

Inaugural Professorial Lecture Series

**Bloodshed and compensation
in ancient Ireland**

**A public lecture by Professor Neil McLeod
Murdoch University
20 October 1999**

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Medieval English law

[The opening overhead for this lecture was a suitably sensational picture of a gentleman receiving a blow to the head with an axe.] Suppose this were a contemporary artist's drawing of timber-workers in medieval rural England. And suppose the incident depicted led to the death of the gentleman who has just been struck. Is it murder? Is it manslaughter? Is it merely an accidental killing? The answer to those questions, curiously enough, depends not just on the facts, but on how far back in time you wish to go.

At all times in the history of medieval English law, homicides were divided into two classes. There were particularly heinous homicides, for which the penalty was death, and less serious homicides, for which the death penalty could be escaped. For these less serious homicides the penalty was usually financial. In earlier times, the killer and his kin paid financial compensation to the victim's kin as well as a fine to the king. In later times, the killer was exiled from the realm and his property was forfeited to his lord.¹

Homicide in medieval English Law

Date AD	Death penalty	Distinguishing feature	Financial penalty	Defences
1050	secret murder	covert	killing	
1250	secret murder	covert	'voluntary' homicide	accident self-defence
1350	murder	planned	chance-medley	accident self-defence
1550	murder	deliberate	manslaughter	+ mistake of fact

Anglo-Saxon Law

If you want to travel back to Anglo-Saxon times, to the first millennium AD, it was entirely beside the point whether a killing was deliberate, careless or accidental.² What mattered was whether the killer hid the body or denied the killing; that is, whether the killing was covert or overt. A covert homicide was a sure sign of the most guilty of circumstances. Only covert killings warranted the Latin term *murdrum* (Anglo-Saxon *morth*) in those times. This term means 'murder', but we now usually translate it 'secret murder' to highlight its

¹Sir William Holdsworth, *A History of English Law* (16 vols), vol ii (London 1903; 1982) pp 45-48, 358; vol iii (London 1908, 1977) p 303.

² Holdsworth ii 51-52.

distinguishing feature. The penalty for secret murder was death. All other killings were atoned for by the payment of blood-money.

13th century English law

It was only in the 13th century that the English common law recognised accident and self-defence as mitigating circumstances in criminal trials. In those circumstances, the killing was not the, 'voluntary' act of the killer. But even then, involuntary killers needed to receive a pardon from the king: they were guilty of crime, but the crime was pardonable. Even when pardoned of the criminal offence, the involuntary killer could face a civil action on behalf of the kin of the person killed.³

Some killings were, of course, authorised by law; such as the hanging of convicted murderers. Felons could be killed if that was the only way to effect their arrest. And if our overhead showed a forester acting with some enthusiasm in the arrest of a trespassing tree-feller, then he too would be cleared of homicide by a late 13th century statute of Edward I.⁴

Even in the 13th century, the most serious form of homicide was still secret murder. All other culpable homicides were lumped together. A death which was the result of mere negligence was treated the same way as one which was the result of a deliberate intent to kill.⁵

14th century English law

It is only in the 14th century that the question of the intent of the killer became important. It is in this period that we see the rise of the concept of 'malice aforethought'. Put at its simplest, malice aforethought indicated that the defendant had planned and carried out the killing in cold blood.⁶ But there was still no distinction drawn between a deliberate killing in hot-blood and a death as the result of negligence.

Self-defence continued to exculpate the killer, as did accident. So, for example, Sir William Holdsworth notes that by the mid-fifteenth century it was considered to be a mere accident if "a man is cutting his trees and by accident they fall on some one's head and kill him."⁷

But even where the killer was pardoned on the grounds of accident, this only saved him from exile or death. He was still liable to forfeit all his goods. This was declared to be the law as late as the case of *Beaulieu v Finglam*, which was decided in the year 1400.⁸ In that case, counsel for the defendant complained that his client would be ruined if his possessions were taken from him, and that this seemed harsh given his client was blameless. To this the Chief

³ Holdsworth iii 311, 313.

⁴ Holdsworth iii 312, citing 21 Edward I st 2.

⁵ Holdsworth ii 359.

