowen to Cardwell: PRO, CO 234/10, despatch no 8, folio 20ff, 17th February 1864.

24 Cardwell to Bowen: PRO, draft in CO 234/10, despatch no 20, folio 21A, 19th May 1864.

25 Bowen to Cardwell: PRO, CO 234/13, despatch no 78, folio 392-393, 5th December 1865.

This statement obscures the vital fact that in Queensland, as in Victoria, a clear distinction was being made between counsel who had achieved political office as Attorney-General or Solicitor-General and those who had not. Those who had achieved such office could become Queen's Counsel on the recommendation of the members of the Executive Council (their cabinet colleagues); those who had not such experience required the support of the Chief Justice.

Nor was the difference likely to have been accidental. We must, after all, consider the prior record and character of Charles Lilley, the man who became Queensland's first, and for some years only, Queen's Counsel.[26]

Lilley had only come to the bar in 1861, under a procedure whereby a solicitor of five years standing who qualified in classics or mathematics could be admitted as a barrister; a procedure made possible by the *Supreme Court Constitution Amendment Act* (Qld) 1861, a provision promoted by one Charles Lilley.[27] Even though he undoubtedly had a significant practice at the bar, it is not likely that a barrister of only four years standing would ever have been awarded silk in any other jurisdiction. Nor does his later career incline the historian to think that Lilley was motivated by altruism in introducing the rank of QC to Queensland. Leaving aside the spectacular nature of his forced departure from the bench[28] which was due to claims of partiality toward his barrister son and antipathy toward former political opponents,[29] there is the remarkable fact that in 1869, when his Government appealed against a Supreme Court decision in favour of a leaseholder on a disputed lease, Lilley briefed out the Crown appeal, and appeared for the leaseholder respondent![30] It was commonplace for Attorneys-General to appear in their private capacity as counsel in cases where the Crown had no interest; there is no other known case where an Attorney-General and QC appeared against the Crown!

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26 Ratcliffe Pring and John Bramston, who were qualified for appointment under the 1865 regulations as former Attorneys-General both declined appointment in that year for fear that the inability to appear in minor matters would affect their practice. As above; see also McPherson, *The Supreme Court of Queensland 1859-1960* p83.

27 As above p82.

28 To which he, as Premier, appointed himself in 1874.

29 As above pp179-181; Gibbs "A Nineteenth Century Cause Celebre" (1987) 13 *RHSQ Jnl* 73; Murphy & Joyce (eds) *Queensland Political Portraits 1859-1952* (University of Queensland Press, St Lucia 1978) pp82-85.

30 Murphy & Joyce, *Queensland Political Portraits 1859-1952* p77.

Bennett notes that: "the acceptance of the title and all that it represented was in striking contrast to his own extreme views about anything to do with royalty".[31] The contrast is less of a puzzle if one postulates that the institution of the rank of Queen's Counsel was primarily designed to advance the position of Lilley *personally*, and was not intended to indicate any ideological acceptance of the premises of the system in England.

This appears to be one of the key differences, perhaps the key difference, between the operation of Queen's Counsel in Australia from that in England. In England the bulk of Queen's Counsel were appointed from the professional elite; political office provided a short cut for only a relatively small number. In Australia the position was, in fact, reversed. Political silks dominated. The attribution of Queen's Counsel to acceptance and adoption of English *legal* traditions may well be quite wrong. A better view is that the institution underwent a colonial transformation, and became a device whereby those attaining transitory political influence could take insurance for a future rendered uncertain by the unsettled social and political circumstances of the colonies.

It must be remembered that not only did silk enhance the professional standing of the recipient; it also provided an inestimable advantage in seeking appointment to any vacancy on the judicial bench - a bench which provided secure pensionable employment for many a former lawyer-politician in their later years. Lilley was, after all, one of the first, indeed probably the first Australian Supreme Court judge to have been first admitted to the bar in the colonies. It may be thought that he was merely the most blatant example of the adaptation of an English institution to the purposes and practicalities of nineteenth century colonial Australia. Similar political influences surround the first appointments of silk in the other Australian colonies.

New South Wales

The first New South Wales QC, Plunkett, had served for many years as Solicitor-General and then Attorney-General prior to the grant of responsible government. Bennett notes the award of silk "had the appearance of a consolation prize".[32] Plunkett was followed into the ranks of 'inner' barristers by six more counsel in the period 1857-1863 - all except Broadhurst having held office as Solicitor-General or Attorney-General or both. Of the six, James Martin, for many years a solicitor,

31 Bennet, "Of Silks and Serjeants" (1978) 52 *ALJ* 264 at 273.
32 As above at 271.

apparently only became a barrister to ensure cabinet office as Attorney-General.[33] Martin had thus been at the bar for only a year when awarded silk. One of his successors, JF Hargrave, reportedly had even less claim to professional leadership, but awarded himself silk.[34] Both were later to sit on the Supreme Court bench, as were several other political Queen's Counsel. Martin and Hargrave are perhaps the most obvious examples of consistent pattern of the use the institution of Queen's Counsel by the political elite to perpetuate a favoured position achieved by political success.

