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University of New England
Armidale NSW 2351
Australia

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Irish Catholic marriage law in early penal New South Wales ¹

Damian John Gleeson
University of New England

In an important contribution to our understanding of marriage in early New South Wales (NSW), Ian Dodd presented a persuasive case for overturning long-held interpretations about English law 'travelling the seas'. Drawing on a range of primary sources, Dodd provided strong evidence that the 'English Clandestine Marriages Act of 1753 (26 Geo. 2, c.33), known as Hardwicke's Act (in force 25 March 1754) ... clearly did not apply in the colony'.² Dodd's work challenged earlier commentaries by Sir Samuel Griffith, Australia's chief justice, who in 1906 said 'there can be no doubt that amongst the laws introduced upon the settlement of the Colony of New South Wales were the marriage laws of England', and Charles H. Currey's claim that the 1754 *English Marriage Act* applied in the colony up until 1834, and that prior to then all Roman Catholic rite marriage in the colony were invalid.³ One of Dodd's supporting arguments was that Governor Lachlan Macquarie introduced marriage regulations in October 1820 that permitted the first two official Catholic chaplains — Fr Philip Conolly and Fr John Joseph Therry — to solemnise Catholic marriages, something not permitted in England at the time, and entirely inconsistent with Hardwicke's Act that only recognised the legitimacy of the Established Church; that is the Church of England.

This article, while supporting Dodd's revisionist thesis, aims to extend the discussion about marriage practices in penal NSW with a specific focus on the complex nature of Catholic marriages, which despite Macquarie's regulations, often occurred in direct opposition to

¹ I am grateful for discussions with Fr Peter Blayney, Fr Edmund Campion, and Fr Brendan Quirk and for their assistance in translating Latin phrases. Any errors in this article are solely my responsibility. This research was assisted by an Australian Government Postgraduate Research Scholarship through the University of New England, New South Wales.

² I. Dodd, 'Marriage Law in colonial New South Wales: C. H. Currey revisited', *Journal of Australian Colonial History*, Vol. 20, 2018, p. 14.

³ High Court of Australia, *Miller v. Major*, <jade.io/article/61689> (11 December 2022). Case cited in *Sydney Morning Herald*, 10 October 1906, p. 7; C. H. Currey, 'The law of Marriage and Divorce in New South Wales (1788-1880)', *Royal Australian Historical Society Journal and Proceedings*, Vol. 41, Pt. 3, 1955, pp. 97-115.

them, and to Hardwicke's Act. It advances several main points. First, neither Currey nor Dodd considered the impact of Catholic marriage laws in the penal colony after the May 1820 arrival of Conolly and Therry, who had, on the advice of their supervisor, Bishop Edward Slater, promulgated their understanding Council of Trent marriage laws, known as *Tametsi* (1563). As a result, Catholic rite marriages often became contested in early NSW, given the different approaches by colonial and Catholic officials, with the latter arguing that *Tametsi* took precedence over local statutes. Second, Catholic clergy, while restricted by official colonial decisions about convict applications to marry, proceeded nonetheless to marry some couples, often of two different Christian traditions, in a clandestine and at times, bigamous manner.⁴ These secretive marriages — which were not usually recorded in marriage registers — give rise to a broader definition of clandestine marriages in the colony, especially those solemnised in *sub sigillo* or 'under the seal' ceremonies and reinforce Dodd's point that Hardwicke's Act did not apply in the penal colony.⁵ Third, regardless of regulations, colonial officials were often powerless to prevent Catholic clergy from performing mixed marriages; and, finally, in the development of colonial marriage laws there has been little consideration of the impact of the agitation — indeed recalcitrance by Therry — which brought about amendments to marriage regulations and contributed to Governor Bourke's 1834 decision to formally recognise all marriages solemnised in the Catholic rite, including mixed marriages.⁶

Whether legal or clandestine, Catholic rite marriages had currency in the colony for two decades before the arrival of Conolly and Therry. James Dixon, one of the three convict priests transported to the colony in connection with the 1798 Irish rebellion, received colonial approval

⁴ Bigamous marriage is a large and complex topic requiring fuller examination elsewhere. Suffice to say, it in part involved a clash between the perspectives of the state and the Roman Catholic Church. While Church of England marriages involving Catholics were legal in both England and penal NSW, Catholic priests in the latter did not usually consider them as having sufficient canonical form. As a result, it appears that some parties, usually women, were permitted to re-marry in the colony despite having a prior marriage that the state upheld as legal.

⁵ By not recording such marriages in Catholic marriage registers the entries do not appear in official colonial records, which later formed the basis of the pre-1856 records held by the NSW Registry of Births, Deaths, and Marriage (NSW BDM).

⁶ *An Act to remove Doubts as to the Validity of certain Marriages had and solemnized within the Colony Of New South Wales, and to regulate the Registration of certain Marriages, Baptisms, and Burials*, 1834, (5 Will. 4, No. 2).

from Governor King to celebrate marriages in 1803-1804.⁷ After the Castle Hill uprising, Dixon's official status was removed, but several writers, such as Dodd claim that 'Catholic marriages continued to be performed in NSW over the ensuing decade, without legal objection or questioning'.⁸ The 1806 muster which listed Dixon as a 'Roman Catholic clergyman self-employed' has been interpreted as meaning that Dixon was permitted to continue to 'minister privately, baptism and marriages'. It also appears to be the basis for Cashman's claim that prior to Dixon's departure from the colony in 1809, he 'regularised' marriages, which may have been a reference to marrying Catholic couples who had previously married in Church of England ceremonies.⁹ While there are no contemporaneous records of marriages performed by the convict priests, Fr Peter O'Neill, who was transported as a convict in 1800, said in his memoirs that for an unspecified time after arrival he 'was allowed [to] exercise his ministry owing to the kind favour of Major [Joseph] Foveaux'.¹⁰ Dodd, relying on Reverend Harold Perkins, a distant relative of the third convict priest, James Harold from Wicklow, says that after Dixon was released 'Harold succeeded to his private ministry at Parramatta in 1808'.¹¹ There are few details of this 'private ministry', other than a handful of clandestine Catholic marriages that have been identified between 1805 and 1809 (see Table 1). If the convict priests had married large numbers of Irish couples before 1810, it would have likely aroused an official — and probably hostile — response from local authorities, including the colony's senior (Protestant) chaplain, Reverend Samuel Marsden.

⁷ Conditional Pardon to Reverend James Dixon to 'enable him to exercise his clerical functions as a Roman Catholic priest', 19 April 1803, State Archives New South Wales (SANSW), SZ991, pp: 12-13; *Sydney Gazette*, 24 April 1803, p.1. Dixon's first sanctioned marriage was between Catherine Rourke (*Sugar Cane* 1793), a widow of the Rocks, and Henry Simpson, a free settler and shipwright, in May 1803, *Sydney Gazette*, 15 May 1803, p. 4. There is no record of it and other Dixon marriages.

⁸ Dodd, *op. cit.* p. 10.

⁹ V. Parsons, 'Dixon, James (1758-1840)', *Australian Dictionary of Biography*, Vol. 1, Melbourne, 1966 <adb.anu.edu.au/biography/dixon-james-1980> (11 December 2022); G. Cashman, 'Dixon, Fr James', in T. J. Linnane, *From Abel to Zundolovich*, Melbourne, 1979, p. 144.

¹⁰ P. O'Neill, *Memoir of Rev, Peter O'Neill of Ballymacoda, Co Cork: The Exiled Priest of '98, Pioneer Missionary of Australia*, Cork, 1900 [1804]. O'Neill, sent to Norfolk Island, returned to Ireland in 1803 as 'soon as the exculpating papers arrived' in the colony.