⁶ Even that is disputed for this period, with some scholars suggesting that all 'wicked' killings were lumped together and only accidental killings during unlawful acts came within the definition of 'chance-medley'. See the discussion in David Sellar, 'Forethocht Felony, Malice Aforethought and the Classification of Homicide', in WM Gordon and TD Fergus ed *Legal History in the Making - proceedings of the ninth British Legal History Conference, Glasgow 1989* (London and Rio Grande 1991), chapter 4, pp 43-59.

⁷ Holdsworth iii 313.

⁸ YB 2 Henry N 18,6: cited in JH Wigmore 'Responsibility for tortious acts: its history' [(1984) 7 *Harvard Law Review* 315, 383, 441; reprinted in] *Selected Essays on the Law of Torts* (Cambridge Mass. 1924) 18-86, p 79.

justice replied "What is that to us? It is better that he should be undone wholly, than that the law should be changed for him."

Even in the fifteenth century, a killer pardoned on the grounds of accident remained at risk of a civil action.⁹

16th century English law

It was not until the sixteenth century that a distinction was finally drawn between deliberate killing and negligent killing. This was the beginning of the distinction between murder and manslaughter as we know it today. Manslaughter included deaths which were the unintentional outcomes of careless, but intentional, acts. Tree-felling again provides us with a good example. Cutting down trees was an inherently dangerous act (as the drawing in our first overhead appears to show). That is why timber cutters notoriously yelled something appropriate like 'Stand clear!' (or 'Timber!') when a tree was about to fall. It would have been careless not to have given such a warning, because the result might well have been the death of a bystander. If such a death occurred, it was treated as manslaughter rather than murder. While the death itself was not intended, the act which caused it was intended, and that act was carried out carelessly.

Of course, if the inherently dangerous act of felling a tree was carried out with all due care, then any resulting death was merely an accident.

Medieval Irish law

The drawing we are discussing does not, in fact, depict an incident in England at all. It is set in Ireland. And when we turn to examine medieval Irish law, we discover a system far more elaborate and far more sophisticated than that which we have noted in England.

In Ireland, the distinction between intentional killing and negligent killing was developed about 800 years earlier than it was in England.

Medieval Irish legal manuscripts

The earliest Irish legal manuscripts were written in the Old Irish language. (This was the language spoken from the 7th to the 9th centuries AD.) In the following centuries, medieval lawyers added short glosses. These glosses were designed to explain individual words and phrases in the original texts. In addition, the ancient texts are usually accompanied by expansive commentaries. These commentaries were generally composed in the period from the 12th to the 16th centuries.

In other words, the Gaelic Irish legal materials were copied and re-copied, edited and added to, for a period of nearly a thousand years. Over 2,000 pages of these materials still survive. This constitutes the most comprehensive set of materials for any Western medieval legal system. But less than half of the Irish materials has even been translated.

Tonight I want to focus on one ancient text in particular. This text was known as the *Bretha Étgid*. The title *Bretha Étgid* means 'Judgements concerning Irresponsible Acts'. It

⁹ Wigmore p 80, citing Year Book 6 Edward. IV (for the year 1466) 7,18.

deals with the various circumstances that might surround a homicide or injury. In particular, it is concerned with those circumstances which make the actions of the offender more or less blameworthy. One such circumstance was the offender's mental state. Another was the presence or absence of a social justification for any risks the offender subjected the victim to.

Legend of *Bretha Étgid*

According to the legend recounted in the opening pages of this tract, *Bretha Étgid* includes the instructions of King Cormac mac Airt to his son Cairbre in the 3rd century AD. This legend is unlikely to be true, not least because Cormac mac Airt is in fact a euhemerised version of one of the pagan Celtic gods of Ireland. The language and treatment of the text places it rather in the Old Irish period, that is between the 7th and 9th centuries. If we say the 8th century, we will most likely not be far wrong.

Bretha Étgid §14 has not previously been translated. But it is a very significant section. It introduces us to a wide range of factors, each of which influenced the outcome in a case of homicide or injury.

***BRETHA ÉTGID* §14**

[§ 14] Son, [I will instruct you] so that you may know [the law regarding an] edict or treaty together with their harmful acts and their mistaken acts and their irresponsible acts:

[§14.1] So that the penalty for an act of anger is not paid in the case of negligence, nor negligence in the case of an act of anger;

[§14.2] Nor the penalty for knowledge in a case of [mistake through] ignorance, nor of ignorance in a case of knowledge;

[§14.3] Nor an intentional act in a case of [any other] irresponsible act, nor [any other] irresponsible act in the case of an intentional one;

[§14.4] Nor a large [offence] in the case of a small one, nor a small one in the case of a large one.¹⁰

***Bretha Étgid* §14.1 -Anger versus negligence**

In §14.1, we find that already in the 8th century Irish law drew a distinction between injuries which were inflicted in *ferg*, 'anger', and those which were inflicted through *anfot*, 'negligence'. This is a distinction which the English common law was not to develop for a further 800 years.

