

## DANIEL O'CONNELL - THE BARRISTER

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### Introduction – Daniel O'Connell and his causes

Daniel O'Connell was a truly remarkable man. I remember in national school in the 1960s we regarded Daniel O'Connell as a failure – a failure because he did not succeed in achieving Repeal. Underlying this perspective was the sense, sometimes, unspoken, that he was a failure, because he refused to resort to violence to achieve his aims and because he cancelled the Great Clontarf Repeal meeting, in October 1843, following its proscription by the British Government, rather than stand up to the threat of British violence. *An Irish History Reader* by the Christian Brothers which was popular in the 20<sup>th</sup> century criticised O'Connell for thinking that Britain's hold over Ireland could be damaged by cheers and speeches. History has not always been kind to Daniel O'Connell and his extraordinary achievements have often been overlooked. Patrick Geoghegan's two volume biography provides some deep insights into his achievements and helps redress this omission.

Apart from his extraordinary career at the Bar Daniel O'Connell had three great causes, namely, Catholic Emancipation, Repeal and the ending of slavery. He succeeded fully only in the first of these but it would be wrong to assess his achievements solely by the metrics of a successful outcome particularly given the almost insuperable odds he faced. I believe his greatest achievement was his almost intuitive understanding of the Irish People (greatly enhanced by his career at the Bar) and his ability to transform that understanding into a gravitational force that channelled opposition to British injustice into a constitutional process.

O'Connell worked within the law, and gave hope to a downtrodden and helpless people. He was a champion for those who never had a champion. He was a voice for those who never had a voice. He gave self-respect to those who enjoyed no respect. He taught the People to disown servility and to develop the courage to oppose. In a real sense all the Catholic population of Ireland were his clients. It was this universal appeal and instinctive connection to his own countrymen while always working within the law, which made him such a unique force in Irish history. He left a legacy of opposition to injustice, the benefit of which extended beyond these shores. He did not consider his people expendable in the cause of some great ideology or cause. He always remembered they were his cause.

Such was his international fame that in 1830 when the Belgian parliamentarians voted on their new King, three of them voted for O'Connell. William Makepeace Thackeray said that no man had done so much for his nation since the great George Washington. Bismarck praised him in the 1830's but when he became a dictator, he said O'Connell was a man who ought to be shot. Honoré de Balzac included him among a list of four men, (including Napoleon) in the first half of the 19<sup>th</sup> century who had an immense influence. Captain Nemo in Jules Verne's *20,000 Leagues under the Sea* had a portrait of O'Connell hanging in his cabin. James Joyce referred to O'Connell in *Ulysses* paying glorious tribute to his oratory

*“the Tribune's words howled and scattered to the four winds. A people sheltered within his voice”.*

Daniel O'Connell's international reputation was enhanced by his opposition to slavery. He was one of the most influential and outspoken critics of slavery in the world. He opposed slavery because he firmly believed that men and women could not reach their potential until they were free. He brought a more inclusive and humanitarian dimension to the anti-slavery movement. William Lloyd Garrison called him "*the most wonderful of the statesmen and orators of the age*". Charles Lenox Remond, like Frederick Douglass, an African American abolitionist said "*No country or people possess a superior to Daniel O'Connell*".

In 1845 Frederick Douglass accepted an invitation from Daniel O'Connell to speak at the Conciliation Hall in Dublin. A great orator himself he believed that all the stories of O'Connell's great oratory were surely exaggerated and O'Connell could not live up to his reputation. He said O'Connell rose and delivered his speech, about an hour and a quarter long, it was a great speech, skilfully delivered, powerful in its logic and majestic in its rhetoric, biting in its sarcasm, melting in its pathos and burning in its rebukes, those attributes could be applied to so many of O'Connell's great speeches in the law courts and without. Douglass quoted O'Connell as saying

*"I have been assailed for attacking the American Institution as it is called - negro slavery. I am not ashamed of that attack. I do not shrink from it. I am the advocate of civil and religious liberty, all over the globe, and wherever tyranny exists, I am the foe of the tyrant; Wherever oppression shows itself I am the foe of the oppressor. Wherever slavery rears its head I am the enemy of the system or the institution, call it by what name you will. I am the friend of liberty in every clime, class and colour. My sympathy with distress is not confined within the narrow bounds of my own green island - no, it extends itself to every corner of the Earth. My heart walks abroad and wherever the miserable are to be succoured, or the slave to be set free, there my spirit is at home, and I do like to dwell.*

The magnificence of those words resonates with us today and articulates a sophisticated and extremely developed understanding of human rights and of the dignity of human beings that was almost a century ahead of its time. His stance on slavery reflected his stance on human rights in general and he did not view human rights as merely a national issue. He condemned the treatment of the Aborigines in Australia, of the Maoris in New Zealand and of slaves throughout the world. He played an important role in ending slavery in the British Empire in 1833. He strongly believed in the dignity of the human person and the inalienable rights of that dignity. Those were amazing achievements for the early part of the 19<sup>th</sup> century and the beliefs expressed by him were truly revolutionary.

O'Connell's opposition to slavery continued unabated despite the damage it did to the Repeal movement. He did not hesitate to rebuke slaveholders even those who wished to support the Repeal movement. Indeed O'Connell's stance on slavery damaged support for Repeal in the United States. Douglass recalled that a gentleman from America had been introduced to the Liberator and was about to extend his hand when he suddenly stopped because O'Connell said to him

*"Pardon me, sir, but I make it a rule never to give my hand to an American without asking if he is a slaveholder?"*

The gentleman attempted to placate O'Connell by saying

*“No Mr O’Connell I am not a slaveholder but I am willing to discuss the question of slavery with you”.*

*“Pardon me again”* said O’Connell.

