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Irish Legal History: An Overview and Guide to the Sources

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Irish Legal History: An Overview and Guide to the Sources*

Janet Sinder**

This bibliographic essay covers sources for researching Irish legal history from the earliest days of the brehon legal system to the present. In addition to suggesting sources for research, the article provides brief explanations of the Irish legal system and its major developments.

Table of Contents

Introduction	232
General Sources: A Starting Point	233
Irish Legal History	233
Irish Political History	235
Early Irish Law	237
Description of Early Irish Law	237
Publication of Early Irish Law	239
Ancient Laws of Ireland	239
Corpus Iuris Hibernici	240
Other Publications	241
Analysis and Interpretation of Early Irish Law	241
The Medieval Period until 1600: Existence of Two Legal Systems	243
Development of the Common Law	244
Right of Irish to English Law (1331)	244
Statutes of Kilkenny	245
Brehon Law in the Middle Ages	246
Relation of the Two Legal Systems	247
The Palatinates	247
The Dominance of English Common Law	248

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Historical Development	248
Penal Laws	249
The Nineteenth Century	250
Development of Modern Irish Law	251
1919–1924	251
The Irish Constitution	252
Development of Institutions and Constitutional History	253
Parliament	253
Poynings' Law	254
Court System	256
Legal Profession	256
Primary Sources of Law	257
Effect and Publication of Statutes	257
Law Reporting	258
The Public Records of Ireland	259
Conclusion	260

Introduction

¶1 In 1947 F.H. Newark wrote, “Ireland not only awaits its Reeves or Holdsworth; it even lacks an elementary text-book on Irish legal history.”¹ Although much has been written on the subject of the legal history of Ireland in the more than fifty years since, there is still no introductory book on the subject. While this article will not fill the gap of a textbook, it attempts to provide researchers with a starting point for their research and a basic overview of the subject.

¶2 An article on the sources for Irish legal history could simply be either a bibliographical discussion of primary sources: manuscripts, statutes, court reports, and public documents; or an extensive bibliography of secondary materials: articles and books discussing various aspects of Irish law and legal history. To the extent the latter have been written, they have usually focused on one period of legal history² or have surveyed sources for researching current Irish law.³

¶3 This article combines brief explanations of the legal system and its major developments with references to sources providing more detail. The intention has been to include sufficient narrative to assist a reader with little or no background on the subject. For each topic a sample of resources is presented, along with a mention of sources containing annotated or critical bibliographies, if available.

¶4 With very few exceptions, the sources discussed are in English, and most

1. F.H. Newark, *Notes on Irish Legal History*, 7 N. IR. LEG. Q. 21, 21 (1947).

2. See, e.g., Barbara M. Pawloski, *Gaelic Law in Early and Medieval Ireland: A Bibliography*, 79 LAW LIBR. J. 305 (1987).

3. See, e.g., THOMAS O'MALLEY, *THE ROUND HALL GUIDE TO THE SOURCES OF LAW* (1993).

have been written in this century. However, the article includes bibliographies, and books containing extensive bibliographies, in which references to older materials and sources in foreign languages can be found. The article focuses more on secondary than primary sources, but many of the bibliographic works mentioned are excellent guides to the primary sources for Irish law.

¶15 The section following this introduction discusses general sources; the following four sections contain information about the legal system from the earliest known period until 1924. Specifically, these sections discuss the early Irish (or *brehon*) law, the native legal system that existed before the Norman invasion in 1169; the Norman invasion until about 1600, a period during which the English and *brehon* systems coexisted; the period from 1600 to 1919, which saw the dominance of the common law and the complete conquest of Ireland by England; and the brief period from 1919 to 1924, when Ireland became divided, part of it obtained independence from Britain, and the basis of the new Irish Free State (later the Republic) was formed. I have not included a section on modern Irish law, but sources for research can be found in the writings on the current state of Irish law and Irish legal research.⁴

¶16 The next section looks at the development of legal institutions—parliament, the court system, and the legal profession—and considers Irish constitutional history, particularly the uneasy relationships among the Irish Parliament, the Westminster Parliament, and the Crown before 1800. A final section briefly covers primary materials. Each section of the article contains some substantive background on the subject along with sources for research. For the most part, the focus is on the structure and institutions of the legal system, rather than the substance of the law, although almost all of the bibliographic sources mentioned contain references to substantive areas of law.