***Bretha Étgid* §14.3 – Intention**

Bretha Étgid §14.3 makes much the same point as § 14.1. But there is a change in vocabulary which alerts us to some additional sophistication in the Irish approach. Here we find the word *comraite*, 'intention', being used, so that negligence was distinguished not just

¹⁰ For a transcription of the original Irish manuscript, see DA Binchy ed, *Corpus Iuris Hibernici* (6 vols; Dublin 1978) at 1260.28-32.

from killings in anger (or 'hot blood'), but also from those in 'cold blood'. And instead of the term *anfot*, 'negligence', we now have the term *étged*, 'irresponsible act', alerting us to the fact that there was a multi-layered approach to negligence in Irish law. In other words, the law looked not just to see whether the offender was negligent, but also the context of the act in which that negligence occurred.

Of course, none of this is screamingly obvious from the bare words of §14 alone. But the reader of *Bretha Étgid* §14 would already have read §2, in which the terms used in §14.1 and §14.3 are introduced and linked.

BRETHA ÉTGID §§ 2-3

[§2] How many categories of irresponsible act are there?

That [question] is not difficult.

Four: intention, negligence, utility, folly.

[§3] What are the names of those offences [which arise from them]? That [question] is not difficult.

Three categories of harm: malice, negligence, negligence in addition to utility.

Bretha Étgid §§ 2-3

In §2, we again find the contrast between intention (in §14.3) and negligence (in §14.1); but also two new terms: *torba*, 'utility', and *espa*, 'folly'.¹¹

The English law of homicide tended to be two-fold: culpable homicides were either very serious (warranting death), or just serious (warranting severe financial consequences).

But in Ireland the law was threefold, as we see from §3.¹² Account was taken of intention and negligence, and then negligence was itself further divided into negligent acts which had an element of social utility and those which did not. Those which had no social utility were the acts of 'folly' referred to in §2.

The legal consequences which flowed from each of these kinds of act are described in the opening section of *Bretha Étgid* :

BRETHA ÉTGID §1

[§1] What is an exemption? The description [given to] everything exempt and everything entirely without legal remedy.

¹¹ The meaning of *torba* has unfortunately been misunderstood by modern scholars as a result of Charles Plummer's attempt to clarify it in his article 'Notes on some passages in the Brehon laws', *Ériu* 9 (1923) 31-42 at p 32.

¹² Indeed it was at least four-fold. Irish law also treated secret murder as particularly serious - though this is not dealt with in this particular text. According to the medieval commentators, the penalty for secret murder was twice that for intentional homicide: see *Ancient Laws of Ireland* (6 vols; Dublin 1865-1901) vol iii at p 99.

[§1.1] Full penalty for intention, half penalty for negligence, restitution for utility, exemption for true-justification.

And when we study the ancient texts in detail, this is the position which emerges:

Summary of position in Irish law (c. AD 750)

Dangerous act of MALICE performed intentionally	Dangerous act of FOLLY (i.e. performed irresponsibly)	Dangerous act of UTILITY performed irresponsibly	Dangerous act of UTILITY performed responsibly
full <i>éric</i> -fine	half <i>éric</i> -fine	1/7 = restitution	exempt

(By AD 1100:)

Dangerous act of UTILITY performed responsibly
1/21 to other workers

Illustration: wood-cutters in England

To illustrate the way this scheme worked, let us consider two merry woodcutters; one in England and one in Ireland. What happens if a tree they cut down lands on someone's head and kills them?

For the position in England we can turn to the case of *R v Hull*,¹³ which was decided in 1664. At that trial the judges confirmed that when "a man [is] lopping a tree, and when the arms of the tree were ready to fall, calls out to them below, take heed, and then the arms of the tree fall and kill a man, this is misadventure." Indeed it had been treated as misadventure (i.e. an accident) for at least two centuries.¹⁴ However, what if the wood cutter gave no warning that the tree was about to fall? In medieval England the only alternative open to the courts was a finding of voluntary homicide. It was only in the sixteenth century that a finding of manslaughter was possible in such cases.