*“Discuss it with me, without meaning the least harm in the world should a gentleman come into my study and propose to discuss with me the rightfulness of picking pockets I would show him the door lest he be tempted to put his theory into practice”.*

O’Connell did not confine himself to championing international human rights. He also made a great contribution to the theory and practice of British politics. Gladstone said of him that he was *“as thorough an English Liberal as if he had no Ireland to think of”* but that he was also

*“the greatest popular leader the world had ever seen...who never for a moment changed his end and never hesitated to change his means”.*

O’Connell’s moral courage in the pursuit of these great causes was matched by his physical courage. On 22 January 1815 O’Connell referred in a speech to the *“beggarly corporation of Dublin”*. He was greatly surprised to receive a letter a few days later from John D’Esterre asking if he had indeed used that expression as reported in the press. He duly replied:

*“Without either admitting or disclaiming the expression – I deem it right to inform you that no terms attributed to me however reproachful, can exceed the contemptuous feelings I entertain for that body in its corporate capacity, although doubtless it contains many valuable persons.”*

At that time if the Establishment wished to get rid of a troublesome figure it could contrive to engineer a duel as the killer would go unpunished by the law. The person so challenged would then have to accept the challenge with the likelihood he would be killed, or refuse it with the certainty that he would be destroyed.

The suspicion is that the D’Esterre duel was planned for this purpose. Robert Dunlop in his book on Daniel O’Connell says that D’Esterre because of impoverished circumstances became sensitive to the insinuations of more unscrupulous men. D’Esterre was part of the Establishment being a Limerick Protestant and member of Dublin Corporation. He was extremely courageous and was known to be a crack shot. O’Connell readily accepted the challenge. When the duel took place both of the protagonists fired simultaneously. O’Connell had deliberately aimed low as he intended only to wound D’Esterre. D’Esterre fell and did not appear badly wounded but died the next day. In an extraordinary gesture O’Connell offered to settle a very generous annuity on Mrs D’Esterre but the offer was declined. In an even more extraordinary act he subsequently prevailed on the daughter of the deceased to accept an annuity from him which was regularly paid until his death.

From the outset of his career as a barrister to the end of his public life O’Connell always strove to achieve the best for his many clients. In his last sad appearance in February 1847 in the House of Commons he took his seat to participate in a debate on the state of Ireland and on how to address the crisis caused by the Famine. He stood to make a final speech but the task was beyond him. His voice was broken, hollow and occasionally quite inaudible. He was visibly sick and he appeared to be dying. His vigour, his eloquence, his ability to persuade and convince had deserted him but his fighting spirit and love of his people lived on as he pleaded in vain with the Commons whose members listened with a respectful silence to save Ireland. He said Ireland was in their hands and if they did not save her she could not save herself.

## O'Connell's early life

Daniel O'Connell was the eldest son of Morgan and Catherine O'Connell. He was born on 6 August 1775. O'Connell belonged to a family of Gaelic family gentry based in Kerry. The O'Connell trade would have been called “*smuggling*” in other places but there in Kerry it was to all the locals just “*trade*”. In Kerry “*the trade*” involved everybody almost within a mile of the sea including the O'Connells. His uncle Maurice O'Connell known as “*Hunting Cap*” was the smuggling chief of the county. O'Connell showed great intellectual promise at an early age. A hedge schoolmaster called David Mahony taught him his letters which he modestly said he learned in an hour.

O'Connell's perspective was completely Gaelic. He absorbed and thoroughly enjoyed the lifestyle of the Iveragh Peninsula. By virtue of the O'Connells' economic success they were both conservative and confident. They felt the equal of any Protestant.

A Catholic's life in the early 18<sup>th</sup> century was governed by the anti-Papist Penal Laws enacted by an Irish parliament composed of and elected by Protestants. Some of the laws deprived Catholics of rights they had been specifically granted by the Treaty of Limerick. The object of the Penal Laws was to safeguard the Protestant Ascendancy. Catholicism was not made illegal but much ingenuity was devoted to making it inconvenient and expensive while encouraging conversions to the Established Church. But although the Penal Laws were harsh their implementation was mitigated by personal friendships, inefficiency and sheer lack of zeal for law enforcement.

Protestants by the 19<sup>th</sup> century owned about 90% of the land. A papist could not buy land. There were laws similar to the “*petty apartheid*” of South Africa which served no purpose but to humiliate and annoy. If a Protestant found a Catholic riding a horse worth more than £5 he could buy it for £5. For families like the O'Connells of Derrynane the effect of the Penal Laws was mitigated by their good relations with the Protestant gentry of Kerry.

## O'Connell's legal training

From 1720 to 1793 membership of the Bar in England and Ireland was comprised exclusively of Protestants. They had a monopoly of all of the offices of the law from the Lord Chancellorship to the sub-sheriffs of counties and they necessarily availed themselves of this boom. The Catholic Relief Act of 1793 opened the legal profession to the Roman Catholics. However power with its emoluments and high offices continued to be jealously preserved by the Protestant Ascendancy for itself.

There were no facilities for reading for the Bar in Dublin so O'Connell entered Lincoln's Inn in 1794. He was supported in his studies by his uncle Maurice “*Hunting Cap*” O'Connell. There was no formal instruction for law students, no lectures, no required course of reading. In Lincoln's Inn he had to eat the required number of dinners, learn *Blackstone's Commentaries* almost off by heart, study Coke on *Littleton*, *Hale's Pleas of the Crown*, *Gilberts Law of Evidence* and *Jacob's New Law Dictionary*. However he read widely Thomas Paine's *Age of Reason and Rights of Man*, Rousseau's *Confessions*, Humes *Works*, Voltaire's *Essays*. He changed to Gray's Inn for his last term so he could accommodate the requirement to complete his nine dining terms in the Kings Inns with a view to starting on Circuit in the summer of 1798.

In November 1796 having completed his terms he returned to Ireland to attend the Kings Inns. His call to the Bar took place on 19 May 1798, three days before the rebellion broke out. His plans to commence practice were interrupted by pneumonia. He joined the Munster Circuit in early 1799 being one of the first to profit by the Relief Act of 1793 and the removal of the disabilities placed by the Penal Laws on Catholics practising at the Bar.

## **The beginning of O’Connell’s career at the Bar**

O’Connell earned his first guinea five days after his call for drawing up a declaration on a promissory note but practically speaking his legal career did not commence until the following February. The law courts had been much disrupted in 1798 by the Rebellion. In 1799 he made a reasonable beginning at the Bar. Ten of his 16 briefs came from James Connor of Tralee who gave O’Connell his first brief in 1798. Much of his early work was drawing up declarations, composing petitions for compensation from the local rates.