¹¹ Dodd draws on H. Perkins, 'Harold, James (1744-1830)', *Australian Dictionary of Biography*, Vol. 1, Melbourne, 1966 <adb.anu.edu.au/biography/harold-james-2156> (11 December 2022). See also by H. Perkins, 'Father Harold: the story of a convict priest', *Journal of the Australian Catholic Historical Society*, Vol. 3, No. 3, 1971, pp. 1-14; *The Convict Priests*, Melbourne, 1984.

Moreover, if the children of such marriages had been christened in the Church of England, their baptisms may have been later 'validated' in the Catholic rite, as happened in the Galvin case. On 18 February 1821, when baptising twins, Catherine and Richard Galvin, who had been born in 1819, Conolly noted that their parents, James Galvin and Johanna Davis, 'had been married by Fr Dixon about 14 years earlier'. Conolly, who confirmed that the marriage solemnised by Dixon had validity according to the Catholic Church, may have been unaware that the marriage were not officially registered in the colonial record.¹²

However, colonial officials do not appear to have been aware of clandestine Catholic marriages before 1810, although some came into focus later. For example, Martin Burke (an Irish rebel and convict per the *Tellicherry* 1806) and Phoebe Tunstall (*Nile* 1800), reputedly married secretly in 1807. Years later, in 1825, colonial officials inquired into the 'place and date of the marriage of Martin Burke, Pittwater Constable to the woman with whom he resides, together with the names, residences, and age of their progeny'.¹³ The Burke/Tunstall marriage was also bigamous, with at least Tunstall having a living spouse overseas.¹⁴ It was also reported that unofficial clergyman, Jeremiah O'Flynn (who arrived without evidence of any permission to serve as a priest in the NSW) secretly married eight couples during his brief stay in the colony from late 1817 to early 1818, but again there are no records to confirm this assumption.¹⁵ In the pre-1820 colonial period therefore, very few Catholic rite marriages occurred: most Catholics who *legally* married, did so in Protestant ceremonies.

¹² Fr Philip Conolly, 'List of Baptisms, 1821', CA 6, MP 3, Archdiocese of Hobart Archives and Heritage Collection (AHAHC). Despite providing this 'list' to colonial officials it was not included in annual statistics and thus these entries do not appear in the NSW BDM.

¹³ Bench of Magistrates, Windsor, 25 October 1825, SANSW 4/3509, pp. 477, 538. There is no response on file, likely because it was an unrecorded clandestine marriage. The marriage entry of John Butler and Phoebe Tunstall was marked 'illegal' in the original St Philips' marriage register, NSW BDM, Vol. 3a, no. 852, 1808.

¹⁴ Tunstall was about thirty-five years of age when transported and claimed to have been married to George Tunstall. The marital status of Burke, a similar age, was not recorded on arrival.

¹⁵ V. Parsons, 'O'Flynn, Jeremiah Francis (1788–1831)', *Australian Dictionary of Biography*, Vol. 2, Melbourne, 1967 <adb.anu.edu.au/biography/oflynn-jeremiah-francis-2521> (22 December 2022) repeats the claim that O'Flynn 'performed many baptisms and marriages'.

Groom	Bride	Year	Priest
Michael Hayes	Elizabeth Baker/Huffnell ¹⁶	ca 1805	Fr James Harold
James Galvin	Jane Morgan (Davis) ¹⁷	1807	Fr James Dixon
Martin Burke	Phoebe Tunstall ¹⁸	1807	Fr James Harold
William Davis	Catherine Miles ¹⁹	1809	Fr James Dixon

Central to Dodd dispelling the notion of Hardwick's Act applying in early NSW, is Macquarie's set of 'instructions' governing the activities of Conolly and Therry on 6 June 1820. Dodd correctly noted that historians, Fr (later Archbishop) Eris O'Brien and James Waldersee, have confused these instructions with Macquarie's revised regulations, first dated 14 October 1820.²⁰ Dodd recognised the importance of these latter instructions in terms of reinforcing Macquarie's authority and in refuting traditional English marriage law that did not recognise Catholic marriages, but Dodd did not assess why Macquarie and his officials felt a need to revise the instructions, nor their impact on Catholic rite marriages. He says:

We therefore cannot know what changes were made, but the point is that, as of October 1820, there was an official and explicit understanding that the English Marriage

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- ¹⁶ Hayes referred to his marriage to Huffnell in correspondence to family members, but he did not indicate a date, nor the celebrant.
- ¹⁷ Jane Morgan (née Davis) who came from an English Protestant family, had been previously married. Whether Morgan disclosed this to Dixon is unknown and disclosure may have been influenced by the priest's question: have either of you been married previously, or have you ever married in a Catholic ceremony? If the latter question was asked, Morgan may have been able to truthfully answer no, which may have satisfied Dixon, as the first marriage lacked canonical form.
- ¹⁸ In a response to the Colonial Secretary on 7 November 1823, D'Arcy Wentworth said that Bourke had married Tunstall in 1807, SANSW 4/3509, p. 477. The marriage was certainly bigamous given Tunstall arrived as 'Mrs'.
- ¹⁹ Catherine Miles referred to Dixon (sic) solemnising her marriage to William Davis at Parramatta in 1809, see her advertisement in the *Sydney Gazette*, 29 March 1826, p. 3.
- ²⁰ Dodd, *op. cit.*, p. 14. Copies of these revised regulations were also dated 25 October 1820.

Act did not apply in the settlements of the colony of NSW.²¹

The main reasons for the change appear to have been Therry's independent attitude and behaviour, especially in solemnising marriages, within his first months in the colony. Such behaviour had resulted in Macquarie in August 1820 becoming sufficiently concerned about Therry's emerging aberrant behaviour that he sent the June 1820 marriage instructions to Lieutenant General Sorrell in Van Diemen's Land, because of the prospect of Therry relocating there:

His Excellency conveys these instructions and advice to these gentleman [Conolly and Therry] in regard to the line of conduct they should pursue in the performance of their clerical duties. Mr Therry even in the short period of being resident here having in several instances acted counter both to the letter and the spirit of His Excellency's instruction, and also in variance with the conduct of his senior chaplain, Mr Conolly, who has disapproved thereof.²²

As the original instructions are not extant, we do not know precisely how Therry acted against them, but several factors appear salient.²³ Between May and September 1820, Therry married fifteen convict couples, of whom only one had followed the existing marriage regulations and made application for banns of marriage (through a Protestant minister). Therry also had not followed the 1817 regulations by which all clergymen had to submit banns to the Colonial Secretary for approval. Conolly, in contrast, had quickly become aware of Therry's cavalier approach, which involved little checking of the marital status of couples seeking to be married. In advice to Macquarie at the end of 1820, Conolly said, 'my [1820] Returns will show I have married but very few, for though many persons have applied to me, I found but two instances where I could safely marry the parties'.²⁴ Conolly, a more circumspect priest than Therry, was evidently referring to parties having legal and church impediments to marriage,

²¹ *Ibid.*, p. 14.

²² Campbell to Sorrell, 31 August 1820, SANSW 4/3502, pp: 328-329. This copy of the letter does not include the stated instructions of 6 June 1820.

²³ These instructions could not be located in either the Reverend John Joseph Therry Papers, State Library of New South Wales (SLNSW) or the Roman Catholic Sydney Archdiocesan Archives (SAA), confirming Dodd's finding, *op. cit.*, p. 14.