Illustration: wood-cutters in Ireland

The law on this point had developed far earlier in Ireland.

***BRETHA ÉTGID* §30**

[§30] The exemption of trees in falling, provided [there is] a warning beforehand.

[Commentary] If he has observed the legal requirement for removing [incapacitated persons and animals] and for giving a warning, there is an exemption for [injuries to] idlers and persons who are present for no useful

¹³ (1664) Kelyng J 40; 84 ER 1072.

¹⁴ Holdsworth iii 313, citing the Year Books from the reigns of Edward IV (1461-83) and Henry VII (1422-1461).

purpose. And [in all other cases] it comes down from half-compensation to a third of restitution.

If he has not observed the legal requirement for a warning, nor of removing, it is treated as a careless act of utility. As a result, half-restitution is paid for an injury to an idler and to a person who is present for no useful purpose. Restitution is paid to a person who is there for a useful purpose.¹⁵

In the eighth century text of §30 we see that the law had already developed the notion of accident. A death which had been caused despite the lack of any intention to kill, and after all due care had been taken, was not a culpable homicide. In this respect the Irish law was already 400 years ahead of its English counterpart.¹⁶

The later medieval commentary to this provision, written about the time the English had finally developed the notion of accidental killing, shows a further development in Irish law. Those who had no good cause to be present had no claim if they did not move away once a warning was given. But the same was not true of persons who could not hear the warning because they were deaf. Nor was it true of persons who could not move away because they were likewise engaged in useful work..

As far as the deaf were concerned, the tree-feller had to physically escort them from the site. And the same was true for livestock - who would likewise derive no benefit from a mere verbal warning.

As far as fellow-workers were concerned, a special duty of care was owed to them because of the fact that they could not be expected to remove themselves from the scene. If they were injured, a small payment equal to 1/3 of *aithgin*, 'restitution', was payable. ('Restitution' was the name given to a component of the compensation for injuries. Where it was called for, it made up 1/7 of the total payment, which was known as the *éric*-fine.)

The second half of the commentary I have quoted deals with the situation where the tree-feller has not given the required warning. While cutting down the tree was still considered an act of social utility, he has now engaged in it in an irresponsible manner. As a result, he owes the full amount of restitution to those who are injured by his negligence.

Contributory negligence

But note that people who have no good reason to be present only get half-restitution. This is because they are guilty of what we now call 'contributory negligence'. Certainly the tree-feller was negligent in not shouting a warning when the particular tree was about to fall. But the idlers were equally negligent in hanging around while he was at work chopping down trees in the first place. The compensation paid to them is therefore halved.

¹⁵ For the original Irish see *CIH* 274.16-23.

¹⁶ Self-defence was likewise recognised as exculpatory: "[Ancient text:] **Self-defence is exempt from liability.** [Commentary:] **It is exempt for him to kill him if he was unable to escape from him.**" For the Irish see *CIH* 2158.9.

A further illustration: injuries caused by brooches

Let us look at a second example of the way the Irish scheme worked.

***BRETHA ÉTGID* §59**

[§59] **The exemption of a brooch on the upper chest.**

[Commentary] **There is an exemption for men if their brooch is on their upper chest at their shoulder, and there is an exemption for women if their brooch is on their upper chest at their breast, provided there is no protrusion beyond it.**

And if there is [a protrusion], it is governed by the rule of repeated injuries: Restitution for its first offence, half-compensation with restitution for its second offence, full compensation with restitution for the third offence.¹⁷

A brooch was a necessary item for keeping your cloak attached properly, so wearing a brooch was an act of social utility. But it had the potential to cause injury. If the brooch was fitted carelessly, then the first injury it caused was treated as an act of social utility performed irresponsibly. The appropriate fine was therefore restitution.

But once one injury had occurred, the wearer was alerted to the dangerous positioning of the brooch. For the wearer to continue without adjusting the brooch would be an act of negligence. So a second injury brought the penalty for negligence. This was half the penalty payable for a deliberate injury.

But suppose the wearer still continued to wear the brooch without adjusting it, even after two injuries had been caused by its dangerous state. That would show a reckless disregard for the safety of others. Such recklessness was treated as tantamount to an intent to injure. Any further injuries brought the full penalty attributable to deliberate acts.

