

DR C. J. FOSTER — CANTERBURY'S FIRST LAW TEACHER

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Dr Charles James Foster, who was the first law lecturer at Canterbury College, is an interesting but somewhat neglected figure in Victorian Jurisprudence.¹ Before he came to New Zealand in 1864 he had been Professor of Jurisprudence at University College London and an effective and prominent figure in the politics of British Nonconformism. He emigrated to Christchurch in 1864 and became a leading member of the Bar for nearly twenty years but later retired to the rustic seclusion of Geraldine to write at treatise on Civil Procedure, returning to Christchurch in the 1890s to eke out a pathetic existence until his death in 1896.

It seems fitting that the first issue of this review should give at least a sketch of his unusual career and then attempt an assessment of his contributions to Jurisprudence and legal education.

FOSTER'S UNUSUAL CAREER

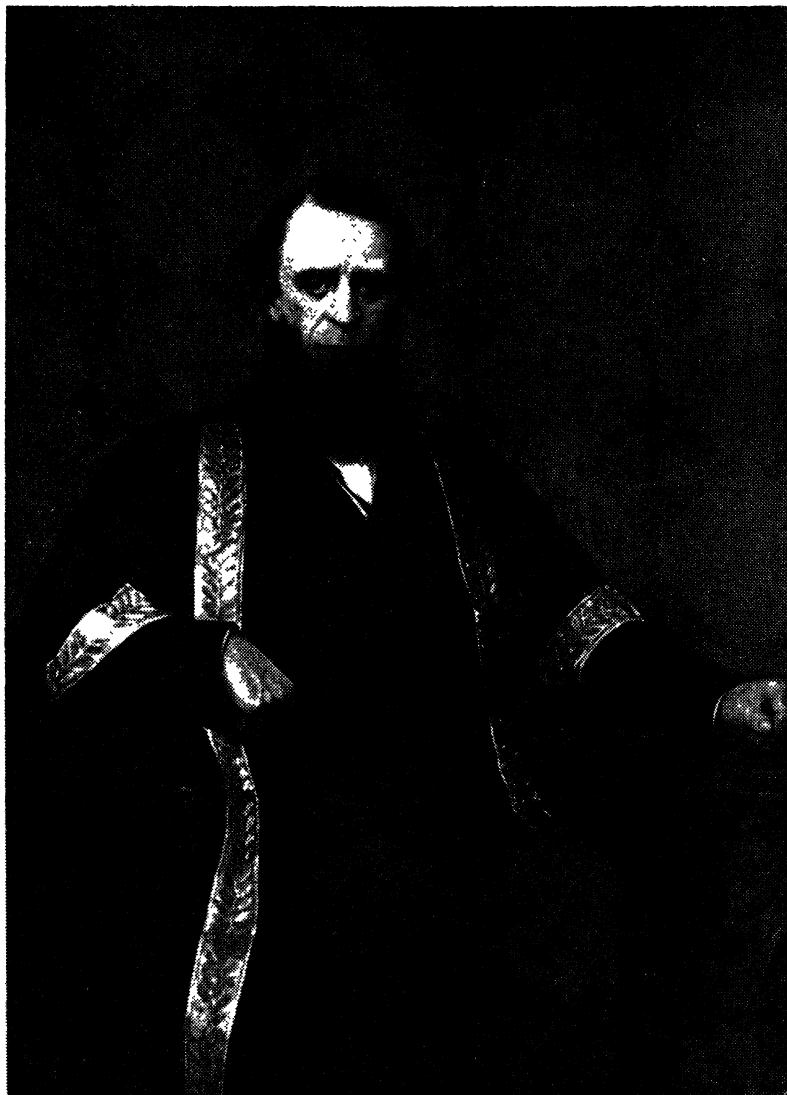
Charles James Foster was born in 1818 of a well established Cambridge Baptist family. His father was a brewer and his two uncles were successful banker and flour miller respectively.² Foster, as a nonconformist, was ineligible to go to Oxford or Cambridge but studied law at University College London as a pupil of J. T. Graves who had succeeded John Austin as Professor of Jurisprudence. Graves is better known as a mathematician than a lawyer but was "a man of great flexibility of mind".³ At this time University College provided the only "considerable facilities for legal education" according to a report in 1846. Foster's academic career was brilliant.⁴ He obtained the Logic and Mental Philosophy Prize in 1839-40. The following session he gained First Prize in Equity and Second Prize in International Law. Professor Graves in a testimonial dated 16 October 1849, spoke very strongly of the clearness and acuteness of intellect and the unusual industry and research displayed by Foster as a student. Foster graduated M.A. with a special distinction in Political Economy and then LL.B. with a scholarship in Jurisprudence. It is interesting to note that the