General Sources: A Starting Point

Irish Legal History

¶17 Although no book covers the whole of Irish legal history, various articles and book chapters provide outlines of it, usually focusing on how the common law developed in Ireland. The most frequently cited work is *Notes on Irish Legal History* by F.H. Newark, which has been published in several editions and formats. It first appeared as an article in 1947,⁵ and most citations in the literature are

4. See, e.g., *id.*; Kevin Boyle & William Twining, *Republic of Ireland*, in *LAW PUBLISHING AND LEGAL INFORMATION: SMALL JURISDICTIONS OF THE BRITISH ISLES* 44 (William Twining & Jennifer Uglow eds., 1981); John Furlong, *Ireland*, in *INFORMATION SOURCES IN LAW* 249 (Jules Winterton & Elizabeth M. Moys eds., 2d ed. 1997).

5. Newark, *supra* note 1. A revised edition was published as a pamphlet in 1960. F.H. NEWARK, *NOTES ON IRISH LEGAL HISTORY* (1960).

to this version. The revised version, which contains several sections not in the original, can most easily be found in *Elegantia Juris*,⁶ a collection of Newark's writings. Newark begins his history with the English invasion of the twelfth century and focuses on the development of the court system in Ireland. Very useful sections on the types of statutes in effect in Ireland in 1921, and the law after 1921, were added to the revised version.

¶18 Other helpful background readings include the chapter "Development of the Irish Legal System" in *The Irish Legal System*,⁷ which is a good, brief overview, and A.G. Donaldson's *Some Comparative Aspects of Irish Law*,⁸ which is particularly strong on Irish constitutional history. Though articles on Irish legal history can be found in a great variety of journals, the three most useful sources are the *Irish Jurist*, the *Northern Ireland Legal Quarterly*, and *Irish Historical Studies*.

¶19 Researchers should be aware of two book-length bibliographies of Irish law. The Irish volume of *A Legal Bibliography of the British Commonwealth of Nations*⁹ lists books published through 1956. It is arranged by author, with a subject index at the back. An essential work for locating journal articles is Paul O'Higgins's *Bibliography of Periodical Literature Relating to Irish Law*,¹⁰ first published in 1966, but with 1973 and 1983 supplements. There are separate subject headings for legal history, constitutional history, and biography. O'Higgins has also published several selected bibliographies on Irish legal history in the *American Journal of Legal History*.¹¹

¶10 For recent articles on Irish legal history, researchers should consult *Writings on British and Irish Legal History*, which is published in each annual issue of the *Cambrian Law Review*. This bibliography was first published in the 1976 volume of the *Review* (volume 7), listing materials published in 1975. Each year's bibliography contains a separate section on Ireland and has the advantages of being relatively current and of including articles from journals other than law reviews.¹²

6. FRANCIS H. NEWARK, *Notes on Irish Legal History*, in *ELEGANTIA JURIS: SELECTED WRITINGS OF FRANCIS HEADON NEWARK* 203 (F.J. McIvor ed., 1973).

7. RAYMOND BYRNE & J. PAUL McCUTCHEON, *THE IRISH LEGAL SYSTEM* 19 (3d ed. 1996).

8. A.G. DONALDSON, *SOME COMPARATIVE ASPECTS OF IRISH LAW* (1957).

9. *4 A LEGAL BIBLIOGRAPHY OF THE BRITISH COMMONWEALTH OF NATIONS* (Leslie F. Maxwell & W. Harold Maxwell comps., 2d ed. 1957).