***Bretha Étgid* §14.2 – Mistake**

Note that already in the 8th century Irish law recognised mistake of fact as a mitigating factor (§14, §14.2).

Mistake in English law

Mistake as to fact emerged as a defence to homicide in English law only in the sixteenth century. For example, in the early 17th century case of *R v Levett*,¹⁸ the accused was acquitted of the murder of a woman called Frances Freeman. Levett had mistaken Freeman for a burglar. Frances Freeman was in fact a friend of William Levett's servant, Martha Stapleton. Freeman had come in secret to the Levett's house to help his servant complete a particularly large backlog of housework. Martha and Frances finally finished up at midnight. Just as Frances was about to leave, Martha thought she heard burglars trying to break in. Frances Freeman hid in the buttery, while Martha ran upstairs and woke William Levett. Levett rushed downstairs with a drawn rapier in front of him and his wife Helen behind him. It was

¹⁷ *For the Irish see CIH 289.25-29.*

¹⁸ Referred to in *Cook's Case* (1639) Cro. Car. 537 at 538; 79 ER 1063 at 1064.

Helen who spotted someone in the buttery. Levett charged into the buttery, lunging with his rapier and killing the unfortunate Frances Freeman.

William Levett was charged with murder. He would not have been guilty of murder if he had used such force against a real burglar. The court of King's Bench held that his intention was lawful, even though it was based on a mistake of fact. As a result Levett was innocent of both murder and manslaughter.

It was lucky for Mr Levett that his case had not been heard a century or so earlier. Unless, of course, he'd been living under Irish law at the time.

Mistake in Irish law

In Ireland, the basic principle that it was permissible to kill a thief caught in the act was set out in §115 of the original text of *Bretha Étgid*.

***BRETHA ÉTGID* §115**

[§115] **Every lawless person is completely without recourse to law.**

Four hundred years or so before *Levett's* case was decided, a medieval Irish lawyer added this explanation of §115:

[Commentary] **i.e. there is an exemption for killing the thief, if you don't know his name, and don't recognise him, and are unable to arrest him at the time he commits the trespass.**

And there is an exemption for every person who shall have been killed in mistake for such a thief.¹⁹

The rule which allowed you to kill a burglar in your home was something of a special case. It also required you to show that you had no means of arresting the burglar without violence, or of identifying him for future arrest. In most other cases where the defendant has attacked an innocent person in mistake for a guilty person, the defendant had to pay half the normal penalty.

For example, *Bretha Étgid* § 13 says:

***BRETHA ÉTGID* §13**

[§ 13] **Son, [I will instruct you] so that you may know [the law regarding] a law-abiding man mistaken for an outlaw and an outlaw mistaken for a law-abiding man.**

[§13.1] **Half the penalty is the full amount for the first of these situations.**

[§ 13.2] **A quarter for the second situation because of the person he has been mistaken for.²⁰**

¹⁹ For the Irish see *CIH* 1161.15-17.

²⁰ For the Irish see *CIH* 1067.30-31.

§13.1 illustrates the general law of mistake. The assailant thinks he is attacking an outlaw, someone he is entitled to attack. But instead he kills an innocent person. As a result, he pays half the penalty he would normally pay for the homicide of that innocent person.

Attempt in Irish law

§13.2 is even more interesting for the sophistication of the legal principle underlying it. Here the assailant intends to kill an innocent person, but instead mistakenly kills someone whom he actually had a right to kill. This time he pays a quarter of the normal penalty for homicide. But that quarter-penalty is not paid to the outlaw. Rather it is paid to the innocent person for the unsuccessful attempt to kill him.

Here is a table setting out the gradation of attempt fines in Irish law:²¹

ATTEMPT c. AD 700

Penalty	1/7	1/4	8/21	1/2	2/3
With naked weapon		drawing weapon	hunting down	damage to clothing	injury
Without naked weapon	mere statement	hunting down	damage to clothing	injury	

An unsuccessful assailant did not pay the fine for the injury he intended to inflict. Rather he paid a fraction of that fine. The particular fraction varied in accordance with how close he came to inflicting the intended injury. For example, suppose an assailant threw a spear at someone in an unsuccessful attempt to kill them. The assailant paid half the penalty for murder if the spear damaged the victim's clothes, and one-quarter if it missed altogether.