¹ See Professor G. W. Keeton, "Charles James Foster" (1965) 4 *Solicitors' Quarterly* 350 reprinted in (1966) N.Z.L.J. 568; the unpublished biographical cards on Foster in the Canterbury Museum; and the tribute to Foster in E. S. Bowie QC's chapter on the Canterbury Bar in *Portrait of a Profession* ed. by Robin Cooke QC 238 et seq. The present article owes much to Professor Keeton's original article (which was largely based on the researches of Mr Alan Brassington which have also been made available to the present author) but differs from it in a number of significant respects. In particular it makes use of material in the archives of the University of London and in Christchurch.

² I am grateful to Mr Andrew A. Smith of Cambridge, England, for these details.

³ See Professor A. F. Murison's typed manuscript, "The College Record in Legal Studies", in the University College London (UCL) archives, 6. The archives are housed in the DMS Watson Library and I am grateful to Mrs J. Percival, Archivist, for her assistance in this research.

⁴ The following details appear from the UCL Minutes at the time of Foster's appointment to the Chair of Jurisprudence. The testimonials cited are extracted in the Minutes.



University College archives contain a letter dated October 30th 1840 from Foster to Lord Brougham seeking advice on a course of study in Political Economy. Lord Brougham's reply does not survive but whatever it said it seems to have contained good advice. In 1849 Foster graduated LL.D. by examination. It is probably true to say that the LL.D. in those days approximated to the modern LL.M. He was called to the Bar at Lincoln's Inn in 1841, practised as a Conveyancer and Equity Draftsman and later joined the Norfolk Circuit. Mr Joseph Goodeve, who was his pupil master, attested to his intelligence, knowledge and industry. "The Law," said Goodeve, "has always appeared to me to be his very element." On the basis of these qualifications and testimonials Foster was appointed Professor of Jurisprudence, succeeding his friend C. J. Hargreave who had

been appointed to the Chair at the incredibly early age of 23! Foster was then 31 and held the Chair until 1858 when he was appointed by Sir George Grey to the Senate of the University. The Chair was only a part time appointment,⁵ the number of students was small and legal education was in its doldrums.⁶ Indeed Foster himself said "At London University, Law is, among the Faculties, what the University itself has been said to be among the Universities—the Cinderella of the Sisterhood".⁷ Foster could not have been overjoyed in 1851 when a small cabal of Shaw Lefevre, the Vice Chancellor, Nassau Senior and Henry Warburton abolished "Jurisprudence" as a subject in the curriculum and replaced it by "Principles of Legislation". John Austin, a member of the Committee, was absent from the meeting. Foster's indignation shines forth on Page 1 and in the Appendix to his book, *Elements of Jurisprudence*, published in 1853. He sets out recent examination questions in "Principles of Legislation" and says that they will show how far he is justified in complaining that the examination can hardly be recognised as a *Law* examination at all. Foster was right; questions such as "Define a pure democracy" were banal and more suited to an elementary course in political science than Law. His dissatisfaction perhaps prompted him to apply for the Readership at the Middle Temple in 1850 and the Equity Readership at Lincoln's Inn in 1852. In his letter to Lord Brougham⁸ requesting a reference he also gives us some indication of his lack of success at the Bar when he states that "The reputation still more than the reality of an occasional deafness has seriously retarded that progress at the Equity bar" for which his academic successes gave him some hope. He was unsuccessful in his applications. From then until his departure for New Zealand in 1864 Foster was active in three main areas—attempting to reform legal education; to democratise the University of London and to abolish the privileges of the Church of England.