In the summer Assizes in Tralee in 1799 O’Connell was briefed as a junior by Connor. in a case of some significance. He was led by Jerry Keller who was a convert to Protestantism to gain advancement at the Bar. The practice at the time was for senior and junior counsel to cross-examine witnesses. Normally inexperienced juniors elected not to exercise their right to cross-examine unless it was a purely formal cross-examination. However O’Connell did not hesitate when his opportunity came.

O’Connell was asked to cross-examine a man called Darby who was described as “*half foolish with roguery*”. O’Connell asked Darby if he was telling the truth to which he replied, “*Yes, your Honour*”. O’Connell told Darby that he was a good humoured honest fellow and asked him did he “*take a drop of anything that day?*” Darby replied that he had “*taken his share of a pint of spirits.*” O’Connell paused and reflected on the answer and then ordering Darby to tell the truth under oath, he asked him whether his share “*was not all except for the pewter mug?*” Darby confessed that it was and O’Connell won his case. The victory drew attention to O’Connell and the success set O’Connell on his way.

When O’Connell was first called to the Bar, the County of Limerick was then much disturbed by the Whiteboys and he usually had the brief to defend them. One of the officials in the jail of that city was instrumental in getting him briefed for that purpose. A good deal of O’Connell’s early circuit practice involved defending prisoners. Throughout the whole circuit he was pre-eminently the prisoners’ counsel. He built up an immense practice on the Munster Circuit. O’Connell’s reputation quickly grew both in Dublin and Munster. Men charged with every crime from murder to common assault sought to retain him.

## **O’Connell’s success**

As a Catholic he could not take silk but he made up his income by a multitude of small fees from poor men involved in petty cases. While these cases could be time-consuming O’Connell had a great ability to master his brief quickly.

His success was immense and rapid. This was notwithstanding that he was a Catholic, a Nationalist and without family connection at the Bar. Even if he had been a Protestant, a Tory

or the offspring of a judge, or nephew he would not have rose so quickly in the ranks of the Bar. R.L. Shiel who shortly followed O'Connell to the Bar wrote of the contemporary profession as he found it

*“There is at the Irish Bar a much larger quantity of affliction than is generally known... The struggle between poverty and gentility which the ostentatious publicity of the profession in Ireland has produced has I believe broken many hearts.”*

Shiel said that even the most eminent career involved unemployment for many years as the barrister struggled to make his name. This demonstrates O'Connell's prodigious achievement.

O'Connell had extraordinary physical strength, concentration and a great disposition. He needed all of these in abundance. The time spent on roads and tracks during a circuit probably accounted for six or seven full days. Road surfaces were in a terrible state and from time to time, particularly during the earlier years, those travelling the roads were at risk of being robbed by brigands. In the evening, on circuit, the Bar stayed together at the best inn. Con Lyne (Con of the 100 Bottles) or Jerry Keller usually presided. These evenings were very convivial in the traditional way.

When in Dublin O'Connell was up every day at 4am and after a short prayer he would wash, shave and dress, light the fire and by 5am he was at the desk. He would stay there until breakfast time which was 8:30am. He would eat haddock or herring or maybe some dried ham, breakfast cakes, porridge with a dish of tea. At 10:30am he would set off on foot for the Four Courts when he was in Dublin and would always arrive there five minutes before the judge had arrived and would remain there normally in court without a break until 3:30pm.

O'Connell was immensely able and his legal skills were of a very high order although they were of a practical rather than academic nature. Roderick O'Flanagan in his book *The Munster Circuit* says that O'Connell gained the reputation as the best criminal lawyer in Europe. He had a voice of great power and now rolling like tones of a grand organ, bursting forth in thunder, then dying away into deep pathos, and rushing into rapid declamation or denunciation.

O'Connell was frequently flamboyant and theatrical in court and many people would come to court to see his performance. Once one bad tempered attorney tried to upset him with a barrage of frivolous interruptions O'Connell suddenly turned on him, feeling the court was with him and shouted “*Sit down – you audacious snarling pugnacious ramcat.*” The Judge and jury evidently greatly enjoyed this putdown. Sometimes he would use language in addressing the court that certainly would not be tolerated nowadays. At times he treated judges with a degree of contempt even insolence. Some of them, such as Lord Norbury, were difficult to deal with on any other basis.

It was said that in the *Nisi Prius* court (court of original jurisdiction before a judge and jury) – he was unequalled. O'Connell mixed abuse and humour to great effect. He was very skilled at making a witness seem ridiculous and could make even genuine answers sound absurd. When he became distinguished as a *Nisi Prius* lawyer he was not able to devote as much of his time to criminal business as formerly but so long as he would accept these briefs no-one else would be retained.

By 1813 O'Connell was already being described as “*the eagle of the Bar*”. He excelled over all his competitors due to a range of talents. He was not necessarily the best at any one thing, but his

range of talents distinguished him from all his competitors. It was said that William Waggett was as eloquent, that Charles Burton and Richard Pennefather knew more law, that Harry Deane Grady was as skilful at cross-examination and that Thomas Gould could brow-beat with as much vehemence and simulated fury. O'Connell was able to combine all these talents in a manner and with an effect that could not be equalled.

He kept a fee book still extant which shows an income of £60 in the first year rising to £420 17 shillings and 6 pence in the second year. This figure was slightly misleading as £175 (two-fifths of the whole, derived from a single extraordinarily protracted case – *Segerson v Butler* at trial. £1077 pounds 4 shillings and 3 pence in 1806 and £3808 pounds 7 shillings in 1814.

He essentially practiced as a junior counsel for 30 years. He did very few cases after 1828 by which time his emoluments exceeded £8,000 (though he had lost one term) which in simple retail price index terms would exceed £600,000 today but in terms of real purchasing power would be very significantly greater. O'Connell was very proud of this and boasted that nobody at the outer Bar in Ireland had ever earned such a sum. This of course was also a reference to the fact that as a Catholic he was prevented from taking Silk. As a result he was limited in the type of work he could do and the amount of money he could make. He reckoned he could probably have increased his income by one half if he had been allowed take Silk.

Later in his career attempts were made by the government to secure O'Connell's support and in 1831 he was offered the office of Attorney General but refused to sacrifice his campaign for the attractions of office and wealth. He did accept a patent of precedence which allowed him to be admitted to the Inner Bar on 4 November 1831. However at this stage it made no difference to him because his legal career had effectively ended.