The same thing applies in *Bretha Étgid* § 13.2. In throwing his spear at the outlaw by mistake, the assailant has also missed the innocent person he intended to kill. (The fact that he has killed the outlaw does not affect that conclusion.) The appropriate penalty paid to his intended victim is therefore one-quarter of the penalty for the injury he intended to inflict.

Attempt in English law

England was without attempt laws until the sixteenth century. In the 14th century some courts solved the dilemma by finding the accused guilty of the principal offence, even for mere intent.²² But most failed attempts went unpunished. It was not until the sixteenth century that the common law finally adopted the solution developed in the Court of Star Chamber, and tried attempted felonies as misdemeanours.²³

²¹See Neil McLeod, 'Assault and attempted murder in Brehon law', (1998) 33 *The Irish jurist* 351-91.

²² Holdsworth iii 373.

²³ Holdsworth iii 434.

In other words, Irish law showed remarkable sophistication in its treatment of the mental element in offences against the person. By the eighth century it had developed a range of concepts which did not emerge in England until the sixteenth century.

***Bretha Étgid* §14.4 - Large and small offences**

Irish law had at its heart a set scale of payments for injuries of various kinds. Each payment consisted of a fixed *éric*-fine plus a fraction of the victim's honour-price. (Each rank in society had its own honour-price. These ranged from a yearling heifer, for young landless men, to 21 milk-cows for a king.²⁴)

Classification of injuries: AD 700

Injury	<i>éric</i> -fine (milk-cows)	Honour-price
white-blow	1	1/21
lump-blow	2	1/7
bloodshed	2.5	1/4
bandage-wound	3	1/3
confinement to bed	3.5	1/2
deadly bed-wound	10.5	full
death	21	full

As *Bretha Étgid* §14.4 emphasises, a judge had to be aware of the characteristics of each type of injury so as to be able to apply the appropriate penalty.

White blow

The white blow was an injury which did not leave any lasting mark or cause any lingering pain. It included things like violent pushing and shoving.

Lump blow

A lump blow was a battery which left a swelling or a bruise or an abrasion.

Bloodshed

In order for a cut to be serious enough to warrant the description 'bloodshed', it had to drip at least five drops of blood onto the ground.

Bandage-wound

A bandage wound was, naturally enough, a wound requiring a bandage. The injured person was still ambulatory, and could move around the countryside unaided.²⁵

²⁴ Neil McLeod, 'Interpreting Early Irish Law: status and currency (Part I)' *Zeitschrift für celtische Philologie* 41 (1986) 46-65; (Part II) 42 (1987) 41-115.

²⁵ The commentaries distinguished an upper and lower bandage wound on the basis on the degree to which victims could still get about. A lower bandage wound did not interfere with the victims' movements about the kingdom; whereas the more serious bandage wound saw them confined to their own townland. (See the Irish material at *CIH* 699.5-7 and the discussion in DA Binchy, 'Sick-maintenance in Irish Law', *Ériu* 17 (1934) 78-134 at pp 130-132.)

Standard bed-wound

`Confinement to bed' was required for injuries such as fractured skulls. The term was applied to any injury which prevented the victim from moving around outside. According to the medieval commentators, the victim was only able to go to the toilet if someone supported his arm.²⁶

Deadly bed-wound

The `deadly bed-wound' was an injury which left the victim in danger of death. The victim could no longer hobble to the toilet with support. They could no longer even turn from side to side without someone lifting them. Deadly bed-wounds included wounds which had penetrated through the skull to the brain. The term was also applied to injuries which left the victim with `three floods of bloodshed': i.e. with blood flowing from their wound, and being vomited from their mouth, and being passed in their urine.²⁷

For the three most serious categories of injuries, the victim was also entitled to their medical costs.²⁸

Compensation vs capital punishment.

In medieval England, the punishment for the more serious forms of murder was death. Indeed, death was technically the punishment for the less serious forms of murder as well. However, in those cases the guilty person could usually avoid death by seeking a royal pardon or by using the escape hatch into the ecclesiastical courts known as `benefit of clergy'.²⁹

In Ireland the penalty for homicide remained a financial one no matter what form the killing took. However, the penalty increased with the degree of criminality involved in the killing. Furthermore, the penalties were set so high that the malicious killer would need the support of his kin in making the payments. If the killer's kin were unable or unwilling to support him, his life became forfeit. Defaulting murderers were hanged. Those who defaulted on fines for negligent manslaughter were set adrift on the sea in a boat without oars, and left to pray that they would wash up further down the coast where they might survive in a life of servitude.³⁰ But most kins could be expected to support a kin-member by paying his fines unless he was a reprobate.