Foster was co-signatory of a report on the state of the University which criticized the LL.B. in the following terms:—

Although the Law Honours rank deservedly high, yet the examination for the mere degree (being confined to two specified books) is generally considered to be more capable of being 'got up' than any other. Those who pass it must in general be looked upon as Bachelors of Arts who have found sufficient leisure to gain an academic step while entering upon the routine of professional avocations.⁹

Foster eventually resigned in 1858. In 1865, the year after he left for New Zealand, the movement for reform began to get under way but it was not until 1908 that law teaching at London really improved.

Foster's unremitting labours on behalf of the London graduates and Convocation have been described by Professor G. W. Keeton, and Dun-

⁵ As to the poor remuneration of Professors at London in this period see Foster's letter to the College Secretary dated 2 October 1850; Murison op. cit; and Dr J. H. Baker "University College and Legal Education 1826-1976" [1978] CLP 1, 5.

⁶ *Elements of Jurisprudence*, London; Walton and Maberly 1853, 139.

⁷ *Ibid* Appendix.

⁸ Letter dated 26 June 1852 in the UCL archives.

⁹ Letter dated 10 November 1852 extracted in the Minutes of the Senate of the University of London 1 December 1852, 87.

sheath and Miller.¹⁰ In 1851 Foster wrote a pamphlet entitled "The University of London—a Parliamentary Constituency" which was published for the Committee of the Graduates of the University. It outlines the history of the founding of the University "to compensate the large portion of the community who, by the character of their religious professions, were excluded from the privileges of the older universities" and records the opposition of the latter. It also records the backing of the City of London. Clearly the "Establishment" was split on the issue. The pamphlet pressed the claim of London University to send a member to Parliament and the agitation led to a Royal Commission on Oxford and Cambridge in 1852 and to the creation of a new constituency for London in 1868, the first member being Robert Lowe. Foster had headed the poll at the time of the earlier Liberal Reform Bill which had been withdrawn and it is said that he could almost certainly have obtained the seat¹¹ if he had waited, but by that time he was in New Zealand. Foster was a Fellow of University College, Senator of the University of London from 1858 and Chairman of Convocation from 1859 until 1863.

Foster was a leading spokesman for the British Anti-State-Church Association, later known as the Liberation Society, which sought separation of Church and State and the abolition of the privileges of the Church of England.¹² He was very successful as its Parliamentary Counsel in welding it into the most effective pressure group in Victorian politics. He also developed an effective whip system for nonconformist M.P.s. For the most part, however, Foster avoided the demagogic style of the Society's leading spokesman, Edward Miall, and preferred to build up the Society by cultivating the right people. In a feature in the *Lyttelton Times* of 4 June 1864 he is said to have been complimented by Disraeli for "his ability and thorough frankness". Eventually, however, the Miall populist style prevailed and Foster resigned. Miall was a Congregationalist minister turned politician and it was probably through his original association with Miall that Foster turned Congregationalist. Foster's activities with the Society brought him into close contact with leading politicians like Gladstone and Disraeli and in later life Foster used to interest audiences by his descriptions of them.¹³

What motivated Foster to come to New Zealand in 1864? The answer seems to be the necessity for an adequate source of income. He had married in 1859 and had two infant children, and up to the date his Chair and all his voluntary efforts had distracted him from earning a proper living. He had unsuccessfully applied for the post of Parliamentary Counsel in 1860. Here his involvement in politics cannot have helped him. It is said that "His public engagements withdrew him for some years from the ostensible practice of his profession" but that "he had resumed practice for about three years on the Norfolk Circuit and in Westminster Hall when he decided upon accepting an invitation to try his professional fortunes in New Zea-

¹⁰ Keeton (1966) N.Z.L.J. 568; P. Dunsheath and M. Miller *Convocation in the University of London*.