### **O'Connell's Court performance**

O'Connell possessed a deep knowledge of the law and enjoyed taking technical points, many of which judged by today's standards would be regarded as having little merit. In one case he defended a man for cattle stealing. The victim swore that he had lost a valuable cow and found the accused in the field where the cow had been killed. O'Connell made one point for the defence. He said the indictment should have been different and should have charged his client with stealing beef because the cow was dead and once dead she ceased to be a cow. The court upheld him on this point.

In cross-examination he exhibited a speed of response and flexibility that could be devastating. He was assisted by a remarkable capacity to read the minds of ordinary Irish people. He understood their reluctance to commit perjury and their attempts to balance that fear with a desire to avoid the admission of fatal evidence. He excelled at cross-examining hostile witnesses. In this he varied his technique depending on the circumstances. O'Connell frequently adopted a coaxing confidential voice to elicit helpful answers. At other times he asked seemingly irrelevant question after irrelevant question in order to lay a trap for a witness. He was extremely adept at exposing witnesses who were lying and also at making a witness contradict himself.

His outbursts were calculated as were his gestures and questions. He frequently put legal questions to witnesses knowing they would be overruled and then would make an aside to the jury about the evidence a practice no doubt developed because of the then prohibition on

counsel's speeches to the jury. His questions were very well thought out. He had great concentration and was constantly assessing how the case was going and whether a different approach might be merited. O'Connell's outbursts in court belied a deep caution. Indeed it is said that his greatest characteristic was caution. While he might appear reckless in manner, every gesture, every outburst was finely calculated. He never confused a jury with too much evidence. He would put a legal question to a witness and when it was overruled he would make asides to the jury about the evidence. O'Connell rarely put a damaging question. Beneath an assumed careless and indifferent style he was weighing and watching every turn of the case with great vigilance.

O'Connell was not above trickery in his attempts to discredit witnesses. In one case O'Connell examined the inside of a hat with care slowly spelling out the accused's name. "J, A, M, E, S," and he asked

*"were these words in the hat when you found it?"*

*"They were".*

*"Did you see them there?"*

*"I did".*

*"This is the same hat?"*

*"It is".*

O'Connell then held up the hat to the Bench and said

*"That's an end of the case. There is no name whatever inscribed in the hat".*

At the time there were no regular court interpreters but one would be retained and sworn in for a particular case. O'Connell had no difficulty in cross-examining in Irish. Once in a probate case the issue was whether the testator had been alive when he signed the will (by making his mark) or whether his hand had been held and moved after death. Witness after witness deposed in the same words that "*life was in him*" (bhí bheatha ann) when he made his mark.

O'Connell was struck by the constant repetition of the unusual phrase "*Life was in him*" and asked

*"By virtue of your oath, witness, was the man alive?"*

*"By virtue of my oath life was in him".*

O'Connell thought for a second and then said

*"Aye, so I suspected. Now by the solemn oath you have taken and you shall one day answer for it, was there not a live fly in the dead man's mouth when his hand was put to the will".*

The unnerved witness confessed that it was so.

O'Connell was a master at exhibiting indignation. If necessary he would pretend to be enraged and complain about the terrible injustice being done to his client. He engaged in theatrics and thought these would help. All this was done with a view to impressing the jury.

O'Connell was astute at assessing the judge and at altering his approach to the case as appropriate. He immersed himself totally in the case and never appeared to be daunted. He did for the most part adhere carefully to rules and conventions but was not afraid to break them if he considered it necessary to do so. He was never frightened by the judiciary and refused to be intimidated by them. When you consider it, this was quite remarkable. A moment's reflection leads to an appreciation of how remarkable that refusal to be intimidated was, given that he was a Catholic junior counsel in a Bar still dominated by Protestants facing a Bench exclusively populated by them.

O'Connell's refusal to be intimidated and his support for other counsel is evident from an incident that occurred in a case in which O'Connell appeared with junior counsel before Lord Chancellor Thomas Manners. The Lord Chancellor was bullying the junior counsel and made it clear that he would not hear any more argument. His mind was evidently made up. O'Connell stood up and without waiting for permission or caring what the Lord Chancellor would think insisted on addressing him. He said "*well then my Lord since your Lordship refuses to bear my learned friend, you will be pleased to bear me*" and he launched immediately into a detailed analysis of the case. The Lord Chancellor listened intently. Every five minutes as he opened fresh ground he prefaced it with "*now, my Lord my learned young friend beside me would have informed your Lordship in a more impressive and lucid manner than I can hope to do*" and so on. Ultimately the Lord Chancellor was won over and decided the case in favour of their client. On the other hand O'Connell was totally intolerant of any counsel who ingratiated himself with a judge.

Both as a counsel and as a public man, O'Connell combined aggression and dauntlessness in the popular cause with a caution and a respect for the system in which he was obliged to operate. He immersed himself completely into "*the case*" and win or lose he moved with undiminished appetite for, and commitment to, the next struggle. As in his public life O'Connell was prepared to be aggressive when the need arose.

O'Connell seemed to have no qualms about pushing for work. On one occasion O'Connell had been promised a brief in a case if a new trial took place. Accordingly he told the Attorney involved in the case not to concede a point. Baron McClelland was not impressed by his intervention and rounded on him. He asked O'Connell whether he had a brief in the case. O'Connell replied he had not but he would have "*when the case goes down to the Assizes.*"

McClelland retorted

*"When I was at the Bar it was not my habit to anticipate briefs."*

O'Connell's devastating response was

*"When you were at the Bar I never choose you as my model and now that you are the Bench I shall not submit to your dictation."*

Before the passing of the Prisoners' Counsels Act 1836 prisoners did not have the advantage of their counsel's speech to the jury. This was one of the most significant developments in criminal trial procedures in the 19<sup>th</sup> Century. The practise of allowing counsel to appear for defendants in felony cases only began after 1730. Until the passing of the 1836 Act there were considerable restrictions on lawyers appearing for defendants. The new Act gave prisoners in felony trials the right to delegate the presentation of the defence to professional counsel. Prior to that prisoners could only rely on advocates to examine and cross-examine witnesses at the discretion of the trial judge. If the prisoner wished to put forward any defence to the court by way of an explanation or coherent narrative they could only do so by addressing the court.