Attempts to suppress the taking of 'blood-money'

The Irish disinclination for capital punishment was viewed with horror by the Church in the first millennium and by the English in the second. Both tried to stamp out the practice of accepting monetary compensation for homicide and to replace it with hanging. Both were unsuccessful.

²⁶ See *CIH* 699.8-9.

²⁷ See N McLeod, `Crólige mbáis', in the forthcoming festschrift for Professor Gearóid Mac Eoin (D Ó Baoill & D Ó hAodha eds) and the Irish material at *CIH* 699.9-11.

²⁸ See McLeod, `Crólige mbáis' (forthcoming).

²⁹ JH Baker, *An Introduction to English Legal History* (2nd ed, London 1979), pp 420, 422-3 and 429.

³⁰ See *Ancient Laws of Ireland* vol i at p 15 and Mary Byrne, 'On the punishment of setting adrift', *Ériu* 11 (1932) 97-102.

The Church attempted to suppress the institution of the *éric*-fine in two ways. Firstly, the Church itself refused to accept blood-money for the murder of clerics.³¹ However, it did accept the honour-price component of the payment, and introduced a replacement system of monetary penances which seems designed to serve the same financial end as the *éric*-fine.³² (This may even have been a subtle attempt to divert all compensation payments away from kindreds and towards the Church.)

It also launched a propaganda assault, by playing the 'Saint Patrick card'. The Church had a major role in compiling the massive texts of ancient Irish law. It inserted a story about St Patrick into the Introduction of the most famous of these, the *Senchus Már*. According to this story, St Patrick's charioteer had been murdered soon after St Patrick's arrival in the 5th century. St Patrick had refused to accept an *éric*-fine for the loss of the man and had instead insisted on the death penalty. This ingenious fable had no impact on the law, however. The jurists simply distinguished the case in the time-honoured fashion of judges. They said the verdict applied in St Patrick's case only, since only St Patrick could ensure the reception of the condemned man's soul into heaven. And there the matter rested until the 12th century and the arrival of the English.

The English colonists themselves did not expend too much energy attempting to suppress Irish law. Instead they adopted it enthusiastically as their own. However, the authorities in England were constantly aghast at the way the colonists in Ireland were abandoning the English common law in favour of Irish law. A series of apparently quite unsuccessful statutes were passed to reverse the process. An Ordinance of Kilkenny of 1351 prohibited the use of Irish law, asserting that it was so barbarous that it ought not to be called law at all.³³ This was so unsuccessful that an even more strident attempt to wean the English colonists back to English law was made in the Statute of Kilkenny 14 years later.³⁴ Again this appears to have been to no avail. As late as 1495 King Henry VII was forced to pass a statute for Ireland entitled 'An Act that no person take any money or amends for the Death or Murder of his Friend or Kinsman'.³⁵

In Ireland the common law was up against a legal system which had known for many centuries how to distinguish murder from negligence, culpable homicide from self defence, and malice from accident. The English settlers appeared to prefer it. I think, perhaps, we may have touched here on some of the reasons for that.

³¹ This was enshrined into the law in the ancient text known as *Bretha Nemed*: "**What are the good qualifications ennobling a church? It is not difficult: ... let it not accept the price of innocent blood; further let it forgive everyone through repentance.**" See Liam Brearnach, 'The first third of the *Bretha Nemed toísech*', *Ériu* 40 (1989) 1-40 at 9.

³² See the sources cited in Fergus Kelly, *A Guide to Early Irish Law* (Dublin 1988 [repr. 1991]), at p 43.

³³ Ordinances of Kilkenny 1351 c 16.

³⁴ It is agreed and established that ... [in the case of any] Englishman, having disputes with any other Englishman ... that they shall sue each other at the common law; and that no Englishman be governed in the termination of their disputes by March law nor Brehon [ie Irish] law, which reasonably ought not to be called law, being a bad custom; but they shall be governed, as is right, by the common law of the land ..."

³⁵ Henry VII (Irish Statutes) 1495 c 11.