¹¹ Keeton op. cit 571.

¹² See William J. Mackintosh, *Disestablishment and Liberation* passim and David M. Thompson, "The Liberation Society 1844-1868" in *Pressure from without in Early Victorian England* ed. by Patricia Hollis, 211 et seq.

¹³ J. T. Read's account to Mr Alan Brassington extracted in Keeton op. cit 570.

land".¹⁴ It is more likely that he answered an advertisement for a partner, probably inserted by J. C. Helmore in an English newspaper although I have been unable to confirm this. Certainly it appears that he was partner of Helmore in 1864.¹⁵ Initially he was successful. He was appointed legal adviser to the City Council in 1866 and was a spokesman for the local Bar in 1867. The Canterbury District Law Society was founded in his chambers in 1868 and his name regularly appeared in the *Lyttelton Times*, the local newspaper, as counsel. Foster seems to have suffered from recurrent deafness and to have had a low, rather squeaky voice which was scarcely audible to the reporter's bench.¹⁶ He was also an advocate of Temperance and spoke regularly on such social issues. He was attacked nevertheless for a lecture on Law and Morals, which sounds like an epitome of his book *Elements of Jurisprudence* (law representing average morality) but which the stupid editor took to be an attack on morality. The editorial ends with the bombastic statement "The maxim Caveat Emptor as an LL.D. even of London ought to know, is a maxim of positive law and has nothing to do with morals whatever".¹⁷ Foster denied using the term and was obviously misreported. Foster is probably Dr Syntax who comes over in a bad light in a satirical case about lawyers' excessive fees in "Punch in Canterbury" of 20 May 1865. He is referred to in snobbish and critical terms by Leonard Harper, son of Bishop Harper and a local practitioner, who himself ended up on a charge of embezzlement. In a letter to H. Selfe now in the Hocken Library of Otago University, Harper said, "I suppose from what you say, he is doing a first class business. I can hardly believe it, however—though he does know how to make costs in a remarkable way. I am afraid my opinion of him is not very high. He is a sly old woman and whenever we have any business with him, we look out sharp. I dare say he does £1000-£1200 a year but he has no first rate clients—mostly small men and his work is consequently of the same character". In short Foster seems to have had certain characteristics which did not endear him to influential sections of Christchurch society and which made it difficult for him to fit into colonial life.

In 1869 he was made bankrupt with liabilities three times his assets but was discharged within a very short time of his adjudication.¹⁸ The circumstances of his bankruptcy remain obscure. The surviving court records and contemporary newspapers fail to give the reasons. Rather surprisingly he seems to have continued at the Bar and on the Council of the Canterbury District Law Society during his bankruptcy.¹⁹ He was even representing bankrupts! In 1871 he was found guilty of unprofessional conduct on the complaint of Wynn Williams,²⁰ a rather irascible practitioner

¹⁴ *Lyttelton Times* 4 June 1864, 4 col. 5.

¹⁵ See *Lyttelton Times* 22 June 1864 and the Canterbury Museum biographical cards. Helmore was a somewhat eccentric figure — see Bowie op. cit. 250.

¹⁶ See *Lyttelton Times* 4 August 1867.

¹⁷ *Weekly Press* 8 April 1876.

¹⁸ Supreme Court Minute Book in the Canterbury Museum entries 2 April 1869 and *Lyttelton Times* 11 June 1869. His liabilities were £1562, his assets £521.

¹⁹ *Lyttelton Times* 1869 and the Minute Book of the Council of the Canterbury District Law Society.