Evidently the theory was that an innocent person would always demonstrate his or her innocence. By this time of course O'Connell was no longer practising at the Bar and accordingly never enjoyed the benefit of these new procedures. His success is all the more impressive in that context and of course the existence of these restrictions on the role of Counsel partly explain his willingness to ask impermissible questions in order to suggest defences and his asides to the jury during the trial.

O'Connell was very adept at using an inadmissible question to convey to the jury the nature of his client's defence. He would put a question which was certain to make the Crown Prosecutor object. Once the objection was made O'Connell would say

*"You have seen my Lord I have every right to put that question. It is quite material and I am surprised at my learned friend's objection. If the witness answers in the affirmative, it is as plain as a pikestaff my client is entitled to an acquittal and if in the negative it contradicts the case advanced by the Crown."*

When O'Connell's inadmissible questions were ruled out he was not above pretending to be in a fury and storming out of the court and telling the judge that his innocent client's fate lay in his hands. Some judges were not sufficiently robust to stand up to this intimidation and often were more favourable to the defendant in their direction to the jury than they would otherwise have been.

Occasionally this tactic was even more effective. In one case an inexperienced judge was presiding and O'Connell deliberately put to the witness a number of leading questions which the judge disallowed. O'Connell said *"As you refused me permission to defend my client my Lord I leave his fate in your hands, his blood be upon your head if he is condemned."* O'Connell then stormed out of court. The judge was so unsure of himself that he instructed the jury to acquit.

O'Connell always expressed his abhorrence at serious crime. He believed that it was very important to make sure the judge and jury understood that he was not excusing the crime but rather was maintaining that his client had no hand, act or part in it. He believed that this approach inclined judges and juries to view his client as being innocent.

While O'Connell conformed with convention he had little time for the Bar's ceremonial procedures. He was a very proud Irish man and he detested the wig which he was obliged to wear.

O'Connell during much of his career at the Bar was popularly known as *"the Counsellor"*. This was evidently due to his success in defending the people against what were perceived to be, and frequently were, unjust laws. He subsequently became known as *"the Liberator"*, when he immersed himself in politics.

Even allowing for the exaggeration of the time and to distortions created by some of the great dramas in which he participated, it was clear that O'Connell left behind an enormously successful if not unique career at the Bar when he devoted himself to politics from 1830. William Henry Curran, a son of John Philipott Curran, said that his knowledge of the law in all kinds of court was comprehensive and that he was unrivalled as an advocate in all kinds of law but especially in jury cases. He had an acute understanding of the Irish mind which was of

great benefit to him in cross-examining witnesses appealing to juries and indeed to judges. Curran expressed his opinion of O'Connell's handling of juries in the following terms:

*“Throw him upon any particular class of men and you would imagine that he must have lived among them all his life, so intuitively does he accommodate his style of arguments to their particular modes of thinking and reasoning”.*

## O'Connell's views on Judges

O'Connell was not slow to criticise the judges before whom he appeared. He recorded his comments in a fee book. John Toler, who was Attorney General, during the passing of the Union and then replaced Lord Carlton as Chief Justice to the Common Pleas in the 1800s with the title of Lord Norbury had been popular at the Bar but O'Connell found him offensive as a judge and referred to him as *“the Thing”*. O'Connell dismissed Luke Fox as *“morose, sour and impetuous”*. He was another who was elevated to the Bench in return for his support of the Union. O'Connell praised Sir Michael Smith, Master of the Rolls in 1801 as a gentleman and a scholar but did not think much of him as a judge. He dismissed St. George Daly as *“extremely ignorant and knows nothing of the law and does have the art to conceal any part of his want of knowledge”*.

O'Connell had great personal regard for Judge Day but had little respect for his legal abilities. *“Ah poor Day”*. O'Connell once said. *“Most innocent of law was my poor friend Day”*. W.H. Curran said that Robert Day's attempts to understand a point of law *“reminded him of nothing so much as an attempt to open an oyster with a rolling pin.”*

History has been kinder to Judge Day at the expense of some distortion. In the book on *Georgian Kerry*, Robert Day is described as *“a distinguished Irish judge and esteemed political figure”*. He built the houses at Day Place, Tralee during the period 1790 – 1800 and is described in *Mr Justice Robert Day the Diaries and the Addresses to Grand Juries* by Gerard O'Carroll as the outstanding political and judicial figure of Kerry at the turn of the 19<sup>th</sup> Century.

On one occasion O'Connell was before Day defending a man who had stolen some goats. The case seemed clear-cut but O'Connell produced an old Act of Parliament which stated that the owners of cornfields, gardens, or plantations could kill and destroy all goats that trespassed. O'Connell contended that this legal power of destruction clearly demonstrated that goats were not property and therefore could not be stolen. Day instructed the jury accordingly and the prisoner was convicted. Another time O'Connell was refused permission to make a speech at the end of a case by Day who said he was *“always of opinion with the last speaker and therefore I will not let you say one word”*.

## O'Connell's famous trials

### A. The Magee Case

Of all the many great trials of which O'Connell was involved there are perhaps two which particularly stand out. The first is the Magee trial and the second the Doneraile Conspiracy trial.

The *Magee* trial arose out of a publication on 3 June 1813 in the *Evening Post*. The *Post* announced to its readers that its proprietor had been committed to Kilmainham Jail on a charge of publishing a libel against the Duke of Richmond. The paper reminded its readers that this was the third Dublin printer that had been imprisoned by His Grace's '*conciliatory government*'. Everyone guessed that the alleged libel was a mere pretext for a determined effort on the part of the government to silence the chief organ of the Catholic party. This appears to be borne out from Sir Robert Peel's secret correspondence with the speaker of the House of Commons. Peel at the time was Chief Secretary of Ireland.

Magee a Protestant who was favourable to the Catholic cause was charged with seditious libel for printing an attack on the Duke of Richmond. The hope was that the prosecution of Magee would instil sufficient fear in the anti-Government press to silence it. Peel at the time believed that the speeches of anti-Government agitators were moulded by reporters "*into sense and English*". The Government considered it wiser not to proceed directly against the Catholic Board to pursue its press allies instead.

