

**BOOK REVIEW: “MYSTERIES AND
SOLUTIONS IN IRISH LEGAL HISTORY”**

EDITED BY D.S. GREER AND N.M. DAWSON

(FOUR COURTS PRESS)

THE HON. MR. JUSTICE RONAN KEANE*

The temptation for a reviewer of a collection such as this is to follow the Dodo in *Alice’s Adventures in Wonderland* and say “everybody has won, and all must have prizes”. That would avoid any discomfiture to an essayist whose contribution was not mentioned. But I can say without any hesitation that, in the case of this collection, that difficulty does not arise. This is not least because one of its most attractive features is that the contributors have, in their different ways, illuminated such sharply contrasting aspects of our legal history. It is the latest of a series of such collections published by the Irish Legal History Society of papers which have been delivered since its inauguration in 1988.

If I start with the last essay, by Professor Nial Osborough, from which the collection takes its title, it is because, in addition to providing a useful checklist of work that has been done in the field of Irish legal history, it also points the way forward by identifying particular topics to which legal historians might profitably direct their attention. In particular, he would like scholars to address the question as to how particular doctrines of the common law achieved a secure anchorage in Irish law.

Professor Osborough himself has written illuminatingly on the origins of the suspended sentence in both the Irish jurisdictions: here he establishes that it can be

* Chief Justice of Ireland.

traced back to a parliamentary inquiry on criminal and destitute children in Ireland held in the early 1850s by an assistant barrister in Cork, which provokes from Professor Osborough this interesting comment:

The context shows that Berwick and the others may have deliberately embarked on this course of action [the suspension of prison sentences on juveniles convicted of offences] when governmental procrastination and indecision had brought about the postponement in Ireland of the inauguration of special custodial institutions for the young offender.

The relevance to contemporary concerns of that passage needs no emphasis from me.

A surprising feature of mainstream Irish historical writing, if I can so describe it, is the scant attention, in my limited experience, which they pay to legal records as a primary source. One has only to think in contrast of the fruitful use to which, on the Anglo-American historical scene, Laurence Stone has put the records of marital proceedings in charting developments in English society over the centuries. Of course, the catastrophic destruction of the Public Records Office in 1921 removed at a stroke much of the raw material. But that there is still much neglected treasure in our legal records is demonstrated by the distinguished English legal historian, J.H. Baker in his essay : “‘United and Knit to the Imperial Crown’ : an English view of the Anglo-Hibernian Constitution in 1670”.

The case he considers, *Craw v. Ramsay* in 1670 raised an issue which could hardly be of more far reaching significance: could a statute of the then Irish parliament have any legal force in England? Its implications emerged dramatically from these comments of one of the judges, Wylde J:

Ireland was a distinct kingdom from England till Henry II completed the conquest of it. It

was distinct in its very laws and government as much as Spain is now. By his conquest, he brought it *infra dominium Angliae* not *infra regnum Angliae*. It being a Christian kingdom, the ancient laws of it remained notwithstanding the conquest, until the conqueror made an alteration of them, as my Lord Coke rightly observes ... And no such alteration being at the time of Henry II or Richard I, the Irish remained governed by the Irish laws, or the Brehon laws as some call them (but they are angry at that name).

A not dissimilar theme is pursued by John McCafferty in “To follow the late precedents of England’: the Irish impeachment proceedings of 1641” which considers the confrontation between the Irish Parliament of 1640-1642 that arose from the attempts of the lower house to impeach a number of Strafford’s associates. Jane Ohlmeyer’s study of the “Records of the Irish Court of Chancery: A preliminary report for 1627-1634” is more daunting for the non-specialist reader, but certainly demonstrates that, despite the cataclysm of 1922, many records did survive (some damaged by fire, smoke and water) and are at last being systematically analysed by Dr. Ohlmeyer and others.

That at least some mainstream historians are not indifferent to the important part played by legal structures in the development of Irish society is demonstrated by Professor R.B. McDowell’s essay on “Edmund Burke and the law”. Burke’s father, he reminds us, was an attorney in the Court of Exchequer, a position he only achieved, because, although born a Catholic, he had “conformed”. Burke himself read for the bar at the Middle Temple but, Professor McDowell records, was soon distracted from his legal work by other interests and above all, “the fatal itch that makes me scribble...”

He did, however, at one stage contemplate a history of the English law, a work of which only a few of the

introductory paragraphs survived. Much later, in one of the most celebrated episodes in his life, the impeachment of Warren Hastings, his understanding of legal principle was well in evidence, particularly in what Professor McDowell's describes as his bold assertion that, though the House of Lords was a Supreme Court of Justice, the House of Commons had a degree of control over the upper house in its judicial capacity - "one of the seeming paradoxes of our Constitution".