²⁰ Minute Book of the Council of the Canterbury Law Society 3 March 1871.

with whom he had crossed swords in the courts and who had replaced him on the Council.²¹ However, next year Foster replaced Wynn Williams and laid a number of such complaints against others. Such was the fashion of the day. In 1873 a number of leading lawyers and merchants commended him to the Minister of Justice for appointment to the proposed District Court Bench. Nothing came of it. In 1874 he stood for Heathcote in the Provincial Assembly Elections when he was described in the *Lyttelton Times* of 4 April 1874 by one speaker as "very fluent in speech and of broad and comprehensive views". He nevertheless came bottom of the poll.

There was some friction with the City Council over his fees which eventually blew up into an unseemly public row in 1878 where his professional reputation was attacked in Council meetings reported in the *Lyttelton Times*.²² He finally resigned.

He was appointed the first law lecturer at Canterbury College in 1873²³ but his lectures on Jurisprudence were criticized as too academic. In later years he modified them to make them more practical.²⁴ We shall discuss this later. The attendance remained poor and in 1880 the classes were discontinued.

In 1880 Foster applied for the job of law reporter in Christchurch for the New Zealand Law Reports. He was unsuccessful, possibly on account of his deafness, the job being offered in 1881 to the young Pember Reeves, who had little legal experience²⁵ and was destined for greater things. The same year Foster moved to Geraldine for reasons that are not entirely clear.²⁶ Geraldine was a small farming town scarcely able to support a legal practice and he was forced to live in rented accommodation. In an article on Geraldine in the *Canterbury Times* of 30 September 1882 there is the following account of Foster:—

The place keeps only one lawyer; and Dr Foster occupies a pretty little office just by Mendelson's store. The genial doctor is not a man calculated to promote strife, and is just suited to the good folks among whom he has elected to make his stay.

Geraldine is described as a "little paradise at the foot of the hills", the hills being the Southern Alps. The author perhaps gives us a hint of Foster's reasons for going there when he says

To people who get tired of town life, or who become wearied and used up with work and worry, or who want a change of scene and air to brace up a system weakened by illness, I should say, go to Geraldine.

²¹ As to Wynn Williams see Bowie op. cit and *Lyttelton Times* 4 August 1867.

²² *Lyttelton Times* 7 and 18 December 1878.

²³ See *A History of the University of Canterbury 1873-1973* by W. J. Gardner, E. T. Beardsley and T. E. Carter, p.91. In his letter 6 February 1880 to the Chairman of the Governors Foster referred to the fact that he had originally undertaken to lecture without fee. In fact he was paid a small fee.

²⁴ See e.g. *The Weekly Press* 8 April 1876. The Prospectus for 1876 describes the course as "Jurisprudence—a course of lectures on the Constitutional and Civil Law of New Zealand".

²⁵ Minute Book of Canterbury District Law Society, 12 May 1881.

²⁶ See Annual Report of the Law Society for the year ended December 1881.

He set to work to write a work of Procedure on the new Supreme Court Code and sought a guarantee by the Law Society of his expenses, but this was refused.²⁷ The book appeared in 1884²⁸ "after more than a year's unremitting labour" and was favourably reviewed in the Law Quarterly Review.²⁹ The work resembled the current English *Supreme Court Practice* but was "less of a practical handbook and more of a scientific treatise". Taken altogether is represented "a skilfully and well-written summary of the law and practice of New Zealand". Foster hoped to follow it with a volume on appeals and another on forms and precedents but these never appeared, probably because the original work was not the commercial success which its author had hoped. Foster returned to Christchurch about 1890 but never seemed to recover his practice nor his place on the Council of the Law Society. He eked out a meagre living combining a small law office with tutoring in Latin and Mathematics and died in poverty.³⁰ His widow and daughter were reduced to penury ten years after his death and had to approach the Canterbury District Law Society in 1909 who paid them £25 to cover their necessities.³¹