Tasmania

In Tasmania the first QC appointed was Thomas Knight, in 1861. As with Plunkett, the granting of silk appears to have been made as a consolation for a recently ended political career.[35]

Western Australia

In Western Australia the first award of silk went, as mentioned before, to George Leake. Here we have the unusual advantage of official communications which disclose the reasons for his appointment. The Governor, Sir Frederick Weld, recommended silk because he had been

> informed that it has been usual in some colonies, on the recommendation of the Governor, to confer the title of Queen's Counsel upon Barristers of the Supreme Court in cases where they have temporarily filled public offices or otherwise merited such a distinction.[36]

Leake was therefore nominated because he had twice acted as Attorney-General - indeed he was in a third term as *locum tenens* of the position when his formal application was made.[37] There is no clearer instance of the actual use of the award of silk as a reward for past service rather than for professional leadership. It might be thought that if this was an unusual

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33 Bennett, *A History of the New South Wales Bar* pp72-73.

34 Bennett in Nairn, Serle & Ward (eds), *Australian Dictionary of Biography 1851-1890* Vol 4 (Melbourne University Press, Melbourne 1972) pp345-346.

35 Bennett, "Of Silks and Serjeants" (1978) 52 *ALJ* 264 at 271.

36 Weld to Kimberley: PRO, CO 18/176, despatch no 76, folio 22-23, 17 June 1873.

37 Weld to Carnarvon, PRO, CO 18/179, despatch no 99, folio 401ff, 3 September 1874.

case for the bestowal of an honour, it would have drawn comment to this effect.[38]

In Victoria and South Australia the position does appear a little different.

Victoria

In 1857, Victoria acted to create regulations for the appointment of Queen's Counsel, probably as much out of rivalry with New South Wales as for any other reason. No counsel were then appointed; indeed it was not until 1863 that the then Attorney-General George Higinbotham prompted two leading Melbourne counsel to seek silk, a step he claimed would benefit the bar "by bringing it into closer correspondence with the state in which the profession exists at home".[39] Bennett finds Higinbotham's action to be a "paradox", because he thinks it was motivated by a "sympathy with tradition" which is out of character with the Attorney-General's other views.[40]

However, an alternative hypothesis is open, which seems to me to accord better with Higinbotham's character. It would be quite in character for Higinbotham to try to strengthen local institutions at the expense of English ones. Let us suppose that he intended that the institution of Queen's Counsel do just that. It seems to me that Higinbotham's interest may well have been to try to increase the perceived strength of the local bar. This could have two effects; first to make it less likely that adventurers from the English or Irish bars might be able to insinuate their way into high office after only a short period in the colony - he had, after all, witnessed the example of Lyttleton Holyoake Bayley who had achieved the office of Attorney-General of New South Wales in 1859 after only a few months in the colony.[41] Such precipitate and unjustified advancement of a well-connected Briton would be much less likely if it required overleaping a local counsel with the cachet of silk. Secondly, and perhaps more importantly, the establishment of local Queen's Counsel

38 This motive for Leake's appointment appears not to have come to the notice of legal historians, one of whom Bennett (see (1978) 52 *ALJ* 264 at 273) is justly critical of it; cf Russell, *History of the Law in Western Australia and its Development 1829 to 1979* (University of Western Australia Press, Nedlands 1980) pp95-97.

39 Higinbotham to Michie and Ireland, quoted by Bennett, "Of Silks and Serjeants" (1978) 52 *ALJ* 264 at 272.

40 Bennett, "Of Silks and Serjeants" (1978) 52 *ALJ* 264 at 272.

41 See Walsh in Nairn, Serle & Ward (eds), *Australian Dictionary of Biography 1851-1890* Vol 4 (Melbourne University Press, Melbourne 1969) pp119-120.

could ensure the continuation of the practice in Victoria of appointments to the Supreme Court Justices from the ranks of local counsel, rather than the importation of British lawyers, a custom which appears to have begun earlier in Victoria than anywhere else in Australia.