The Duke of Richmond had been in Ireland for over six years, the longest period of any Lord Lieutenant in the first half of the 19<sup>th</sup> century and was served by no fewer than four Chief Secretaries of whom Sir Robert Peel was the last. In the article Richmond was declared to be the worst of his predecessors – the profligate and unprincipled Westmoreland, the cold-hearted and cruel Camden and the artful and treacherous Cornwallis (who had been responsible for the introduction of the Act of Union). They all insulted. They all oppressed. They murdered and they deceived. The reference to the murder was held sufficient to justify the government in arresting Magee on the charge of having accused the Duke of that crime.

The trial began on 26 July 1813 and lasted two days. The court was crowded each day and attracted enormous publicity and interest. The *Magee* case provided O'Connell with the first great opportunity for a public display of his oratory and he could not resist. O'Connell was technically being led by John Finlay and Charles Philips and they were helped by two junior barristers. O'Connell has been heavily criticised for the manner in which he defended Magee. Many thought that he put attacking the Administration above the interest of his client. However others take the view that Magee had no prospect of being acquitted as the jury was well packed with Orangemen and Lord Chief Justice Downes was the presiding judge in a court of three. Seán Ó Faoláin in the *King of Beggars* commented on O'Connell's handling of the *Magee* trial in the following terms:

*"Everybody, indeed who regards gracious living, nobility of thought and word and behaviour, must read this demagogue with a curl of distaste. Heaven knows, they may well do so for O'Connell did a great deal to kill gentle manners in Ireland and to vulgarise and to cheapen us".*

However Ó Faoláin concluded O'Connell had no alternative if he was to raise a people from their knees.

The Attorney General, William Saurin whom O'Connell particularly disliked, led for the prosecution, supported by the Solicitor General and by Thomas Kimmis and three serjeants. Saurin was arrogant, ill-prepared for the case and virulently anti-Catholic. Though he had passionately opposed the Act of Union he was eloquent in his opposition to the Union and his speeches were widely lauded. He said the legislature could not alienate its sacred trust and that Union would amount to a forfeiture of the estate that was derived from and held under the people in whom the reversion must perpetually remain. He said that they were bound to

consult the will of the majority of the nation and the will of the majority was the foundation of all law.”

The prosecution took the first day and on the second day O'Connell said to the jury

*“He had made it the rigid rule of his professional conduct never to mingle his politics with his forensic duties and if in the present instance he appeared to have departed from this rule he would remind the jury that he was compelled to follow the Attorney General into grounds which, had he been wise, he would carefully have avoided.”*

He continued:

*“It was possible he might have misunderstood the Attorney General for there was he knew no relying on his words for what he meant but as he gathered from his words he had talked of the Catholics having imbibed the principles of a seditious treasonable and revolutionary nature. It was impossible to refute such charges in the language of dignity and temper but the Attorney General was a profligate liar who asserted, knowing as he must do, that the whole tenor of his conduct confuted the assertion.”*

“For what was it they sought” asked O'Connell. Lord Downes was not a judge that O'Connell was able to intimidate. He asked O'Connell what all this had to do with the question the jury were to try. O'Connell replied

*“My Lord, you heard the Attorney General traduce and calumniate us. You heard him with patience and with temper. Listen now to our vindication. What was it that they the Catholics sought? What was it that they incessantly and even clamorously petitioned for. Why to be allowed to partake in the advantages of the Constitution. It was said they wish to destroy it. Would they if they wished to overturn it exert themselves through calamity and in peril to obtain a portion of its blessings.”*

*“The Attorney General, that wisest and best of men boasted of his triumph over pope and popery. “This wisest and best of men glorifies himself with the prospect of pulling down the Catholic Board. I tell him to his beard that he is not honest in not having sooner prosecuted us and I challenge him to that prosecution”.*

O'Connell said the Attorney General's speech

*“contained very little logic and contained no poetry and was violent and virulent and was a confused and disjointed tissue of bigotry amalgamated with congenital vulgarity...He accused my client of using Billingsgate<sup>1</sup> and he accused him of it in language suited exclusively to that meridian. He descended even to the calling of names. He called this young gentleman a malefactor, a Jacobin and a ruffian, gentlemen of the jury. He called him a brothel keeper, a king of bawd in*

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<sup>1</sup>Bad language such as that used by the fishwives of Billingsgate Market.

*breeches and a ruffian...How has the Attorney General contrived to preserve the nature of his dialect? He has been now for nearly 30 years in the class of polished society, he has for some years mixed amongst the highest order in the State. He had the honour to belong for 30 years to the finest profession in the world, the Irish Bar. He was seen and heard among his colleagues at that Bar, some of the greatest names in legal history. With this galaxy of glory, flinging their lights around him, how can he alone have remained in darkness? How has it happened that the twilight of happiness of his soul has not been illumed with a single ray, shot from their lustre?" "Devoid of taste and of genius how can he have memory enough to preserve this original vulgarity? He is indeed an object of compassion and from my inmost soul I bestow on him my forgiveness and bounteous pity."*

O'Connell then turned his fire on prejudice against the Catholics and against the Administration. Peel subsequently wrote to a friend saying

*"I hope the Chief Justice will not allow the court to be again insulted and made the vehicle for treason but that he will interrupt his harangue by committing him to Newgate ... for contempt of court."*

Chief Justice Downes allowed O'Connell speak at great length and was later heavily criticised by Peel for doing so. O'Connell continued his invective against the Duke:

*"Not for him [Richmond] alone should compassion be felt. Recollect upon his advice – that with him as the prime mover and instigator of those rash and silly and irritating measures of the last five years which have afflicted and distracted this long suffering country have all originated with him. Is there then compassion due to millions whose destinies are made to depend upon his counsel. Is there no pity for those who like me must know that the liberties of the tenderest pledges of their affections and that which is the dearest still of their country depend on this man's advice."*

In all O'Connell spoke for about four hours. His speech received enormous publicity. The tone and content were very different from that which would have been allowed in the English courts. The abuse of the Attorney General was unprecedented in its vulgarity and viciousness. The insults did not stop there. O'Connell insulted the jury and accused the Chief Justice of corruption and prejudice against his client and called him a traitor, if not to Ireland, at least to the British Empire.