FOSTER'S JURISPRUDENCE

Foster's *Elements of Jurisprudence*³² published in 1853 is a young man's work and represents his early lectures. He was widely read and a deeply religious man, who believed strongly in the Natural Law tradition. He respected his former mentor, Austin, but saw the positivist position as an aberration. In a letter to the secretary of University College dated 18 January 1859 he says that the view taken in his lectures will be of the opposite school to Mr Austin's but he wishes it to be stated in any prospectus that it is desirable for students to read Austin's treatise concurrently with his lectures. He thought that Law as a command reduced the bulk of the internal law of every community to the abnormalism of *ex post facto* legislation and excluded International Law altogether from the domain of Jurisprudence.³³ He also made constructive criticism of Austin's concept of sovereignty. Habit of obedience by the bulk of the members—but how often, how long or how many of the members must obey cannot be precisely determined.³⁴ The test is imperfect. Instead ,he postulates the view that sovereignty can be politically limited and is the *right* of declaring in the last resort the whole course of moral conduct enforceable throughout the community. It seems a little odd to equate sovereignty with morality but not when seen in the context of his overall view of law and morals.

²⁷ See Annual Report for year ended December 1884.

²⁸ A *Treatise on the Principles and Practice of the Supreme Court Code*, copies of which are held in the Institute of Advanced Legal Studies, London and the Canterbury Law Society Library.

²⁹ (1884) 2 L.Q.R. 260.

³⁰ See Keeton op. cit. 570-1.

³¹ See Minute Book 16 February 1909.

³² The copy in I.A.L.S. is marked "withdrawn from Bradford City Libraries". A photocopy has been placed by the present author in the University of Canterbury Library.

³³ Op. cit. Preface.

³⁴ Ibid. 103 et seq.

Foster regarded Law "as it is" and Law "as it ought to be" as one and the same thing. Law expresses the average moral feeling of the community.³⁵ There are always members of the community whose moral standard is higher than the average. The essential characteristic of law is its uniformity of operation.³⁶ The true idea of law is that it is a course of operation i.e. a system.³⁷ Foster is led into paradox through his opinion that law is what it ought to be when it satisfies the average moral standard of the community and keeps pace with that standard. Laws requiring the burning of heretics and recognising slavery are regarded as law as it ought to be.³⁸ Thus Foster legitimates the very laws which he struggled all his life to reform and fails to deal with the possibility of recession of laws with the moral retrogression of society. However, since he wrote at a time when there was a general faith in the moral improvement of society this is perhaps not surprising and it was left to Hart to postulate a theory as to the persistent durability of a common content in law and social morality.

While too much of Foster's book is given over to a discussion of Ethics there are contained in the book the seeds of many later developments in Goodhart and Hart. He draws attention to the excesses of Bentham and Austin and argues a reasonable modern case for Natural Law.

The book received mixed reviews in contemporary journals. The remarks in the *Athenaeum*³⁹ and the *Westminster Review*⁴⁰ were generally favourable. The *Law Times*⁴¹ contains one of those irritating reviews where the reviewer tells us how he would have written such a book, then lambasts the author for not having done so, ending with the pompous statement, "A good treatise on Jurisprudence yet remains to be written". The most detailed and interesting review was in "*The Irish Jurist*".⁴² This commended the discussion of the moral force of law and the maintenance of the status quo as the function of positive law. The book, said the reviewer, showed that Foster was fully qualified for the task of completing a detailed treatise on Jurisprudence if depth of thought and an intimate acquaintance with the subject are the necessary qualifications.

Unfortunately the book, together with his inaugural lecture, represented the totality of his published work on Jurisprudence. It is incredible to think that at one and the same time New Zealand had two alumni of University College London, Foster and Salmond, working on legal texts in rustic seclusion quite close to each other and yet there is no evidence that they ever met.⁴³

FOSTER AND LEGAL EDUCATION

Legal education at London was not initially a success. During the whole of Foster's tenure of the Chair of Jurisprudence the number of law gradu-

³⁵ Ibid 109.

³⁶ Ibid 124.

³⁷ Ibid 127.

³⁸ Ibid 119. See the criticism of this in (1854) 6 *The Irish Jurist* 150, 151.

³⁹ (1954) *The Athenaeum* 245.