²⁴ Conolly to Macquarie, 30 December 1820, Fr Philip Conolly Personal File, Series 16/26, SAA.

such as one party being non-Catholic or cases where one or both parties were already married. In an 1822 letter to his bishop, Conolly remarked on the extent of bigamy amongst the Irish Catholic community when he arrived in NSW and the brazen attempts to re-marry:

I had not been four days in N.S. Wales, when a man who openly acknowledged his wife was living in Ireland, applied to me to marry him to another. I arrived in time to prevent his intended bigamy in the Protestant Church, where his banns had been published. But while I was in Van Diemen's Land, he got married by special licence to another man's wife.²⁵

From the early days of his ministry Therry instituted a practice of remarrying couples who had been previously married in Protestant ceremonies. Thus, William Mitchell, a Protestant free settler and fifteen-year-old Elizabeth Huon, daughter of prominent French settlers, Gabriel Louis Marie Huon de Kerrilleau and Louisa Emanuelle Sage, had been married by Marsden in 1812 but were remarried by Therry in 1820.²⁶ This re-marriage reflected Huon's strong Catholic background, and Therry's desire for mixed marriages to be doubly celebrated, as was the custom in parts of Ireland where cordial relations existed between Catholics and Protestants.²⁷ Prior to the introduction of pro-forma Catholic marriage registers in 1834 which included declaration of the parties' religion, Therry did not note the religion of marriage parties, but he did record converts to Catholicism, such as Joseph Martin, a 'converted Jew' who married Mary Carroll in June 1820.²⁸

²⁵ Conolly to Poynter, 23 August 1822, Poynter Papers, Correspondence with clergy in Australia, 1817-1826, Series 6, C File Box 65B, Records of the Westminster Diocesan Archives, filmed by the Australian Joint Copyright Project, National Library of Australia (NLA).

²⁶ Marriage, 16 March 1812. NSW BDM, vol. 3a, no 1330/1812; vol 147A, no. 529, 1812.

²⁷ Second marriage, 19 June 1820, NSW BDM, Vol. 127, No. 5/1820. The main witness was Catherine Davis, (nee Miles), who with her then husband, William, provided accommodation for Therry at Charlotte Place, Sydney, between 1820 and 1822. Therry did not notate in his personal register that this was a re-marriage, although he did in some later cases. For an Irish example, see Robert Young and Bridget O'Brien who married in a Protestant ceremony at Killaloe, County Clare on 25 January 1820. Later the same day they were married in the Catholic rite at O'Brien's Bridge, County Clare. The bride was from Nenagh, County Tipperary, see Nenagh Roman Catholic Register, 25 January 1820, National Library of Ireland (NLI).

²⁸ The 19 June 1820 marriage is recorded in two different Therry registers and hence has two references in NSW BDM, Vol. 127, no 4/1820 and Vol. 128, no 10/1820.

Another official concern in 1820 was that when Therry began to co-operate with authorities, he submitted marriage applications directly to the governor rather than through the office of the Colonial Secretary (John Thomas Campbell). This does not appear to have been an error. Rather, Therry's apparent strategy was to by-pass officials and communicate directly with the governor.²⁹ When Macquarie received Therry's application for convicts Michael McMahon (*Guildford* 1816) and Martha Cuffe (*Maria* 1818) to marry, he rejected it as 'irregular'. An unhappy Therry replied that the couple had 'being living these six years in a state of [cohabitation] and will continue to live in it until they are either restrained by law or permitted to marry'.³⁰ As so often happened, the couple successfully reapplied to marry under a different clergyman, Reverend Henry Fulton, with Cuffe now recorded as Gass/Gash.³¹ Ironically, it would be Therry who would marry the couple.³² Given both parties were aged in their thirties it is likely they had been married prior to being transported as convicts.³³ These, then, were likely the circumstances that prompted Macquarie to rescind the original marriage 'instructions' and to issue new instructions seeking to be more 'full and comprehensive on some points' on 14 October 1820.³⁴ In a key point overlooked by Currey, Macquarie demonstrated a different approach to English marriage laws.³⁵

Although, by the laws of England, marriages there can be legally celebrated by the clergy of the Church of England, yet, as I do find that all the provisions of the Marriage Act do not extend to the colonies of Great Britain, you are at liberty to celebrate marriages where

From 1834 most Catholic marriage registers (excepting Therry's personal registers) were proformas, which included provision for marriage parties to declare their respective religions.

- ²⁹ Therry to Macquarie, 10 August 1820, Therry Papers, ML MSS 1810, Vol. 47, SLNSW.
- ³⁰ Therry to Macquarie, 14 September 1820, Series 19B, Box A0391, SAA. Copy of an unauthored letter to Therry, ca 1820, 'no. 16, 1.5 v1104', Box A0388, SAA. This appears to have been extracted from Macquarie's 14 October 1820 regulations.
- ³¹ Michael McMahon of Bringelly, Application to Marry, 3 August 1820, SRNSW, 4/3502, p. 186, SRNSW.
- ³² Marriage, 10 August 1820, NSW BDM, Vol 127, no 11/1820; Vol. 128 no. 6/1820.
- ³³ In the 1828 Census, Michael is listed as 48 and Martha as 40. They had a three-year-old daughter, Mary.
- ³⁴ Campbell to Conolly and Therry, 10 October 1820, Therry Papers, ML MSS 1810, Vol. 47, SLNSW.
- ³⁵ Currey, *op. cit.*, pp. 97-115.

both are Roman Catholics, subject, however, to the following regulations.³⁶

The core elements of the October regulations were that Catholic priests should provide the 'names, residences and descriptions' of the convict parties on the first Monday of the month, as per the requirement for Church of England ministers; that they keep a register of marriages and provide quarterly returns of marriages and baptisms to the governor. Clearly, Macquarie was especially worried about marriage between the denominations, which he regarded as illegal. In direct reference to mixed marriages, he insisted that:

You are on no account, or consideration whatever, to celebrate marriages between parties being Protestants, or where one of them being a Protestant, or where one or both is of any other religious persuasion than that of Roman Catholics. The steady adherence to this injunction, involving in it the rights of legitimacy and inheritance, it will be your duty to keep this prohibition at all times clearly in view, both as it regards your obedience to a direct command and as it is of absolute necessity to guard against the validity of such marriages, being hereafter called in question, and there by the inheritance of property rendered doubtful and insecure.³⁷

Macquarie further warned Conolly and Therry of the 'penalty' if they celebrated mixed marriages and the risk they incurred if they 'performed such forbidden service'. Although he did not cite any particular penalty, Macquarie was likely referring to Irish precedents, based on a 1793 statute that imposed a fine of £500 for a Catholic priest celebrating a marriage between two Protestants or a mixed marriage — a law which was considered to be in force at the time, as illustrated, for

³⁶ Macquarie to Connolly and Therry, 14 October 1820, Therry Papers, Series 21A, Government Correspondence, 21.3 No.18, Box AO391, SAA. Underlining is found in the original and subsequent copies of this significant document. Macquarie also distributed these instructions to Protestant clergy and magistrates. Circular to the Chaplains and Magistrates of New South Wales and its Dependencies, 29 November 1820, with a printed copy of Macquarie's Letter of Advice and Instructions to Philip Conolly and John Joseph Therry, 14 October 1820, SANSW 4/3502, p. 460. These instructions were reprinted in the *Sydney Gazette*, 23 September 1826.