There are those that say this was O'Connell's greatest forensic effort. It seems however they were making this judgment from a non-legal perspective. O'Connell succeeded beyond all expectation in using the platform, which had been given him, to attack the Administration and label its members as hypocrites, violators of the Constitution and oppressors. His speech and his general approach to the case did not however benefit Magee.

Word of O'Connell's protests travelled far beyond Dublin. His speech was translated into French and sold in France. A copy of his speech was given to every member of the Spanish Cortes. There were 100,000 copies in papers all over Ireland. His words and approach did not however benefit Magee.

When Magee's case came up for judgment on 27 November the Attorney General denounced O'Connell's conduct of the trial and urged that the publication of the speech and Magee's approval of it was an aggravation of his original offence.

O'Connell responded by saying the Attorney General had done well to treasure up the resentment since July in order to give utterance to it, "only his profound respect for the temple of the law enabled him to overcome the infirmities of his nature and listen with patience to an attack which, had it been made elsewhere, would have merited chastisement."

The scene was brought to close by Saurin declaring that he had not meant to refer to O'Connell and was not accusing him of a crime.

By this time Magee who had not been enjoying his experience in Kilmainham had lost his courage. Without consulting O'Connell he instructed another of his counsel to disavow his speech. The Attorney General resisted this attempt to disassociate Magee from O'Connell and Magee was ordered to pay a fine of £500 or to go to prison for two years.

Magee subsequently broke with O'Connell and negotiated with the Castle. The *Evening Post* became a government organ. O'Connell had certainly done some damage to the Catholic cause within Ireland. Many Liberal Protestants were disillusioned. However more generally O'Connell's reputation soared as a result of this case. O'Connell himself was nevertheless very upset at Magee's public disowning of him in court and was also concerned about any damage that he might have done to the Catholic cause.

Saurin's personal animosity against O'Connell was such that it is alleged this contributed to his pertinacity in suppressing the Catholic Board in 1814. He used his position to promote an anti-Catholic agitation and sent a famous letter to Lord Norbury urging him to influence the Grand Juries on Circuit. His intolerance seemed to Lord Wellsley to render his removal necessary and he was superseded by Plunkett in 1822. The blow was wholly unexpected and in indignation at what he conceived to be his betrayal by Lord Liverpool he refused a judgeship coupled with a peerage and returned to his practice at the Chancery bar.

Despite his attacks on Peel one of the greatest tributes to O'Connell's legal abilities came from that source. Patrick Geoghegan describes how one evening in the 1830's the great orators of the day would have been discussed with Lady Beauchamp. O'Connell was mentioned and one man dismissed him as a "*broguing Irish fellow*" asking "*who would listen to him? I always walk out of the House when he opens his lips*". Lord Westmoreland asked Peel for his opinion. Peel did not hesitate.

*"If I wanted an efficient and eloquent advocate, I would readily give up all the other orators of whom we have been talking provided I had with me this same "broguing Irish fellow".*

## **B. The Doneraile Conspiracy Trial**

O'Connell's court career effectively ended in 1830 and his last great trial was the Doneraile conspiracy case. This was his most dramatic trial. The essential facts are simply stated. The prosecution alleged that a number of farmers in the neighbourhood of Doneraile in County Cork had assembled in a tent at a fair in Rathclaire and allegedly conspired to murder three landlords. They were overheard by a Patrick Daly who attended the fair as a spy for Colonel

Richard Hill. He gave two depositions before Colonel Hill and Michael Creagh, a local landlord. The first deposition related to a meeting held in Duane's Pub in Doneraile where it was alleged talk took place about shooting George Bond Lowe, a very active and unpopular magistrate hated by the Whiteboys' secret oath bound society, which for over 70 years had perpetrated violence in rural Ireland.

The second deposition described a meeting attended in Rathclaire Fair. According to Daly's later oral testimony a paper was produced at the meeting for signature by all who were willing to shoot George Bond Lowe, Michael Creagh and Admiral Evans. Patrick Daly's cousin, Owen Daly, who was also a paid informer, was also with him at the time.

Following a large-scale investigation various people did deals with the Crown in return for immunity. They agreed to give evidence about the conspiracy. John Leary, a 70-year-old man, was identified by the Dalys as the chief conspirator. He and 21 others were brought before a Special Commission with a Grand Jury presided over by Baron Pennefather in October 1829 on trial for their lives. Many of these people were innocent. The Crown was not particularly interested in whether they were innocent or guilty and was determined to hang them all.

On Friday 23 October, Leary, along with three others, Roche, McGrath and Shine were tried and found guilty and sentenced to death. Leary was completely innocent though the others were involved in some other agrarian crimes.

Mr Fitzgerald was the attorney for the prisoners and he wished to have counsel. The Solicitor-General asked him to name any two barristers he pleased undertaking on behalf of the Government to pay them. Two barristers were assigned for the defence. They complained that a material witness for the defence had been allowed to escape by the police. This was ultimately to no avail. The jury returned a verdict in about 20 minutes against all four accused.

O'Connell had been asked at the start of the summer to defend the men but he had refused. He was worn out after winning Emancipation. However because the remaining prisoners were so afraid after the first trial a further desperate attempt was made to retain O'Connell. William Burke, the brother of one of the prisoners, John Burke, borrowed a horse. They collected a sum of 100 guineas and William Burke, left Cork on Saturday evening October 24, 1829 and travelling through the night rode one horse to O'Connell's residence in Derrynane, a distance of 90 miles. He arrived at Derrynane at 8:30am and having listened to him O'Connell agreed to come to Cork to defend the accused.

Baron Pennefather was an old friend of O'Connell's from the Leinster Circuit but he refused to adjourn the case until O'Connell's arrival. O'Connell arrived in a dishevelled state after his long journey and asked to have breakfast in court and began cross-examining witnesses as he ate his breakfast.

