

of Lords had become much more secular in composition.⁶⁵ At the same time, the number of common lawyers in the House of Commons had markedly increased. It is likely, therefore, that there was a much decreased possibility of a defence of the ecclesiastical or canon law approach to wills and testamentary capacity in the Parliament than there might have been in the past.

The *Statute for the Explanation of the Statute of Wills* determined the matter once and for all by making it clear that the common law was to prevail over both the ecclesiastical view of testamentary capacity, the *Statute of Wills* itself already having made it clear that equity's tolerance of wills of uses had been overcome by the common law as well.

The *Statute for the Explanation of the Statute of Wills* also established the age of capacity, as there was a similar conflict between ecclesiastical and common law as to the requisite age. The canon law followed Roman law and regarded the age of capacity to make a will as twelve for girls and fourteen for boys. By contrast, the common law used later ages for the age of majority. For example, the military tenant's age of majority was twenty-one (that is, the age at which a male ward in Knight's Service came out of wardship), while the age at which a socage tenant came out of wardship was fourteen or fifteen in Bracton's time. By Henry VIII's time, the age of majority at common law was regarded as twenty-one.⁶⁶ Again, the *Statute for the Explanation of the Statute of Wills* removed any possibility of confusion as to the age of capacity to make a will in relation to land.⁶⁷

Idiots and persons of non-sane memory seem to have been included for the sake of completeness, as they were not regarded as having capacity either by the common law or by ecclesiastical law.

Thus the need to clarify the position as to capacity resulted not from poor drafting in the *Statute of Wills*, but from the conflict between the ecclesiastical courts and the common law courts in relation to wills and estates.

65 There were 50 Lords spiritual and 57 Lords Temporal in 1536. By 1542, 29 fewer Lords Spiritual remained: Lehmborg, *The Later Parliaments of Henry VIII, 1536-1547* p217

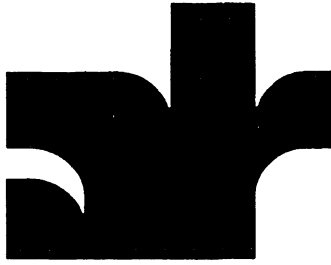
66 Pollock & Maitland, *The History of English Law* (Cambridge University Press, London, 2nd ed 1968) pp438ff.

67 In 1837, the rules for testamentary capacity were made universally applicable - to both land and chattels - by the *Wills Act* (UK) 7 Will IV & 1 Vict c 26.

CONCLUSION

The reasons for the passing of the *Statute for the Explanation of the Statute of Wills* are complex, and much of the evidence is suggestive rather than determinative of the conclusions sketched here. The evidence clearly shows that the Crown's need for revenue was the engine of a great deal of political change at the time, and the interrelations of revenue issues and land law in relation to various types of claimants to land, including aristocracy, gentry and women, were clearly important to the Statute's inception and passage through Parliament. The *Statute for the Explanation of the Statute of Wills* determined that the common law was to prevail over the ecclesiastical view of testamentary capacity, the *Statute of Wills* itself already having made it clear that equity's tolerance of wills of uses had been overcome by the common law as well. In this way the statute might be seen to be a consolidation of a general trend of the 1530s, epitomised in the Reformation Parliament itself, to marginalise the ecclesiastical influence in England's law and ensure the dominance of the common law.

The political dynamics of the time shaped the changes to the land law in the 1530s, most of which had been designed and guided through Parliament by Cromwell. The political dynamics of the time also contributed to the loss of Cromwell, the master draftsman and "first parliamentary statesman" who,⁶⁸ had he not been executed for treason, might have overseen the passage of a *Statute of Wills* which did not require a statute for its further explanation.



BOOK REVIEWS

*The Honourable Justice Michael D Kirby AC CMG**

THE CAPTIVE REPUBLIC: A HISTORY OF REPUBLICANISM IN AUSTRALIA, 1788-1996

Mark McKenna

Cambridge University Press, Melbourne, 1996

xii; 334pp

ISBN 0521 57258 4

I received this book for review on a day when, by chance, I visited the Royal Prince Alfred Hospital in Sydney. On top of the facade of the hospital building I observed a statue which I had not previously noticed. As it fronts the Queen Victoria Pavilion, it is perfectly possible that it is a statue of the Queen Empress' much mourned husband, Prince Albert the Good. I stared at the statue trying to discern the features of its subject because those of Albert are well known. Another statue of him presides over Queen's Square in Sydney, just near the Law Courts. In fact, he looks directly at his wife who imperiously ignores him and stares instead down the vista of Macquarie Street - one of the better colonial thoroughfares in her Australian colony.

* B A, LL M, B Ec (Syd), Hon D Litt (Newc), Hon LL D (Macq), Hon LL D (Syd), Hon LL D (NLS India); Justice of the High Court of Australia.