³⁷ Macquarie to Connolly and Therry, 14 October 1820, Therry Papers, Series 21A, Government Correspondence, 21.3 No.18, Box AO391, SAA.

example, in a recent case in Carrickfergus in Northern Ireland.³⁸ Earlier, in 1726, Timothy Ryan, a suspended Catholic priest of County Limerick, was executed for officiating at a 'mixed marriage'.³⁹ Despite Macquarie's unequivocal 'direct command', Therry flagrantly disregarded it, a fact overlooked by most Catholic historians such as O'Brien, Glynn and John McSweeney, with the partial exception of James Waldersee.⁴⁰

Interestingly, Macquarie's regulations made no reference to applicants' marital status, a situation that would remain unchallenged until Governor Darling's 1825 tightened regulations, which included recording the marital status of convicts in their 'Indents' on arrival in the colony. As a result, many convicts, having already married in Ireland or England, were able to enter bigamous colonial marriages prior to 1825. While Therry was opposed to bigamy, his zealotry in promoting marriage meant that he often did not check the backgrounds of applicants. Writing a century ago, O'Brien provided sympathetic and near hagiographic treatment of Therry:

It was impossible for a Catholic priest to obey the local marriage laws, enforced as they were by district magistrates, some of whom were ministers of another religion. A Catholic marriage was probably the most difficult contract of the time.⁴¹

This exaggerated view overlooked that the administrations of Macquarie, Brisbane, and Darling, approved most marriages involving Catholic convicts, except the latter administration, when there was more attention given to parties having a prior spouse in Ireland or England. If Macquarie's regulations were an unfair imposition on

³⁸ Fr J. M. V. McGary, a 'buckle beggar' of Carrickfergus was fined £500 for celebrating the unlawful marriage of Arthur Connor, a Protestant of Ballinderry and Ann McMullen a Roman Catholic, *The Times* (London), 8 April 1817, p. 3; *Colonial Times and Tasmanian Advertiser*, 3 February 1826, p. 4. Further, S. J. Connolly, *Priests and people in pre-famine Ireland, 1780-1845*, New York, 1982, p. 197 says that between 1820 and 1832, six Catholic clergymen in Ireland were convicted and imprisoned for celebrating mixed marriages.

³⁹ D. Scally, 'The best Catholics in the world and the most oppressed people ever', *Irish Times*, 20 March 2021.

⁴⁰ E. O'Brien, *Life and letters of Archpriest John Joseph Therry: Founder of the Catholic Church in Australia*, Sydney, 1922; A. Gwynn, *Father John Joseph Therry: Founder of the Church in Australia*, Dublin, 1924; J. McSweeney, *A Meddling Priest: John Joseph Therry*, Sydney, 2000; J. Waldersee, *Catholic Society in New South Wales, 1788-1860*, Sydney, 1974.

⁴¹ O'Brien, *op. cit.* p. 86.

Catholic convicts, especially those living in distant districts who had limited options for procuring partners, this struck a chord with Marsden's objections to Macquarie in 1817 that, given the distance for chaplains to travel, it was more expedient to permit convict marriages without excessive government regulations that slowed down the process. Macquarie's actions in relation to Therry, however, do not appear to justify later claims of persecution of Catholics by O'Brien and other Catholic writers.⁴² Certainly, the situation for Catholic clergymen was more difficult than for their Church of England counterparts, and this was exacerbated when Conolly removed himself to Van Diemen's Land in early 1821, leaving Therry as the sole Catholic priest in the colony up until the late December 1826 arrival of his official successor, Fr Daniel Power.⁴³

Nevertheless, Macquarie's support in 1820 for Catholic priests to celebrate Catholic marriages was in stark contrast to the contemporary situation in England, where Roman Catholic marriages were prohibited. Macquarie was likely influenced by Conolly's advice, tendered to Commissioner John Thomas Bigge's 1819-1821 Inquiry into the colony, where Conolly noted that 'in Ireland a marriage celebrated by a Catholic priest between two Catholics was perfectly valid in the eyes of the law'.⁴⁴ Conolly received Macquarie's assurance that colonial permission was not required for a marriage involving free persons or a free person and an emancipist.⁴⁵

Therry objected to Macquarie's marriage regulations and generally ignored them, but it was not until Macquarie had left the colony that he publicly voiced his opposition.⁴⁶ Therry opposed having to make application for permission to colonial officials, in part because of his independent nature and also his view that that Irish Catholics had a long tradition of private consensual marriage which before 1844 'did not require witnesses nor the proclamation of banns to validate

⁴² Marsden to Macquarie, 8 February 1817, Bonwick Transcripts, Box 15, pp. 1677-1683, SLNSW.

⁴³ Historiography has often 'overlooked' or been unkind to Power, who died in Sydney in early 1830. A balanced assessment was made by J. Walderssee, 'Father Daniel Power', *Journal of the Australian Catholic Historical Society*, Vol. 2. No 2, 1967, pp. 21-48.

⁴⁴ Conolly to Bigge, 30 August 1820, Bonwick Transcripts, Box 24, CY1298, p. 4999, SLNSW. Conolly's letter also listed the ten acts of parliament that upheld Catholic marriage in Ireland.

⁴⁵ Colonial Secretary to Conolly, 25 October 1820, SANSW 4/3502, p. 387.

⁴⁶ Therry to McLeay, 24 June 1826, *Sydney Monitor*, 29 September 1826, p. 6.

them'.⁴⁷ Conolly and Power recognised the difficulty of getting Irish Catholics to submit applications for banns.⁴⁸ Aligned with the restriction of Catholic priests celebrating mixed marriages, Macquarie's 1820 regulations also prohibited conversions to Catholicism but this did not stop an energetic Therry converting, but often not recording adult conversions to Catholicism. For example, one of the colony's first trained schoolteachers, Farrell Cuffe married a convert, Bridget Crack in late 1820, and in other cases Therry had fathers make a written statement that whilst Protestant, any children from the marriage would be raised Catholic.⁴⁹

In making representations to Macquarie and officials, Therry highlighted the 'inconvenience to convicts' living in rural areas of having to wait for he, the only Catholic clergyman, to submit marriage applications. He also opposed the requirement that he submit quarterly returns of baptisms, marriages and funerals to government officials, and third, he objected to not being able to solemnise mixed marriages, as he believed he was legal entitled to do.⁵⁰ Therry claimed Macquarie had given him 'verbal permission' to marry convicts without having to make monthly applications, as the latter provided the 'most incalculable inconvenience to convicts of the Roman Catholic community and ... tantamount to a total prohibition of their being married by a clergyman of their own church so extensive as it'.⁵¹ Officials responded that they were unaware of any special arrangements for Catholic convicts and told Therry that the same regulations applied to Protestant clergyman.⁵²

⁴⁷ M. Luddy and M. O'Dowd, *Marriage in Ireland, 1660-1925*, Cambridge, 2020, p. 27.

⁴⁸ Conolly to Power, 27 October 1827, Therry Papers, ML MSS 1810, Vol. 53, p. 99, SLNSW.

⁴⁹ On John Kennedy Hume, see discussion below. In writing to raise the children, Catholics, despite he coming from a high profiled Protestant family, see Therry Papers, marriage records, Vol. 113, SLNSW. In different Therry registers the Cuffy-Crack marriage date is given as either September or December 1820, which is illustrative of frequent errors and omissions in Therry's record keeping and in copies of the original registers, which were later made by clerks. For discussion, see M. P. Tansey, 'The Registers of St Mary's Cathedral', *Manly*, Vol. 1, No. 4, 1921; D. J. Gleeson, 'Genealogical sources in the Sydney Archdiocesan [Catholic] archives', unpublished essay for Society of Australian Genealogists, 1983; Archives Authority of NSW, *Guide to the Records of Rev. John Joseph Therry*, Sydney, 1988.

⁵⁰ Macquarie to Connolly and Therry, 14 October 1820, Therry Papers, Series 21A, Government Correspondence, 21.3 No. 18, Box AO391, SAA.

⁵¹ Therry to Atkinson, 12 January 1821, Therry Papers, Correspondence to Colonial Secretary, Box AO417, SAA.

⁵² Atkinson to Therry, 13 January 1821, Therry Papers, Box AO388, SAA.