The first witness was Daniel Sheehan who was an informer who had claimed to be involved in the conspiracy and received immunity. He insisted he had witnessed a number of the accused men swearing a note to murder. Sheehan claimed to understand O'Connell's questions but kept saying in answer to questions that he had no recollection. According to newspaper reports of O'Connell's cross-examination Sheehan said he did not recollect from one year to the next when he was last sworn in as a Whiteboy. He said in the trial the previous Friday he thought he was not bound to Mr McCarthy since he was not sworn as a witness for him and said that he was not as honest a man today as he was on Friday and he knew he was obliged to answer O'Connell but he did not recollect how long this Doneraile business was going on. He

knew what a month was but not how many there were in a year. He knew Michaelmas and Christmas but could not say whether Mr Low was fired at before or after Christmas. He did not know how many years later the Doneraile business happened. O'Connell accused Sheehan of having been drilled by a policeman. He sensed he was not telling the truth. Sheehan insisted that William Nowlan, another informer, was present as well as his relative, Michael Nowlan. Eventually Sheehan admitted there was no such person as Michael Nowlan.

Patrick Daly, another Whiteboy turned informer was examined by the Solicitor General. O'Connell repeatedly interrupted his examination claiming that he was asking inadmissible or leading questions and each time won the point. Daly stuck to his story and robustly resisted O'Connell's cross-examination. O'Connell said he had never seen such a drilling of witnesses. Bennett, for the prosecution, objected and accused O'Connell of making an improper accusation. O'Connell denied making uncalled for observations and said "Good God, four men up on trial for their lives and with such evidence".

The evidence of the other Whiteboy witnesses was undermined by O'Connell. One of them is said to have cried out " 'Tis little I thought I'd meet you here today, Counsellor O'Connell". O'Connell's discrediting cross-examination of the witnesses was ultimately effective.

O'Connell produced two witnesses to show that Owen Daly, one of the prosecution's key witnesses was not what he seemed. It had been claimed by Doherty that Owen Daly was an innocent young boy, 16 or 17 years old who had become unwittingly embroiled in the conspiracy but O'Connell proved he was in fact a 24-year old man who was employed as an informer under the game laws.

After this Pennefather made a concluding statement and the jury retired to consider its verdict. Although the jury agreed that one of the men, Thomas Barrett, was not guilty. They could not agree with regard to the guilt of the other three. The person who held out was Edward Morrrough the only Catholic on the jury. Subsequently after the jury had continued its deliberations for over a day and still failed to agree on a verdict they were released.

A few days later two more men were put on trial. Patrick Daly in giving evidence made a detailed statement about what he had witnessed in the tent at the fair and claimed that the conspiracy was directed by Leary who signed the document to assassinate Lowe, Creagh and Evans. Baron Pennefather then stopped the examination and called O'Connell to the Bar. After a short discussion Pennefather passed O'Connell a document. As O'Connell read the document there was silence in the court. It was apparent that Daly's evidence in court was inconsistent with the deposition he had sworn two days after the fair when no mention had been made of a written assassination order. To Pennefather's credit he realised the defence must be given this evidence. Pennefather had sent to Doneraile for the missing deposition and when it arrived gave it to O'Connell. This deposition should have been provided by the prosecution to O'Connell but it was not.

Charles Phillips, a lawyer who knew him well, said that in 1829 O'Connell had reached the summit of his glory. The *Freeman's Journal* reported "Every tongue was loud in praise of Mr O'Connell. To his exertions the result is universally attributed". In all O'Connell probably saved a dozen men from hanging. The lives of the first four prisoners who were convicted were saved retroactively and the sentence was commuted to transportation.

O'Connell's court performance on behalf of the ordinary people did much to create a special bond with the rural masses. The *Doneraile Conspiracy* trial played a significant role in this regard.

It was said that when O'Connell changed his occupation from law to parliamentary politics he was just changing to a different forum. Within the law he had fought domination by an unjust system and became skilled at working within the system to effect change. This was to stand to him greatly during the period when he devoted himself to parliamentary politics. It is said he brought Ireland into the heart of British politics.

### C. The Cailín Bán

Not all of O'Connell's trials were great successes. He appeared as a defence counsel in a murder made famous in Dion Boucicault's play "*The Cailín Bán*" and Julius Benedict's opera "*The Lily of Killarney*". O'Connell described his client as a horrid villain and shed no tears when he was convicted.

### Conclusion

Great as O'Connell's attributes as a barrister were, they pale into insignificance in comparison with his other achievements. In my view he has a legitimate claim to being one of the greatest Irishmen if not the greatest. The Catholic People were his clients and he was unstinting in his efforts to promote their interests.

In his thinking he was ahead of his time. He believed in the separation of Church and State and although a devout Catholic he believed in religious freedom no less than political freedom. He opposed sexual discrimination which he recognised not only had no justification but was incompatible with rational humanity. He said the mind has no sex. His opposition to discrimination was built not just on a visceral hatred of what was wrong but on a rational humanity and on an unprejudiced understanding. One of the reasons he cited for women's entitlement to admission at an anti-slavery convention in London in 1840 was that the tools wielded in the struggle for abolition were suited to both sexes. He said

*"We wield not the weapons of destruction or injury to our adversaries, we rely entirely on reasonable persuasion common to both sexes and on the emotions of benevolence and charity which are more lovely and permanent amongst women than amongst men."*

That was a remarkable pronouncement for the 1840s as was his statement in his speech at Tara when condemning the Act of Union, where he said

*"I will not risk the safety of one of you. I could not afford the loss of one of you – I will protect you all and it is better for you all to be merry and alive to enjoy the repeal of the Union; but there is not a man of you there that would not, if we were attacked unjustly and illegally be ready to stand in the open field by my side."*

When you consider the mass murders and genocides which, as Isaiah Berlin said have been committed in the name of so many "*isms*" over the centuries you cannot but be transfixed by a man who had no time for *isms*, only people, and who valued human life and dignity above all else. He was a man who offered a different historical path and who laid the foundations for our democratic state based on the Rule of Law. He deserves our unstinting admiration for his fearlessness and brilliance as a barrister in what was for a Catholic a hostile, unforgiving, and

challenging environment. But most of all he deserves our respect for realising the Bar was a means to an end and devoting his talents to the People of Ireland and sacrificing everything in their cause.

O'Connell's refusal to regard the person as subservient to the system, the ideology or even the cause is not just the hallmark of a great and very exceptional person whose sense of humanity and priorities it serves as a continuing example for politics and society. How many leaders or public figures in the history of the world could claim such an enlightened legacy? His overpowering quest for justice should be an example to us all. That and not his amazing but transient success at the Bar is what makes him great and it is that which endures.

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