10. PAUL O'HIGGINS, *A BIBLIOGRAPHY OF PERIODICAL LITERATURE RELATING TO IRISH LAW* (1966; Supps. 1973 & 1983).

11. Paul O'Higgins, comp., *A Select Bibliography of Irish Legal History* (pts. 1-3), 4 *AM. J. LEGAL HIST.* 173 (1960), 8 *AM. J. LEGAL HIST.* 261 (1964), 13 *AM. J. LEGAL HIST.* 233 (1969). All the articles listed therein should also be contained in O'Higgins's book and its supplements. O'HIGGINS, *supra* note 10.

12. All of these bibliographies are available on the Web as one large text file, with each year's entries being added to the end. There is no subject organization. [*Writings on British and Irish Legal History*], at <http://www.aber.ac.uk/infolib/clr/history.txt> (last visited Nov. 26, 2000).

Irish Political History

“[T]he legal history of Ireland is, in some respects, also its political history.”¹³

¶11 Because the English used the law, particularly legislation, as their primary method of control in Ireland, it would be impossible to understand Irish legal history without knowing the basic elements of Ireland’s political history. A researcher unfamiliar with the political history will want to read some historical background material in addition to researching the law itself.

¶12 This section discusses some of the standard general histories of Ireland. Histories of specific time periods are mentioned in later sections. In addition, if it is required in order to understand a period in Irish legal history, each section gives a basic outline of the political history of the period.

¶13 Three series of books attempt to cover all of Irish history for the general reader. The first to be published was the *Gill History of Ireland*, an eleven-volume series written in the 1970s.¹⁴ Though written for the lay reader, many of the books in the Gill series are considered essential references for the time periods they cover and are frequently cited in the scholarly literature. Each contains a critical bibliography of the period that is helpful for evaluating works written prior to the mid-1970s. Another series, which covers all of Irish history in nine volumes, is the *Helicon History of Ireland*, published in the 1980s.¹⁵ Finally, a new series, the *Longman History of Ireland*, commenced publication in 1995 with a volume on early Ireland.¹⁶

¶14 The most recent and comprehensive history of Ireland is *A New History*

13. RAYMOND BYRNE & J. PAUL McCUTCHEON, *THE IRISH LEGAL SYSTEM* 9 (2d ed. 1989).

14. Books in the Gill History of Ireland series: GEARÓID MAC NIUCAILL, *IRELAND BEFORE THE VIKINGS* (1972); DONNCHADH Ó CORRÁIN, *IRELAND BEFORE THE NORMANS* (1972); MICHAEL DOLLEY, *ANGLO-NORMAN IRELAND* (1972); KENNETH NICHOLLS, *GAELIC AND GAELICISED IRELAND IN THE MIDDLE AGES* (1972); JOHN WATT, *THE CHURCH IN MEDIEVAL IRELAND* (1972); JAMES LYDON, *IRELAND IN THE LATER MIDDLE AGES* (1973); MARGARET MACCURTAIN, *TUDOR AND STUART IRELAND* (1972); EDITH MARY JOHNSTON, *IRELAND IN THE EIGHTEENTH CENTURY* (1974); GEARÓID Ó TUATHAIGH, *IRELAND BEFORE THE FAMINE, 1798–1848* (1972); JOSEPH LEE, *THE MODERNISATION OF IRISH SOCIETY, 1848–1918* (1973); JOHN A. MURPHY, *IRELAND IN THE TWENTIETH CENTURY* (1975).

15. Books in the Helicon History of Ireland series: ROBIN FRAME, *COLONIAL IRELAND, 1169–1369* (1981); ART COSGROVE, *LATE MEDIEVAL IRELAND, 1370–1541* (1981); NICHOLAS P. CANNY, *FROM REFORMATION TO RESTORATION: IRELAND, 1534–1660* (1987); PATRICK J. CORISH, *THE CATHOLIC COMMUNITY IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES* (1981); DAVID DICKSON, *NEW FOUNDATIONS: IRELAND 1660–1800* (1987); DONAL McCARTNEY, *THE DAWNING OF DEMOCRACY: IRELAND 1800–1870* (1987); PAURIC TRAVERS, *SETTLEMENTS AND DIVISIONS: IRELAND, 1870–1922* (1988); RONAN FANNING, *INDEPENDENT IRELAND* (1983); D.W. HARKNESS, *NORTHERN IRELAND SINCE 1920* (1983).