In theory, one may have expected church and state to be in unison and opposed to mixed marriages. The state's objection to the latter was concern that if Catholic clergy solemnised mixed marriages, this could lead to a diminution of the Protestant ascendancy, such as through property rights being heired to Catholic children. From the Catholic perspective, Bishop Edmund Slater, Vicar Apostolic of Mauritius, to whom Conolly and Therry reported, cautioned the two priests that 'Mixed marriages have always been condemned by the Church and it is the duty of its Ministers to lend themselves of such actions with great caution'.⁵³ From his arrival, nevertheless, Therry celebrated numerous mixed marriages. His attitude was that marriage – even between two parties of different Christian traditions – was better than unofficial cohabitation. In some cases he persuaded a non-Catholic party to convert, again in breach of the regulations. A large population imbalance between men and women, the numerical dominance of British (mostly Anglican) convicts, a dispersed population and high levels of cohabitation created rather unique conditions in the colony that contrasted with Therry's Irish experience. In short, there was a greater interest in and need for mixed marriage, and second marriages, in early NSW. Therry met many a successful Irish emancipist who had married an English-born woman, the majority of whom were nominally members of the Church of England. An examination of the backgrounds of couples married by Therry in the first half of the 1820s reveals that quite a few, especially males, were not Catholics, which would have heightened officials' concerns that by solemnising mixed marriages he was in breach of colonial laws.⁵⁴

The official restriction of solemnising mixed marriages become a major point of conflict between Therry and officials, especially during Governor Ralph Darling's administration (1825-1831). Up until Macquarie's departure from the colony in December 1821 and during Governor Brisbane's administration (1821-1825), Therry solemnised many mixed marriages in contravention of the October 1820 regulations, but no action was taken by officials.⁵⁵ The total number of Catholic rite marriages in the 1820s is unknown for several reasons. Therry and Power made notes of marriages on their frequent journeys, but Therry did not transfer all entries into a formal registry, and Power does not appear to have ever kept a registry, which was a breach of *Tametsi*. In part, this reflects the fact that these men were not overly

⁵³ Slater to Therry, 2 October 1822, Therry Papers, Box A0390, SAA.

⁵⁴ Analysis based on studying Therry's marriage registers, Reels SAG 6 and 7, SLNSW.

⁵⁵ Banns of Marriage, Therry Papers, ML MSS 1810, Vol. 113, SLNSW.

diligent in their attention to paperwork. There are six extant Therry registers, but as James Waldersee commented:

They are in any case scrappy, repetitive, often copied out years later in another hand, inaccurate, incomplete etc. If you saw the original records he made, of which there are quite a few among the Therry Papers, you would not be surprised: mostly they are done on little scraps of paper, as likely as not mixed up with memos, tradesman's bills and so on, all on the one sheet.⁵⁶

When giving evidence in a bigamy trial against John Malowney (Moloney), who had married twice in the colony, Therry said of Power: 'I remember his manner of entering marriages, it was on slips of paper'.⁵⁷ Therry added: 'I got his papers connected with ecclesiastical affairs'.⁵⁸ It appears that Power overwhelmed by work and sickness did not keep a separate register of marriages (and baptisms).⁵⁹ But there was a more serious reason: Power was alarmed at potential fraud associated with marriage registers and certificates and so advised the Colonial Secretary in 1828:

All our registers are written in the Latin language as is the usage in the Catholic Church, and that for the purpose of preventing forgery and imposition which might be practised when they are written in the language accessible and intelligible to anyone. It must be admitted that a transcript into English and onto the required forms would necessarily occupy more of my time than more important duties would permit.⁶⁰

Both Therry and Power undertook secretive Catholic marriages in the early penal colony. Eliza Harvey, a married woman with two children from County Wicklow, received a seven-year sentence for

⁵⁶ Waldersee to Hume, 23 February 1968, p. 11, Father John Joseph Therry, copies of letters from James Waldersee, University of Sydney to Stuart Hume of 'Garoorigang', Goulburn, MS. 8566, State Library of Victoria (SLV).

⁵⁷ *Australian*, 16 February 1836, p. 2.

⁵⁸ *Ibid.*

⁵⁹ No register could be located at the SAA or within the Therry Papers at SLNSW. Fr Power is not mentioned in Dodd's article.

⁶⁰ Power to Colonial Secretary, 14 April 1828, Therry Papers, ML MSS 1810, Vol. 53, SLNSW.

stealing and was transported per *Lady Rowena* (1826).⁶¹ A little over a year later, Power wrote a diary note that 'certified that on 24 July 1827 he married Elizabeth Harvey and Michael Ryan according to the Rites of the Roman Catholic Church' in Liverpool Street, Sydney.⁶² There was no application for banns (that is, for notices to announcing an intended marriage). No witnesses were listed in Power's notes and no proper record was kept, which contravened *Tametsi* and also colonial regulations. The marriage also breached colonial rules because Harvey, based at Parramatta, did not have permission from the factory's management committee to marry.⁶³ Nevertheless, Power wrote in Latin: 'omnibus de rite servatis in quantum' [all concerning the rite have been observed in full].⁶⁴ In different handwriting, a notation was made that the marriage was *sub sigillo*, ['under the seal'], which means confidentiality or secrecy.⁶⁵

Why did Power make the statement and how had he fulfilled the 'requirements' for this marriage to be valid?⁶⁶ Power may have sought to give the ceremony respectability or to protect himself against a possible later charge of acting contrary to colonial regulations. We know that Power, unlike Therry, generally respected colonial laws and had received clear instructions from his supervising bishop to cooperate as fully as possible with colonial officials, so there must have been strong pastoral reason for Power to solemnise the marriage.⁶⁷ Given colonial authorities by 1827 were rejecting high numbers of

⁶¹ Eliza Harvey, native of Wicklow, tried and convicted in Dublin on a charge of stealing, received a seven-year sentence. Certificate of Freedom, 18 June 1832, no. 32/0578, SANSW 4/4311.

⁶² The *Lady Rowena* left Cork on 19 January 1826 and arrived in Sydney on 17 May 1826. At the time of the marriage, Ryan, a coachman from County Clare, held a ticket of leave. Three convicts named Michael Ryan were transported per *Southworth* (1822). Two from Tipperary; one from Clare. It appears the older Michael Ryan from County Clare married Harvey. Ticket of leave no. 27/427, 27 June 1827; Certificate of Freedom 18/191, 17 March 1828, SANSW.

⁶³ Parramatta Heritage Centre, 'Women Transported: Life in Australia's Convict Female Factories', 2020, <historyandheritage.cityofparramatta.nsw.gov.au/sites/phh/files/field/media/file/2020-09/women-transported.pdf> (11 December 2022).

⁶⁴ Therry Papers, ML MSS 1810, Vol.113. p. 165, SLNSW.

⁶⁵ The phrase *sub sigillio* traditionally referred to the Catholic sacrament of confession and that all information was confidential and was not to be revealed under the pain of grave sin.

⁶⁶ There is no evidence of the first husband's death, but if it had occurred, it is unlikely word would have reached the penal colony in such a short time, given the usual time of at least nine months for Irish letters to arrive in the colony.

⁶⁷ Poynter to Power and Murphy, 12 August 1826, Therry Papers, ML MSS 1810, Vols. 53 & 54, SLNSW.

marriage applications because many Irish convicts stated they were 'married' on their indents, it is noteworthy that Harvey and Ryan were permitted to bypass the regulations.⁶⁸ The 1828 NSW Census recorded Eliza, 28, Michael, 34, and a three-year-old daughter, Mary, born in the colony. It is unclear exactly when the child was conceived — the age given in the census suggests that it may have been before the mother had departed Ireland in mid-1825, or else during the voyage — but if was to a first husband who remained alive in Ireland, Harvey's second marriage in the colony was bigamous.⁶⁹ So, based on evidence which is hidden to us, Power may have been convinced that Harvey had *not* been canonically married in Ireland and so a second marriage in the colony did not breach Catholic marriage law.⁷⁰ Otherwise, some pressing pastoral reason existed for Power to believe it was in the best interests that the marriage proceed, despite it being possibly or actually bigamous.