As I examined the hospital statue, passers-by, including a medical practitioner of my acquaintance, began to take notice. Perhaps they thought I had taken leave of my senses and was up in the clouds again. But gradually the image of the statue became clearer. I cannot swear that it is HRH Prince Alfred, Queen Victoria's second son. But it is perfectly possible because the hospital was built as an act of community contrition for the shocking attack on the royal person at Clontarf Beach in Sydney in March 1868. The attack was the work of an Irishman, Henry James O'Farrell. The story is told in Dr McKenna's book.¹

McKenna recounts that after the failed assassination attempt, "it was easier for colonial authorities to associate republicanism with the spectre of an Irish Catholic rebellion".² In the words of one Member of Parliament at the time, republicanism was an Irish hope - of "[t]hose who sucked disloyalty with their mother's milk".³ Such infidelity, as McKenna observes, was noted by the majority of loyalists in little things. For example, failure to drink the toast to the monarch on public occasions, failure to stand in the theatre for the anthem or failure to pray for the Royal Family at church. Some contemporary supporters of the moves for a republic (such as Father Frank Brennan SJ) have candidly acknowledged the part played by their Irish Catholic roots in forming the sentiment which motivates them in this regard. There can be little doubt that it was a factor in the motivation of Mr Paul Keating's push for an Australian republic. My ethnic background was different. It lies, for the most part, in the tradition of Ulster Protestants. In that sense, my approach to this book was initially rather unsympathetic. I could see Siobhán McKenna (one of its dedicatees) armed with a sledge hammer toppling the royal statue from the hospital in Sydney at the earliest decent opportunity, once the republic was gained.

Nevertheless, in the context of the current debates about Australia's constitutional arrangements, this is a most detailed examination of the threads of republican sentiment that can be found throughout colonial and post-colonial history. Dr McKenna does not, I think, fully appreciate the strength of the sentiment of affection and loyalty which existed in Australia in favour of the British sovereign over most of the time that he has chosen for review. Many factors supported this sentiment. Some of them, it is true, are examined in the book. They include Australia's then economic and defence interests which, as Henry Parkes proposed, made it

1 At p112.

2 At p113.

3 As above.

perfectly possible to combine loyalty to Australia and loyalty to the Empire and its Crown. They also included the fairly monochrome character of the settlers' ethnicity, being for the most part from the British Isles. During the nineteenth century, despite the angry Mr O'Farrell, most Irish subjects were as loyal to the Crown as the rest. The rather dour, dutiful and homely Germanic monarchs who sat on the throne did little to upset the sense of loyalty. Through the reigns of Victoria, George V, George VI and Elizabeth II, at least, the personal respectability, decency and sense of service of the monarch won widespread admiration and respect. Those qualities are what we hoped for in a Head of State. If the period before Victoria was bumpy - the reigns of the Edwards marked by their private loves - the overall picture was one of duty and majesty. Such things are important in a constitutional monarchy.

This is what I find to be missing from Dr McKenna's book: a sense of proportion which helps to emphasise that for the entire period analysed by his book, republicanism was a distinctly minority opinion in Australia. It was viewed by most Australians as eccentric or disreputable or both. There is a lot of rewriting of history going on now. We should be careful to avoid it. Yet that does not undermine the historian's abiding duty to search out new facts and to see the past with new insights because of developments in the present and possible trends in the future.

Dr McKenna begins his record at 1788. He offers important perspectives of the way in which the early settlers, convicts and military, as well as the colonial authorities, were affected by republican ideas. In part these derived from the then recent revolution in the American colonies. But in part, as he emphasises, they could also be traced to the essentially republican character of the English Constitution as a result of Cromwell's Commonwealth and the Glorious Revolution of 1688. There is a wealth of detail in the early chapters with talk of the "Piratical Republic" and "the Blue Mountains Republic" and so forth. For myself, I think it is top-down reasoning to suggest that the early colonists were actually plotting the establishment of an Australian republic protected by the "ridges and chasms of the mountains".⁴ Survival was uppermost in their minds. Challenging the benign imperial rulers was not a high priority.

Dr McKenna examines the way in which the colonists sought self-government. He seems to perceive this movement as one to "shake off the yoke" of British rule.⁵ I suspect that most people at the time simply saw it,

4 At p16.

5 At p18.

as I was taught, as an assertion of rights which English people enjoyed "at Home" and should quickly have in the colonies beyond the seas.

There is a good examination of Dr John Dunmore Lang who urged a federal Australian Republic, after the model of the American nation which he had toured. It was Lang's misfortune that he came up against Henry Parkes, one of the most gifted politicians Australia has ever produced. Parkes was shrewd, ambitious and pragmatic. He effectively marginalised Lang and his republican views, nurturing the Australian attitude to Britain which was to endure right into my own childhood in the 1950s. For Parkes, as Dr McKenna explains, if republicanism was no more than an extension of representative democracy, there seemed little point in declaring national independence when this could effectively be had under the aegis of the British Crown. To Parkes - and the overwhelming majority of Australian settlers at the time - the nation was *both* British and Australian. A weakness of Dr McKenna's analysis is his failure to grasp fully the depth of this sentiment and the pragmatic and emotional reasons which sustained it for more than a century.