16. DÁIBHÍ Ó CRÓINÍN, *EARLY MEDIEVAL IRELAND, 400–1200* (1995). One other book has been published in the series to date: STEVEN G. ELLIS, *IRELAND IN THE AGE OF THE TUDORS, 1447–1603* (1998) (originally published as STEVEN G. ELLIS, *TUDOR IRELAND: CROWN, COMMUNITY, AND THE CONFLICT OF CULTURES, 1470–1603* (1985)).

of Ireland,¹⁷ which takes a more scholarly approach than the titles above. It is projected to be a ten-volume set, consisting of seven volumes of text and three of chronologies, maps, bibliographies, etc. Three volumes remain to be published, including those on early Ireland, Ireland from 1921 to the present, and the bibliographical volume. Each volume is made up of contributed chapters by a number of historians and an extensive, unannotated bibliography. This project provides a comprehensive restatement of Irish history, but it has not been immune from criticism.¹⁸ A particular problem has been the long delay between the projected publication date and actual publication. Though most authors revised their chapters before publication, the lag has made the series seem outdated to some.

¶15 The length of the volumes in *A New History of Ireland* (each is about 1000 pages) limits its value as simple background reading. Its best use is for reference on a particular topic. Readers seeking a more manageable overview of Irish history may prefer the books in the other series mentioned previously or a one-volume overview such as *The Oxford History of Ireland*¹⁹ or *The Course of Irish History*.²⁰ Both of these are collections of chapters by historians on different periods of Irish history, and both contain useful bibliographies. The recently published *Oxford Companion to Irish History*²¹ contains more than 1800 entries on the people and events in Irish history, and is useful when a brief explanation or reference is called for. Books covering specific periods of the history of Ireland are referenced in the bibliographic sources cited in the following paragraphs.

¶16 The most comprehensive bibliography of books and articles on Irish history (though it does not include articles from most law journals) is *Writings on Irish History*, compiled and published by the Committee on Irish Historical Sciences. From 1939 to 1978, the bibliography was published annually in the journal *Irish Historical Studies*. From 1978 to 1983, the bibliography is available only as a separate annual microfiche publication; since 1984, it has been published as a separate monograph. There is, however, rather a lengthy delay in publication: the latest avail-

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17. A NEW HISTORY OF IRELAND (T.W. Moody et al. eds., 1976-). Projected to be ten volumes, the volumes published so far are: Vol. II: *Medieval Ireland 1169-1534* (Art Cosgrove ed., 1987); Vol. III: *Early Modern Ireland 1534-1691* (T.W. Moody et al. eds., 1976); Vol. IV: *Eighteenth-Century Ireland, 1691-1800* (T.W. Moody & W.E. Vaughn eds., 1986); Vol. V: *Ireland under the Union: I, 1801-70* (W.E. Vaughn ed., 1989); Vol. VI: *Ireland under the Union: II, 1870-1921* (W.E. Vaughn ed., 1996); Vol. VIII: *A Chronology of Irish History to 1976* (1982); and Vol. IX: *Maps, Genealogies, Lists* (1984).
 18. See, e.g., C.A. Empey, Book Review, 25 IRISH HIST. STUD. 423 (1987) (reviewing vol. II, *Medieval Ireland*); Marianne Elliott, Book Review, 25 IRISH HIST. STUD. 427 (1987) (reviewing vol. IV, *Eighteenth-Century Ireland*). See also R.F.V. Heuston, *Legal History and the Author: Some Practical Problems of Authorship*, in THE IRISH LEGAL HISTORY SOCIETY: INAUGURAL ADDRESSES 19, 24 (W.N. Osborough ed., 1989) (discussing the lack of legal history in this series).
 19. THE OXFORD HISTORY OF IRELAND (R.F. Foster ed., 1989).
 20. THE COURSE OF IRISH HISTORY (F.X. Martin ed., 4th ed. 1995). Readers may also see references to what was formerly the standard one-volume Irish history, EDMUND CURTIS, A HISTORY OF IRELAND (6th ed. 1950), known particularly for its nationalist point of view.
 21. THE OXFORD COMPANION TO IRISH HISTORY (S.J. Connolly ed., 1998).

able volume covers 1993 and 1994, and was published in 1999. Organization of entries is either under a general category, if the material covers more than one chronological period, or by relevant era of history. Thus, all articles about medieval Ireland are in one section. Because there are no subject divisions, locating articles on legal history can be a time-consuming process. The older volumes are not even divided chronologically, but simply consist of one alphabetical list.