Dodd's legal analysis overlooked the implications for Catholic marriages given the dominance of the Church of England in the penal colony between 1788 and 1834. As a result, even when Catholic priests could celebrate Catholic marriages, colonial regulations prohibited them from celebrating mixed marriages. Similarly, Dodd and Currey overlooked how agitation by Therry resulted in amendments in local marriage regulations. In 1826 the colonial secretary accused Therry of performing nine marriages at the Parramatta Female Factory and one mixed marriage at Windsor, without government approval.⁷¹ In a long and mischievous reply in the *Sydney Monitor*, Therry admitted to

⁶⁸ Governor Darling's tightened marriage regulations of 1826 included convicts' marital status being recorded on shipping indents, which were then checked when applications for marriage banns occurred. See NSW Convict Applications to Marry, 1825-1851, NRS 12212, SRNSW.

⁶⁹ The 1828 NSW Census records Elizabeth Ryan, 30, and Michael Ryan, 34, as servants to solicitor, William Williams of Pitt Street, Sydney, with a three-year-old daughter, Mary, listed as 'colonial born'. There is no record of birth of Mary Ryan to Michael Ryan and Eliza Harvey. Given the high frequency of Michael Ryans in the colony it has not been possible to trace this couple any further. I have eliminated several Michael Ryans, such as the prominent Catholic leader at *Ryansville*; Michael Ryan of *Brisbane Meadow*, Bungonia, and Michael Ryan and Elizabeth Moody of Appin.

⁷⁰ An incorrect perception prevailed that listing oneself as a 'married' woman may lead to an indulgence from the colonial administration. See, for example, case of John Thompson, a free man praying his wife, Hannah Martin may be assigned to him, Petition, 11 January 1827, located in Therry Papers, ML MSS 1810, Vol. 107, p. 177, SLNSW.

⁷¹ McLeay to Therry, 22 June 1826, printed in the *Sydney Monitor*, 29 September 1826, p. 6; Norris to Colonial Secretary, 8 August 1826, Box 0417, SAA.

having performed *two* recent mixed marriages of parties born in the colony:

it is almost impossible to believe that a gentleman, who having professed the Catholic faith for many years, must know that a marriage celebrated between Catholics, by a Protestant or Dissenting Minister, in any place of which the decree on this subject of the Council of Trent, is received, as it is here, is to be considered as utterly invalid and that such parties invariably consider themselves at liberty to separate as soon as the caprice or convenience of either party may require it.⁷²

In short, Therry was saying that the Catholic Church did not recognise marriages celebrated in the Protestant rite. Therry was thus relying on Trent's marriage rules, which Bishop Slater had instructed he and Conolly enact.⁷³ To what extent either priest fully understood *Tametsi* is unclear. They appear unaware of a 1785 declaration by Pope Pius VII that upheld mixed marriages in Ireland performed by Protestant ministers.⁷⁴ Luddy and O'Dowd point out that 'although the declaration referred only to [Irish] parishes where *Tametsi* had been proclaimed, that statement was interpreted as referring to all mixed marriages in Ireland'.⁷⁵ While most parts of Ireland, including Cork, where Therry ministered for five years before coming to the colony, had not recognised *Tametsi*, the regulations may have been difficult for Therry to understand. But Therry, no fool, used *Tametsi* because it gave him a point of difference — a platform to argue — with colonial officials, as he seemed well disposed to do. Whereas some Protestant nations in continental Europe has largely adopted *Tametsi*, especially in relation to seeking to curb clandestine marriages, England and its

⁷² Therry to McLeay, 24 June 1826, *Sydney Monitor*, 29 September 1826, p. 6.

⁷³ Bishop Edward Bede Slater of the Benedictine Order, was vicar apostolic of Mauritius from March 1819 until August 1831. Ullathorne to Polding, ca 1837, in H. N. Birt, *Benedictine Pioneers*, Vol. 1, 1911, p. 164. See also Therry to Power, letter, 23 January 1827, Therry Papers, ML MSS 1810, Vol. 7, SLNSW.

⁷⁴ Decree of Congregation DE Propaganda Fide, 19 March 1785, File 34/4, Diocesan administration – Priests and Canon Law, Archbishop Daniel Murray Papers, Dublin Diocesan Archives (DD), located on the University of Limerick Institutional Repository, (ULIR), <ulir.ul.ie/handle/10344/1568> (11 December 2022). The Vatican decree 'that mixed marriages contracted in Ireland without the canonical form prescribed by the Council of Trent to be valid but unlawful.' Luddy and O'Dowd, *op. cit.*, p. 42.

⁷⁵ Luddy and O'Dowd, *op. cit.*, p. 42.

officials in penal NSW did not accept *Tametsi*.⁷⁶ Tensions escalated between Therry and officials, with the former brazenly and publicly (via the press) stating that he had never complied with Macquarie's 1820 prohibition against mixed marriages and had no intention to do so.⁷⁷ An angry Darling referred the matter to London and would have been sorely disappointed in the legal response, which was that as English marriage laws did *not* 'extend beyond the seas', Macquarie had no authority to legislate marriage as he had so done in 1820.⁷⁸ This was, as historians have noted, the precise time when the applicability and reception of English law in the colony had become a confusing and tensely debated subject, largely settled the following year.⁷⁹ In the meantime, while English authorities concluded that Therry had acted 'disrespectfully' in his relations with colonial officials, his actions in performing mixed marriages were not 'improper', Darling was advised.⁸⁰ This significant decision further confirmed that English marriage law did not apply in NSW at that time, because English marriage laws had not 'travelled the seas', and thereby enabled Catholic clergy to continue to solemnise mixed marriages in early NSW at a time when such marriages were illegal in both Ireland and England.⁸¹

The first mixed marriage recorded in a colonial 'Roman Catholic marriage register' was between James Lysaght (*Asia* 1825) holding a ticket of leave and Julia Birmingham (*Forth*), still in servitude, on 27 August 1834.⁸² Colonial officials on 26 July 1834 had initially refused permission for the marriage because 'Lysaght was already married'.⁸³

⁷⁶ For discussion of European responses to Trent, see, for example, M. J. Kinservik, *Sex, Scandal and celebrity in late eighteenth-century England*, New York, 2004, pp. 41-45.

⁷⁷ Therry to McLeay, 24 June 1826, *Sydney Monitor*, 29 September 1826, p. 6.

⁷⁸ Goderich to Darling, 28 May 1827, *Historical Records of Australia, Series 1*, No. 13, pp. 372-373.

⁷⁹ L. Ford and D. A. Roberts, "'Mr Peel's Amendments'" in New South Wales: Imperial Criminal Reform in a Distant Penal Colony', *Journal of Legal History*, Vol. 37, No. 2, 2016, pp. 198-214.

⁸⁰ Goderich to Darling, 28 May 1827, *Historical Records of Australia, Series 1*, No. 13, pp. 372-373.

⁸¹ See, for example, the case against a 'correct, proper and respectable clergyman', Fr John O'Connor, parish priest of Kilconnell and Aughrim, County Galway, who was charged with solemnising the illegal marriage of Thomas Curley (RC) and Mary Parry (Protestant) on 17 February 1822, *The Times* (London), 23 August 1822, p. 3. O'Connor was discharged.

⁸² Marriage, 27 August 1834 NSW BDM, Vol. 90, no. 1, also recorded in Vol. 126, no.124/1834.

⁸³ NSW Convict Applications to Marry, 1825-1851, Refusal, 26 July 134, SRNSW.