⁴⁰ (1854) 61 *Westminster Review* (NS) 578.

⁴¹ (1854) 24 *L.T.* 130.

⁴² (1854) 6 *The Irish Jurist* 150.

⁴³ John Salmond practised in Temuka at around this time and published his work *Elements of Jurisprudence* at his own expense.

ates never rose higher than a dozen a year.⁴⁴ This was mainly due to competition from the professional law schools. However what the College lacked in numbers it possessed in quality. Although only 135 students took the LL.B. in the Nineteenth Century, they included in their midst Lord Cozens Hardy M. R., Scrutton L. J., Quain J., Wills J. and Sir John Salmond.⁴⁵ Foster tried hard to improve legal studies in the University as we have seen but was unsuccessful during his professorship. A Report to Convocation of the University of London on the legal curriculum in 1865 stated that "The Faculty of Laws has hitherto wholly failed to realize the position deservedly attained by other Faculties in the University. We believe that the cause of this failure is to be found in the present system of examination . . ." The Committee then accepted what had been Foster's criticism of "Principles of Legislation". "The Study of Law, whether considered in the wider sense of the Science of Jurisprudence or in the narrower and more practical sense of the Law of the Land, has been made ancillary to the study of 'the Principles of Legislation' a subject so vague and unsettled, and on that account, undeserving of the remarkable prominence given to it." The vindicated Foster's stand but came too late.

Foster had a similar frustrating experience in New Zealand. He was appointed a lecturer in Jurisprudence and set out to teach his law clerk students the basic principles of Law in general before going on to a detailed discussion of English and New Zealand Law. He referred them to Roman Law as a source of general principles of law and jurisprudence. There appears to have been some criticism of his lectures.⁴⁶ The common complaint of the practitioner that his law clerk is being taught in too academic a way was first made in 1874. Foster changed the content of his lectures to make them more practical but they were still unsuccessful. He offered to lecture without fee but the lectures were discontinued. Eventually he was passed over for a younger man but this may have been because he had moved from Christchurch to Geraldine. Yet anyone who cares to read the text of his lectures published in the local press will realize his merit as a law teacher. In particular the lecture reported in *The Lyttelton Times* of 8 April 1878 is outstanding. It combines a clear attention to principle with much useful information presented in an elegant style.

Foster had a tragic life with many misfortunes and he never realized his full potential. He had an academic, rather than a practical talent and he was never in the right place at the right time. He also divided his energies between too many activities and public causes both in London and Christchurch. In some ways it is a pity that he did not have sufficient private income to hold the Chair of Jurisprudence for longer so that he could have produced a more detailed and systematic work on Jurisprudence from a Natural Law perspective. He might have rescued England from the extremities of positivism which dogged English Jurisprudence for over a century. As it turned out he had almost weathered the storm in English legal education and the situation would gradually begin to improve. At the same time

⁴⁴ See comments and figures given by Foster in "The University of London—a Parliamentary Constituency" and the Report to Convocation infra.

⁴⁵ See Baker op. cit. 6. Dr Baker's total seems surprisingly low.

⁴⁶ See *The Weekly Press* 8 April 1876.

it is likely that he could have become a Liberal M.P. if he had wished. On the other hand if he had remained in London we would have lacked a colourful character, who helped to put the legal profession and legal education in Canterbury on a proper footing and who consequently left us in his debt.⁴⁷ At the very least we owe it to him to rescue him from the judgement of failure and oblivion⁴⁸ to which he has hitherto been condemned in England, if not in New Zealand.

⁴⁷ See the tribute to him by E. S. Bowie QC op. cit. 258.

⁴⁸ Cf. Keeton's original damning title to his article, "Charles Foster, The Story of a Failure" (1865) 4 *Solicitors' Quarterly* 350 but see his tribute to Foster's stoicism in his distress at the end of the article. Keeton refers to Foster being a "desperate" man basing himself on the statement made by Mr J. T. Read to Alan Brassington in 1949. In fact Read described him as a "temperate" man.