¶17 The series of bibliographies on British history issued under the direction of the American Historical Association and the Royal Historical Society of Great Britain all contain sections on Ireland.²² Unfortunately, most of the volumes were published between twenty and forty years ago.

¶18 There are two other general bibliographic sources that, although somewhat out of date, provide comprehensive coverage of their material. The first is *Manuscript Sources for the History of Irish Civilisation*,²³ a multivolume set and supplement, which indicates the existence and location of manuscripts on Irish history. The other is *Sources for the History of Irish Civilisation: Articles in Irish Periodicals*.²⁴ This set covers all English language periodicals published in Ireland between approximately 1800 and 1969.

Early Irish Law

Description of Early Irish Law

¶19 The earliest known form of law in Ireland is usually called either brehon law or early Irish law.²⁵ The term *brehon* comes from the Irish word *brithem*, meaning jurist.²⁶ The brehons were more like arbitrators than judges, since the parties were required to agree in advance to abide by their judgments and there was no official enforcement of decisions. The brehons were the descendants of the *fili*, who were the poets or historians of the druids.²⁷ Much of the power of the brehons stemmed

22. BIBLIOGRAPHY OF BRITISH HISTORY: TUDOR PERIOD, 1485–1603 (Conyers Read ed., 2d ed. 1959); BIBLIOGRAPHY OF BRITISH HISTORY: STUART PERIOD, 1603–1714 (Mary F. Keeler ed., 2d ed. 1970); BIBLIOGRAPHY OF BRITISH HISTORY: THE EIGHTEENTH CENTURY, 1714–1789 (Stanley Pargellis & D.J. Medley eds., 1951); BIBLIOGRAPHY OF BRITISH HISTORY 1789–1851 (Lucy M. Brown & Ian R. Christie eds., 1977); BIBLIOGRAPHY OF BRITISH HISTORY 1851–1914 (H.J. Hanham comp. & ed., 1976); A BIBLIOGRAPHY OF BRITISH HISTORY, 1914–1989 (Keith Robbins comp. & ed., 1996). A BIBLIOGRAPHY OF ENGLISH HISTORY TO 1485 (Edgar B. Graves ed., 1975) contains entries for Ireland, although not in a separate section.

23. MANUSCRIPT SOURCES FOR THE HISTORY OF IRISH CIVILISATION (Richard J. Hayes ed., 1965) (11 vols.). Volume 6 contains the subject index entries for Law, which has twelve subdivisions, including Brehon Law. A three-volume supplement covers 1965–75.

24. SOURCES FOR THE HISTORY OF IRISH CIVILISATION: ARTICLES IN IRISH PERIODICALS (Richard J. Hayes ed., 1970) (9 vols.).

25. In many articles about this period, when there were two existing legal systems, brehon law is often simply called Irish law, in contrast to English or common law. See NEWARK, *supra* note 6, at 224.

26. Eoin MacNeill, *Ireland and Wales in the History of Jurisprudence* (pt. 2), 16 STUDIES 605, 612 (1927).

27. Eoin MacNeill, *Ireland and Wales in the History of Jurisprudence* (pt. 1), 16 STUDIES 245, 248 (1927); KATHLEEN HUGHES, EARLY CHRISTIAN IRELAND: INTRODUCTION TO THE SOURCES 165 (1972).

from their descent from druidic traditions and their reliance on ancient laws that had been passed down for centuries.²⁸

¶20 One characteristic of early Irish law was the claim by the brehons that the law was immutable.²⁹ However, D.A. Binchy, a leading scholar on brehon law, concluded that the brehons did in fact alter the law to fit changing times and circumstances.³⁰