Certainly it might be thought that if Higinbotham's aims were to ensure adherence to English tradition, he would not have selected as one of his two candidates to inaugurate the new office the distinctive but controversial figure of Richard Davies Ireland. Ireland had a strong claim to silk if awards were to be made in that he was both a former Attorney-General and one of the leading counsel in terms of practice. However his past as a defence counsel at the Eureka trials and as a politician at the radical end of the political spectrum[42] hardly make him a figure who would have been given silk in England without the claims of political office. One can imagine Higinbotham feeling that, having advanced one more or less conventional candidate, the lawyer-politician Archibald Michie, another former Attorney-General and then Minister of Justice, he could simultaneously assert the distinctive colonial character of the Victorian bar by putting forward Ireland as a barrister of unconventional character. It is also notable that the language of the despatch announcing the creation of the new silks is slightly more constrained and formal than comparable despatches from other colonies. Barkly's despatch reads as the formal transmission of a decision of the Executive, and is in terms which suggest that the Colonial Office has no right to intervene in the local decision.[43] Certainly this is all speculation, but this thesis has at least the merit of being compatible with Higinbotham's known views rather than in opposition to them. Uniquely, Higinbotham cannot be supposed to have been motivated by personal advancement in proposing the institution of the QC rank.

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42 Though not then of the dubious repute later attached to his conduct over the *Land Act* 1862 (Vic). See Duffy, *My Life in Two Hemispheres* Vol II (Irish University Press, Shannon 1969) p287, but also see the defence by of RD Ireland by John Ireland, *Three Cheers for Mr Ireland* (B A Hons Thesis, University of Melbourne, 1988).

43 The wording used is "As Her Majesty's name is involved in the creation, I think it right to report that I have with the advice of my Executive Council appointed" Barkly to Newcastle: PRO, CO 309/64, despatch no 71, folio 237, 25 August 1863 Bowen in Queensland uses much less constrained terms; Daly in South Australia is not too dissimilar to Barkly's phrasing.

South Australia

Here the first appointments were Randolph Stow, RB Andrews and WA Wearing. Of these, Stow had been Attorney-General up until the elections of early 1865; Andrews, himself a former holder of the office, succeeded Stow.[44] It may well be that the decision to introduce the rank was made as an inducement to Andrews to take the office of Attorney-Generalship. Contemporary newspaper comment indicates that with the defeat of Stow, the majority party in the House of Assembly was without a member of the legal profession. It seems the Constitution required, or was considered to require, that there be an Attorney-General who was a legal practitioner, and thus the majority party needed to attract a lawyer from the ranks of the Opposition. It was reported that Andrews had refused the offer of the post immediately after the election results. It is therefore tempting to see the introduction of the rank of Queen's Counsel and the granting of silk to Andrews as causative of his acceptance of office rather than as an auspicious coincidence.[45]

South Australia differed from Queensland and Victoria in that there was no special provision made in the regulations for silk for Attorneys-General. Appointments always required the recommendation of the Chief Justice. Despite this it seems probable that political appointments were common. Many future South Australian QCs had been active in politics although it is difficult to determine how many held the office of Attorney-General at the time of appointment.[46]

It appears to have first been in South Australia, with its fused profession, that the question was raised as to whether a lawyer practising as a solicitor could be appointed as a Queen's Counsel. The problem arose early, with John Baker MLC unsuccessfully insisting that the honour should only be

44 Bennett's discussion in (1978) 52 *ALJ* 264 at 272, obscures the fact that Andrews had previously served as Attorney-General; cf Daly to Cardwell: PRO, CO 13/117, despatch no 15, folio 134, 14th March 1865. Hague comments in *History of the Law in South Australia 1837-1867* (typescript, University of Adelaide Law Library 1936) p1353, that the South Australian regulations governing the office of Queen's Council were "copied" from the Victorian overstates the case. The form of the warrant was also probably not copied, in that the first warrants did not restrict precedence to South Australia, an omission which the Colonial Office insisted be remedied - see the annotation to the despatch cited.

45 For the political discussions see *Adelaide Advertiser*, 11 & 15 March 1865.

46 See Loughlin, *South Australian Queen's Counsel 1865-1972* (B A Hons Thesis, University of Adelaide 1974) pp79ff lists thirteen QCs who sat in the South Australian Parliament in the period 1865-1900.

conferred on those admitted and practising as barristers - a group which was soon to include his son Richard Baker, then reading for the bar in England.[47]