The reference by Wylde J. to the Brehon Laws brings us to the first essay by Fergus Kelly on "Giolla na Naomh Mac Aodhagáin: a thirteenth-century legal innovator" Professor Kelly is one of the current generation of Irish scholars who are shedding new light on the Brehon Law, carrying on the tradition established at the beginning of the last century by such Homeric figures as Bergin, Binchy and McNeill. One is again struck by the two contrasting features of the Brehon Laws: their comparative complexity and sophistication and the way in which they mirror life in a society unimaginably different from that of later centuries. One of the law texts attributed to his subject, Giolla na Naomh, considers the most serious crime known to that law, i.e., *dunmharbhadh*, "murder".

In that hierarchical society, the punishment differed depending on whether the person killed was the son of a king, a chieftain, a knight, a poet and so on. (Professor Kelly has found no explanation as to why it is simply the sons and not the dignitaries themselves who are the subject of these gradations: he suggests that it may reflect the general finding of criminology that young males are more likely to die a violent death than other categories.) The punishment was normally a fine, but a fine paid in terms of cattle. The text also confirms what seems to be now accepted as the generally relaxed view of Brehon laws towards polygamy: while they give the main wife (*cétmuinte*) greater legal capacity than other wives or concubines, he tells us that there is no evidence that a son by the main wife was of greater legal

worth than sons by other unions. While a son begotten from a slave woman could not inherit kinsland it would seem, he says, that the distinction between the rights of legitimate and illegitimate sons in the treatise of *Giolla na Naomh* was an Anglo-Norman feature. (The text was composed in the 13th century.)

Turning to the more familiar legal landscape of the 19th century, Richard McMahon demonstrates the enduring legacy of feudalism in that period of Irish history in his survey of manor courts in the west of Ireland before the famine. These courts were established by royal patents granted to landowners, but in some cases the right to hold them was acquired by prescription. The landlord normally appointed an agent known as a seneschal remunerated from court fees to preside over the court, but the ultimate decision in the case lay with a jury selected from the more “respectable” tenants living on the estate. In the 1830s, over two hundred such manor courts were still in operation in Ireland, usually dealing with relatively small civil cases. Mr. McMahon suggests that these jurors had in most cases a personal knowledge of the litigants, a reminder that the jury in our legal system was originally a body selected on that basis rather than as an impartial arbiter between litigants.

Daire Hogan’s study of R.R. Cherry, the Lord Chief Justice of Ireland from 1914-1916, adds to the scholarly vignettes he has given us in these collections of notable Irish judges of the 19th and early 20th centuries. Lord Chief Justice Cherry was the author of a leading textbook upon the Irish Land Act, but was also an active politician, having fought some notable election campaigns on behalf of the Liberal Party. He was vilified in the 1900 election in Liverpool because of his unpopular stance against the Boer War, but was ultimately elected in 1906. He was later Attorney General, Lord Justice of Appeal and Lord Chief Justice.

Mr. Hogan’s study of his career is a reminder of just how actively engaged barristers were in the politics of the

day in the 19th century and indeed for most of the 20th century. That all now seem to have changed. No member of the bar sat on either the front bench of the government or of the opposition parties in the last Dáil. In England, both the present Attorney General and his predecessor sit in the House of Lords. There seems no escaping the conclusion that barristers with remunerative careers are simply not prepared to make the heavy financial sacrifice involved in politics. Our public life is the poorer for it.

The modern contributions are rounded off with an entertaining survey by the late - and much missed - Lord Lowry of the other distinguished Irishmen who have been Lords of Appeal in Ordinary. They are indeed a formidable gallery, including as they do such giant figures as Lord MacNaghten, the first Lord Russell of Killowen and Lord Carson. One quibble may be allowed: I am surprised that his essay on Carson omits any reference to his two greatest forensic triumphs, the destruction of Oscar Wilde in the first of the notorious three trials and his successful championing of "The Winslow Boy" (otherwise Cadet Archer-Shee).

The editing of the volume is beyond reproach and it is handsomely produced with some excellent illustrations. I should also declare an interest: I am, with Lord Chief Justice Carswell, one of the joint patrons of the Irish Legal History Society which is responsible for this and the preceding volumes in the series. Our honorary role is a reminder that the Society is a quintessentially all-Irish body intended to explore the vast legal heritage which all of us share, north and south of the border.

"Mysteries and Solutions in Irish Legal History", by D.S. Greer and N.M. Dawson (editors) (Four Courts Press, 2001), 252 pages.