¶21 Early Irish law is thought to have existed from at least the sixth century A.D., and it continued to be used until early in the seventeenth century. Almost everything known about the legal system comes from manuscripts known as the law-tracts, which are transcriptions of the laws created at ancient law schools.³¹ The manuscripts contained the ancient “text” of the law, along with glosses and commentaries. Although much of the native Irish law dates from the seventh and eighth centuries, none of the manuscripts are earlier than the twelfth century, and most of those that still exist date from the fourteenth to the sixteenth centuries.³² The laws were not statutes enacted by a legislative body, but rather the written version of oral rules that had been passed down for generations.³³

¶22 The ancient Irish law schools were generally family operations, with the teachers also serving as brehons in legal disputes. As the law texts were studied in these law schools, commentaries and glosses continued to be added.³⁴ Many manuscripts are extant only in fragments, although some contain complete texts of certain tracts. Within these manuscripts are three types of material: the text, generally thought to have been originally written in the seventh and eighth centuries and in Old Irish; glosses, mainly from the twelfth to sixteenth centuries, which are definitions of words or phrases; and the commentary, from the same period as the glosses, explaining the text.³⁵ Generally the text is written in large

28. See D.A. Binchy, *Secular Institutions*, in EARLY IRISH SOCIETY 52, 62 (Myles Dillon ed., 1954). According to Binchy, “The Irish jurists issue no commands; they simply formulate what according to them has been traditionally followed from time immemorial, though beyond doubt they sometimes use their privileged status to remould the traditions according to their own ideas.” D.A. Binchy, *Irish History and Irish Law* (pt. 1), 15 STUDIA HIBERNICA 7, 33 (1975).

29. There has been some scholarly debate as to whether Irish law by the Middle Ages had become an antiquated system because it relied on laws that remained unchanged for hundreds of years, or whether in actuality the law adapted to changing times and remained a functioning legal system. For an article arguing that it remained viable into the sixteenth century, see Nerys Patterson, *Brehon Law in Late Medieval Ireland: ‘Antiquarian and Obsolete’ or ‘Traditional and Functional’?* 17 CAMBRIAN MEDIEVAL CELTIC STUD. 43 (1989). The opposing view is stated in Kenneth Nicholls, *Gaelic Society and Economy in the High Middle Ages*, in 2 A NEW HISTORY OF IRELAND, *supra* note 17, at 397, 429.

30. See, e.g., D. A. Binchy, *Introduction*, in 1 CORPUS IURIS HIBERNICI viii (D.A. Binchy ed., 1978).

31. For example, the CORPUS IURIS HIBERNICI (D.A. Binchy ed., 1978) (*see infra* ¶ 29) is an edition of only those manuscripts that originated in the brehon law schools.

32. FERGUS KELLY, A GUIDE TO EARLY IRISH LAW 225 (1988).

33. See D.A. Binchy, *The Linguistic and Historical Value of the Irish Law Tracts*, 29 PROC. BRIT. ACAD. 195, 214 (1943), *reprinted in* CELTIC LAW PAPERS 71, 93 (D. Jenkins ed., 1973).

34. See KELLY, *supra* note 32, at 249–51.

35. A good description of the manuscripts, with several photographs, can be found in *id.* at 225–31.

script. The gloss usually appears between the lines or underneath the text (depending on how much of it there is in comparison to the text), and the commentary is written underneath the text in smaller script.³⁶

¶23 Because the “canonical” law or “ancient stratum” part of the text continued to be transcribed in Old Irish, scholars have been able to distinguish the older parts of the texts and learn what the law was like in the seventh and eighth centuries. However, because the scribes did not understand the Old Irish they were transcribing, errors crept into the manuscripts.³⁷ One task for modern scholars has been to create accurate versions of the laws by piecing together various manuscript versions.