This may have been an error or arisen because Lysaght's transportation offence was the 'abduction' of a woman for the purpose of a coerced marriage in County Limerick. Reverend William Ullathorne, the Catholic vicar general, submitted a second successful marriage application on 19 August 1834. Thereafter, mixed marriages amounted to between 40 and 50 per cent of Catholic rite marriages in the 1830s and 1840s. The rural abode of McDonald's River recorded 42 per cent mixed marriages between 1841 and 1853.⁸⁴ Between 1834 and 1837, 222 Catholic marriages were recorded in Sydney (excluding Therry's marriages reportedly separately). As Table 2 shows, four out of ten marriages were 'mixed' — that is, one party declared that they were not Roman Catholic or left blank the question about membership of the Catholic Church, which usually indicated they were not Catholic

Category of marriage parties	Number	Percentage
Both Roman Catholic	134	60%
Mixed	88	40%
TOTAL	222	100%

Statistics derived from 'Roman Catholic Marriage Register', NSW BDM Registry, Vol. 90, SRNSW.

Hardwicke's Act had not applied in Ireland where marriage ceremonies involving teenagers without parental consent, mixed marriages, and those without appropriate clergy involvement, prevailed up until the calamitous famine of the 1840s.⁸⁵ The *Belfast Newsletter* said that Hardwicke sought to curb clandestine marriages of

⁸⁴ Statistics derived from McDonald's River Marriage Register, NLA.

⁸⁵ L. Stone, *The family, sex and marriage in England, 1500-1800*, New York, 1977, p. 35; See debate in the British House of Commons on 8 February 1825 about two Catholic priests in Londonderry, Ireland, performing secretive mixed marriages. The priests claimed that they were unaware that marriages between Catholics and members of the 'Church of Scotland', or Presbyterians, constituted a breach of the law against Catholic priests marrying 'Catholics and Protestants', *Sydney Gazette*, 21 July 1825, p. 3.

couples under the ages twenty-one without parental consent.⁸⁶ William Lecky, however, argued that the focus was to preserve the Established Church of England by reducing the number of *mixed* marriages.⁸⁷ As no equivalent *Act* was promulgated in Ireland, 'mixed' and teenage marriages continued 'which in the eyes of the law simply existed side by side with regular unions'.⁸⁸ But, as Sean Conolly observed, 'there are no sources from which the precise number of clandestine marriages which took place in Ireland in the decades before the famine could be calculated. However, the trade was clearly extensive'.⁸⁹ In 1792 the [Irish] *Freeman's Journal* warned readers to avoid being witnesses at clandestine marriages as it 'generally brings along with it mischief and trouble'.⁹⁰ But such marriages were not, technically, illegal in the eyes of the church, and sometimes were revalidated at a later time in the Catholic Church.

Certainly, the Irish tradition of clandestine marriage was transported to NSW. As noted, the convict colony provided an array of reasons for Catholic clandestine marriages, including parties of different faith traditions wishing to unite. Patrick Buckley and Mary Kelly from County Dublin, who were transported on the *Providence* in 1811,⁹¹ likely had spouses in Ireland, but cohabited in the colony for a decade and had three children christened in the parish of St Philip's, Sydney.⁹² On the evening of 19 March 1821, Conolly solemnised their marriage, noting that McCaffrey 'was near death'.⁹³ She died a few hours later. It is likely that the couple formally married so that Conolly could give Kelly the last rights. This harsh view was also espoused by Therry, who refused to give the last rights where couples informally cohabitated unless they were married.⁹⁴

⁸⁶ *Belfast Newsletter*, 30 January 1749, p. 2.

⁸⁷ W. E. H. Lecky, *A History of Ireland in the Eighteenth Century*, Vol. 1, London, 1913, pp. 387-388.

⁸⁸ *Ibid.*, p. 395.

⁸⁹ S. J. Connolly, *Priests and People in Pre-Famine Ireland*, New York, 1982, p. 266.

⁹⁰ *Freeman's Journal* [Ireland], 17 May 1792, p. 3.

⁹¹ Buckley was tried at Dublin City, August 1809 and sentenced to seven years. Kelly tried at Dublin in April 1809 and received a seven-year sentence, also.

⁹² Their children were Thomas (1812), Bridget (1813), and Ann (1816).

⁹³ 'Return of Births, Deaths and Marriages made by the Rev. P Conolly for the quarter ending 31 of March 1821', SANSW 2/8302, pp. 73-76.

⁹⁴ Case of Mrs McDermott and Charles Pickeyers (sic) alias Rogers. Statement by Fr J. J. Therry, 7 February 1838, Therry Papers, MSS 1810, Vol. 68, pp. 55-58, SLNSW.

In October 1825, Therry officiated at a clandestine manner between colonial born, John Kennedy Hume of Airds, a Protestant, and Elizabeth Neil. The couple, who had cohabited for several years, had an infant daughter.⁹⁵ Hume asked Therry to marry them 'without giving publicity to it' because he had been 'prevented' from marrying Neil, due to 'interference of my father [Andrew Hume] and family who are all against it'.⁹⁶ The Humes were northern Irish Presbyterians and J. K. Hume's maternal grandfather was a Church of England minister. But it appears Neil's Catholicism may not have been the family's overriding concern.⁹⁷ Elizabeth's reputed 'father', Felix O'Neil (*Atlas* 1802), who had been transported on a life sentence, escaped the colony and turned to piracy, while Neil's mother, Mary Courtenay, had been in several illicit relationships, which may have troubled the upright Humes.⁹⁸ Neil's father may also have been another Courtenay partner, Patrick Carroll.⁹⁹ After Carroll, Courtenay partnered with Patrick Prendergast of Airds.¹⁰⁰ J. K. Hume expressed to Therry 'that it is a matter now of importance that it [the marriage] should take effect

⁹⁵ Hume to Therry, 23 May 1825, Therry Papers, MSS 1810, Vol. 5, pp. 53-54, SLNSW. In Waldersee's account, *op. cit.*, p. 290, the reference to an illegitimate child was excluded. This appears consistent with Waldersee's personal conservatism, being a Catholic convert. He also does not mention bigamy or cohabitating practices of Catholic convicts.

⁹⁶ Hume to Therry, 23 May 1825, Therry Papers, ML MSS 1810, Vol. 5, pp. 53-54, SLNSW. J. K. Hume's exploring interests have been largely overshadowed by those of his brother, Hamilton Hume.

⁹⁷ J. V. Byrnes, 'Hume, Andrew Hamilton (1762-1849)', *Australian Dictionary of Biography*, Vol. 1, Melbourne, 1966 <adb.anu.edu.au/biography/hume-andrew-hamilton-2210> (22 December 2022).

⁹⁸ Felix O'Neil was convicted in County Roscommon and transported *Atlas* (1802). *Sydney Gazette*, 14 March 1818, p.1. In 1969, a Hume relative commented, 'I should point out that in my opinion it wasn't the catholic [sic] aspect of the business [Hume and O'Neil marriage] that worried the family but the unfortunate Elizabeth's background. Mum (Mary Courtney) seems to have been quite promiscuous and might even have been sent out for prostitution. Anyway, I wouldn't have given 2/- for Therry's chances if Andrew Hume had caught up with him! He [Andrew Hume] killed one man in a duel. By the way their first daughter would have been illegitimate (note date) and she became Mrs G. P. De Saily of "Corce"!'. Hume to Carnegie, 1 February 1969, p. 19, in James McLaurin of Yarra: Memories of early Australia, MS 8566, SLV (emphasis in original).

⁹⁹ In 1806 Mary Courtenay was living with Patrick Carroll, and thus he may have been Elizabeth's father. Her relationship with Felix O'Neill began soon after. There is no record of Courtenay marrying Carroll, O'Neill or Prendergast, but a clandestine marriage with Prendergast may have occurred.