Before leaving South Australia, it is appropriate to draw attention to the most perceptive analysis thus far published of the reasons for the adoption of Queen's Counsel in a colony. Castles and Harris have given us a fascinating picture of the legal profession in South Australia. They put forward the view that, for at least some lawyers, an imitation of British models of legal dress, and later of style, was as much an assertion of their own achievement and ability - a visible claiming of the marks of distinction displayed by lawyers of comparable competence in England.[48] While one may agree that this certainly motivated some lawyers, one must also acknowledge that others were more concerned with the tangible benefits of the office - though to some lawyers at least there would have been no contradiction between the two. Silk often enhanced the recipients' practice while at the bar and often assisted further professional and social promotion to the bench. It also amounted to a formal and public recognition of their achievement of a secure place in the colonial elite. Perhaps it is a mark of the nature of South Australian and Victorian society in the last third of the nineteenth century that there are no parallels with the overt self-advancement of a Charles Lilley; nor even the more cloaked self-interest of the New South Wales politician-lawyers.

CONCLUSION

The evidence traversed in the foregoing account does, it is contended, go far to show that in the initial years, the institution of Queen's Counsel in Australia was a matter of politics, not of leadership of the legal profession. However, in the last years of the century the perceived role of Queen's Counsel within the profession underwent a change; professional accomplishment became the more common and dominant criterion for conferral of silk. Various causes of this change may be put forward, though they may well have been more inter-related than distinct.

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47 As above at pp30-32; see also SA, Parl, *Debates* LC [1865] at 713-714. One future avenue for research is to consider whether the issue ever caused concern in other colonies where there was a right of dual practice. There were objections raised in New Zealand, though in Canada there are many Queen's Counsel who were effectively only solicitors. However the Canadian history of Queen's Counsel has been even more political than that of Australasia, the New Zealand position less markedly so.

48 Castles & Harris, *Law-makers and Wayward Whigs; Government and Law in South Australia 1836-1986* (Wakefield Press, Adelaide 1987) pp211-212.

It is arguable that the legal profession as a whole became more Anglocentric in its customs and outlook; less 'colonial' and more 'British'. One piece of evidence of this is the bitter remark in the memoirs of a Sydney barrister:

> In the eighties and nineties any barrister on arrival from England found a practice awaiting him. He was certain to make a general income in his first year. In subsequent years his income depended on his merits, and sometimes dwindled. An Australian had to battle along until he overcame the local prejudice against him.[49]

Secondly there was a significant change in the education of the legal elite. In the latter part of the nineteenth century it became reasonably common for the male children of the colonial elite to travel to England for part of their education, though the exact frequency of this is difficult to estimate. Duman's pioneering work on the make-up of the nineteenth century bar barely mentions colonial Queen's Counsel; nor are his figures easily manipulated to determine the number of young colonials who read law in England.[50] It is difficult to do more than to say that there were some, and to hope that at some future time some researcher will provide good data. One possible indication of the numbers involved is an estimate that there were between 25 and 30 Australians at Oxford in 1886.[51] It seems likely that a substantial proportion of these would have gone on to read law, and that there would also have been some studying at Cambridge.

Another possibility is that there was an Antipodean version of a phenomenon that a Canadian academic, G Blaine Baker, has suggested occurred to the Canadian profession - a kind of collective reflex reaction to the relative loss of importance of colonial lawyers in their own society toward the end of the nineteenth century. Baker's theory is that as the social and economic power of lawyers diminished, they took consolation in increasing the ideological tie with the mother country.[52] It would be

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49 Blackett, *May It Please Your Honour* (Cornstalk Publishing Co, Sydney 1927) p167.

50 Duman, *The English and Colonial Bar* (Croom Helm, London 1983) esp pp122-124.

51 Symonds, "'The Foundations of All Good and Noble Principles': Oxonians and the Australian Universities in the Nineteen Century" in Morphy & Edwards (eds), *Australia in Oxford* (Pitt Rivers Museum, University of Oxford, Monograph 4 1988) p86.

52 Baker, "The Reconstitution of Upper Canadian Legal Thought in the Late-Victorian Empire" (1985) 3 *Law and History Review* 219.

fascinating to know whether this can be borne out for any or all of the Australasian colonies, although this would be a major research project in itself.

Lastly, one may speculate that the first instances of Australasian counsel arguing cases before the Privy Council may have reinforced the cultural factors already present - even if the experience of the Antipodean judges on the Council perhaps point the other way.

Whatever the determining factors were, it seems probable that the institution of Queen's Counsel emerges in the Australian colonies as an institution adapted by the local political elite for their own purposes, rather than by an uncritical aping of English tradition. The more recent and English garb in which the institution has been draped has somewhat concealed these origins, but any evaluation of colonial lawyers and politicians which neglects this political element is likely to be suspect. Indeed, in many cases re-evaluation may be overdue.