Under the bold title "A Victorian Republic", Dr McKenna recounts the story of Eureka. But every time that he seems to be carried along with the interpretation of events as republican in character, he is brought back to the disappointing reality:

Here again we witness the duality of the dominant strain of nationalism in Australia. The loyalty ... was to an almost independent Australian Britannia, that vision of Australian Britons held by Parkes and Menzies - free of heavy-handed interference from London but retaining the monarchical connection as the symbolic embodiment of the people's legitimacy to govern and the protector of an exiled Anglo-Saxon culture.⁶

The book then turns to "A White Man's Republic", which is the story of the run up to Federation. There is no doubt that the Sydney *Bulletin* espoused republicanism. But its supporters had to do battle with a growing movement of imperialism which took Australian troops to fight in the Empire's wars. Dr McKenna describes the despatch, on 3 March 1885, of a vessel to the Sudan as Australia's "first sacrificial ship".⁷ Those with a taste for anti-imperial sentiment will find the prose in this part of the

6 At p107.

7 At p127.

book congenial. There is talk of "a torrent of imperial loyalty" and "embarrassing 'sycophancy' of Victoria's 'zealous colonial loyalists'".⁸ There is faithful reportage of obscure books which describe the history of the monarchy in Britain as that of "plunderers, imbeciles, tyrants, scoundrels, torturers, adulterers, bigots and debauched, crooked, self-willed, heartless liars".⁹ This kind of language reminds me of the prose of *The Rock*, an extreme Protestant newspaper of my youth, or of books describing the supposed debauchery of priests and convents. It scarcely represents mainstream Australian attitudes. If given too much space, opinions of this kind present the risk of distorting the understanding of the time as it really was.

It must have been a depressing period for those few with a true republican sentiment in Australia as the nation moved towards Federation. Not only were the hard-nosed politicians more interested in trade and taxes than in high-flown theories of government but at the same time the widow of Windsor kept gaining more supporters amongst the masses with her irritating longevity and successive golden and diamond jubilees. To press a republic upon a people then sheltering under the protection of the world's mightiest empire, literally at the peak of its military and economic power, took a certain eccentric dogmatism. The Australian people may well now wish to become a republic. That will be up to them. But it is wrong to project that sentiment back to the time when the Founders were drafting the Australian Constitution which would establish the indissoluble union of the Australian colonies "under the Crown". A risk of quoting at length anti-monarchal tracts of the 1890s is that it may elevate minority sentiments to an importance which they did not really enjoy at the time.

After Federation, there follows an examination of what Dr McKenna calls "The Imperial Mardi-Gras, 1901-1963". Here he steps up the vigour of his language. Take this example:

It is not surprising that for the first fifty years of the Commonwealth's existence, Australian media, business and Parliaments indulged in an annual imperial orgy known as Empire Day. Empire Day was the best example of the way in which British paradigms dominated Australian culture, paradigms which were continually bolstered by the public affection for the Royal Family. A succession of Royal "Visitations" helped to bury internal political differences

8 At p130.

9 At p134.

and boost the role of the monarch as a unifying national symbol. The excessive displays of loyalty to the throne, which had always been a feature of Australian public life, were now amplified by electronic media. As had been so often heard, it was the Lord Warden of the Cinque Ports, Robert Menzies, who took over from where Parkes left off half a century earlier. Between 1952 and his retirement in 1966 Menzies played the role of bell-boy to the Queen Goddess Elizabeth.¹⁰

All of this obviously pains Dr McKenna intensely. Part of the reason comes out in the following passage:

How do we explain the fact that many of the Australians who waved enthusiastically as Queen Elizabeth passed by in 1954 were of Irish extraction? The statement of ALP Senator James Ormonde in the Senate in 1964 might provide a useful starting point: 'The principal buttress of the Royal Family is ... I was about to use the expression "the working class" - the little people of the British Commonwealth'.¹¹

One gets the feeling that this is a reality that Dr McKenna finds it impossible to tolerate. But if it is history as it was, it must just be faced up to. So many people (including so many Irish Australians) may not have been wrong. They may even have been right for their time.

The last chapter is titled "The End of the Affair, 1963-1995". Dr McKenna interprets the Queen's departure from Australia in 1963 as "the end of an affair between Australia and Britain which had lasted for almost two centuries".¹² I think most Australians would regard this as hyperbole, or at least dubious. The recent growth in republican sentiment had much more to do with the dismissal by Sir John Kerr of Mr Whitlam, the feelings of Prime Minister Keating and the embarrassing matrimonial troubles of the royal children, than the end of Sir Robert Menzies' long service as Prime Minister.

Dr McKenna accurately charts the foregoing events and the impetus which they gave to a relatively small band of intellectuals who, by the 1970s,

10 At p207.

11 At p211.

12 At p219.