¹⁰⁰ On his birthday, 17 March 1833, Prendergast received communion for the sick from Fr Therry, see Therry Diary, 1830-1835, MS 8688, SLV.

without the knowledge of any person'.¹⁰¹ In what appears to have been a promise of legal indemnity to Therry, Hume wrote:

I the undersigned wishing to be united in marriage to Elizabeth O'Neill, and apprehending that my relative may thro' worldly motives be disposed to endeavour to annul my marriage and to subject the officiating clergyman to personal or pecuniary inconvenience for having performed it without their sanction, I hereby most solemnly engage, promise and in every legal way bind myself and covenant and agree still further to bind myself as far as the bona fide preservation of said clergyman for all damages, Injury or inconvenience which he may at the time be subjected to in consequence of the performance of my marriage.¹⁰²

While there were no bans and the marriage occurred without the consent of the groom, in recording the marriage Therry ensured that the marriage was not entirely clandestine.¹⁰³ The couple's first eight children were baptised in the Catholic tradition, though the NSW 1828 Census listed the family as Protestant — presumably because Hume announced it as such to the clerks who compiled the census data. In 1840, John Kennedy Hume Junior was christened by a Protestant minister, which caused historian James Waldersee to comment that 'By this time Therry was safely in Tasmania, and one begins to wonder whether the family was Catholic or merely Therryite'.¹⁰⁴ This case demonstrates a degree of flexibility about religious arrangements and that whatever may have been Roman Catholic doctrine in relation to mixed marriages, such marriages occurred frequently in the colony despite the presence of official Catholic clergy.

Another reason for Catholic clandestine marriages was previous refusal by colonial authorities. In May 1827, sixteen-year-old, Eleanor Dillon, was declined permission to marry Patrick Fennell (*Mangles*

¹⁰¹ Hume to Therry, 23 May 1825, Therry Papers, ML MSS 1810, Vol. 5, pp. 53-54, SLNSW.

¹⁰² *Ibid.* cited by James Waldersee in correspondence to Stuart Hume of 'Garoorigang', Goulburn, 1 March 1967, located in James McLaurin of Yarra: Memories of early Australia, MS 8566, SLV.

¹⁰³ Marriage, 7 October 1825, NSW BDM, Vol. 127, no. 138, 1825. Witnesses to the marriage were Thomas Roche; Thomas and Jane Byrne.

¹⁰⁴ Waldersee to Hume, 1 March 1967. In 1840 a group of bushrangers murdered J.K. Hume sen. at Gundaroo, leaving Elizabeth and nine children. *Sydney Monitor*, 14 February 1840. p. 2.

1822) because 'The female being underage, the consent of her parents must be first produced with a certificate of P. Fenell's character and E. Dillon's ability to support a family'.¹⁰⁵ No further application was made to authorities, but a note in the Therry Papers indicates that Fr Power married Fennell and Dillon at Appin on 26 February 1827.¹⁰⁶ Several possibilities may explain this discrepancy in dates: the unknown author made an error, as can be seen in other cases. Perhaps Power married the couple in February on the basis that Fennell had previously received colonial permission to marry someone else, or given Eleanor's first child, John Joseph was born in January 1828, it may have seemed proper to list the marriage as having occurred at an earlier date.¹⁰⁷ As with most of Power's marriages, it was not recorded in a Catholic register and thus does not appear in the NSW Registry of Births, Deaths and Marriages.¹⁰⁸ Indicative of the tight knit Irish community of south-western Sydney and the Irish cultural tradition of family intermarriage, John Joseph Fennell obtained a special licence to marry his first cousin, Mary Healy in 1857.¹⁰⁹

Dodd's revisionist contribution to colonial marriage law rightly refuted earlier commentaries that Lord Hardwicke's Act applied in the colony. This article, in partially supporting Dodd, has further extended the analysis with a focus on Catholic marriages in early NSW, demonstrating that understandings and applications of marriage law were complex and contested. Accurate statistics of early colonial Catholic marriages — legal and clandestine — are not available, due to incomplete records and non-recording of marriages in the 1820s by

¹⁰⁵ Patrick Fennell, a ploughman from Rathkeale, County Limerick, had earlier received permission to marry Catherine Horrigan Colonial Secretary to Power, 7 March 1827, Therry Papers, MSS 1810, Vol. 113, SLNSW. Mary Horgan, a married woman from Bristol, was transported per *Aelous* (1809).

¹⁰⁶ Therry Papers, ML MSS 1810, Vol. 74, p. 47. Whether the February date was an error is unsure

¹⁰⁷ Fennell had previously received permission to marry. The death notice of Eleanor Fennell described her as the 'beloved wife of Mr Patrick Fennell'. *Wagga Wagga Advertiser and Riverine Report*, 14 October 1871, p. 1.

¹⁰⁸ An interesting exception which had major consequences concerned the December 1829 marriage of Mary Collins (Healy) a widow, and a free settler John Malowney (Moloney) who were married in Fr Power's 'private residence' in Cumberland Street, Sydney, witnessed by James and Bridget Russell. After Malowney married again, bigamously, in 1835, he was arrested. Writing from gaol to Bishop Polding, he enquired if Power had recorded his first marriage. See Malowney to Polding, 12 October 1835, Therry Papers, ML MSS 1810, Vol. 61; pp. 15-16, SLNSW. Some legal aspects of this case are discussed by Dodd, *op. cit.*, pp. 19-20.

¹⁰⁹ *Freeman's Journal*, 7 February 1857, p. 3. Mary's parents were Matthew Healey (*Guildford* 1819) and Catherine Dillon, who was a sister of Eleanor Dillon.

Catholic priests. We know, however, that a combination of factors, including Irish cultural tradition, Catholic marriage laws, and local factors influenced Catholic marriage practices in the colony. The state responded to the authorised 1820 arrival of Catholic priests by introducing new local regulations that officially recognised Catholic rite marriages, something not possible under Hardwicke, but which also sought to constrain Catholic priests in terms of mixed marriages. The general inapplicability of Hardwicke in the colony was also evidenced by Catholic clandestine marriages, which gathered momentum in the 1820s and 1830s, in part due to Therry's independent nature and powerful role as a community and spiritual leader.¹¹⁰ Non-recorded marriages qualified as clandestine under both local regulations and the church's *Tametsi* policy. Moreover, the practice of secret colonial marriages was an Irish solution to colonial regulations that sought to determine when convicts could legally marry.

Catholic marriage practices in the early colony were quite dissimilar to Ireland. Mixed marriages played a large role in the colonial landscape, indicative of the population imbalance and the mixing of English Protestant and Irish Catholic cultures. The Catholic Church's effective condoning of mixed marriages in early nineteenth century NSW would be severely challenged by the post-Famine arrival of Irish bishops who were infused with Cardinal Paul Cullen's 'devotional revolution'.¹¹¹ In early penal NSW, however, clergy such as Therry, adopted a pragmatic approach: where they could influence conversions they did; otherwise, they supported mixed marriages in the Catholic rite as a better option than couples marriages in Protestant rite ceremonies or informal cohabitation. In doing so Therry further confirmed that the narrow confines of Lord Hardwick's Marriage Act (1754) had no place in early NSW. Finally, marriage in the early was far from a straightforward process. Increasingly, the state sought to sanction the choice and timing of couples, a process that created resentment from clergymen, especially Catholic priests such as Therry.

¹¹⁰ D. Gleeson, 'The Recalcitrant Priest', *Open Book*, Sydney, 2022, pp. 66-69.

¹¹¹ E. Larkin, *The Historical Dimensions of Irish Catholicism*, New York, 1984; T. McGrath, 'Cullen, Paul', in J. S. Donnelly (ed.), *Encyclopaedia of Irish Culture and History*, Vol. 1, 2004; I. Waters, 'The Plenary Council and Canon Law', *Australasian Catholic Record*, Vol. 95, No. 4, 2018, p. 399.