Publication of Early Irish Law

¶24 For scholars working with the text of the early laws, there are two comprehensive “primary” sources: the *Ancient Laws of Ireland*,³⁸ published in six volumes between 1865 and 1901, and D.A. Binchy’s *Corpus Iuris Hibernici*,³⁹ also in six volumes and published in 1978. Both of these sets were intended to present the full text of the brehon laws. The *Ancient Laws of Ireland* attempted to provide both an edited version and a translation of the Irish law texts, while Binchy’s aim was to prepare a “diplomatic” edition, that is, one that simply presented the language of all existing manuscripts so that later scholars could more easily prepare edited texts and translations.

Ancient Laws of Ireland

¶25 The work on the *Ancient Laws of Ireland* began in the mid-nineteenth century, when a commission was appointed to “effect the transcription and translation of the Ancient Laws of Ireland.”⁴⁰ The Commissioners appointed two well-known Irish scholars, John O’Donovan and Eugene O’Curry,⁴¹ to do the work. At this time, Old Irish was virtually unknown to contemporary scholars, but, even with this constraint, O’Donovan and O’Curry did a commendable job, preparing seventeen volumes of transcripts and twenty-five volumes of translations.⁴²

¶26 Unfortunately, both O’Donovan and O’Curry died before any of their material could be published, and succeeding editors have been called incompetent

36. *Id.*

37. *Id.* at 225.

38. ANCIENT LAWS OF IRELAND (1865–1901).

39. CORPUS IURIS HIBERNICI, *supra* note 31.

40. D.A. BINCHY, *supra* note 33, at 197, reprinted in CELTIC LAW PAPERS at 75.

41. A practice non-Irish readers may find confusing at first is that a person’s name may be given in either its English or Irish form. Therefore Eugene O’Curry may also be referred to as Eoghan Ó Comhraidhe and John O’Donovan as Sean Ó Donabháin. See, e.g., Liam Ronayne, *Seandlithe Na nGael: An Annotated Bibliography of the Ancient Laws of Ireland*, 17 IRISH JURIST (n.s.) 131, 132 (1982).

42. D.A. Binchy, *supra* note 33, at 197, reprinted in CELTIC LAW PAPERS at 75.

and worse.⁴³ The later editors decided to choose among the transcriptions, not always selecting the best version of the text for publication. As Binchy put it:

The first four volumes were edited by men who knew little or nothing of Old Irish and to whom Irish law was a book sealed with seven seals. As for the lengthy editorial introductions [some of which run over 100 pages], it is not unfair to call them worse than useless since they have only served to mislead eminent jurists.⁴⁴

The fifth volume, edited by Robert Atkinson, is considered marginally better; the sixth volume is a glossary compiled by Atkinson.

Corpus Iuris Hibernici

¶127 Until relatively recently, the *Ancient Laws of Ireland* was the only source with which all scholars had to work, unless they had access to the few copies that had been made of O'Donovan's and O'Curry's transcripts or looked at the manuscripts themselves. Binchy frequently stated that the inaccuracy of the *Ancient Laws of Ireland* caused earlier historians to formulate largely invalid theories about early Ireland.⁴⁵

¶128 In the twentieth century, scholars of early Irish law began to look back at the manuscripts themselves to try to create better editions and translations. Some of the early leaders in this field were Rudolf Thurneysen (who translated the laws from Irish into German) and D.A. Binchy. This work requires a knowledge of Old Irish, as well as later versions of the language, and in this century the study of the Irish law tracts has been dominated by linguists. Binchy was one of the few with legal training, and he wrote of the need for people with both historical and linguistic skills to enter the field.⁴⁶

¶129 While Binchy worked on editions and translations of portions of the ancient laws, he also began a thirty-year project to produce the "diplomatic" edition of all existing manuscripts that had been produced at the law schools, the *Corpus Iuris Hibernici*. This is an unedited version of the manuscripts, with no additional commentary. Many thought Binchy's talents would be better used in editing and translating, while mere transcription was left for others.⁴⁷ However, as Charles Edwards points out in his review of the set, Binchy's work in spelling out the abbreviations made by the scribes was a task more difficult than it might appear.⁴⁸ This edition was published as the *Corpus Iuris Hibernici* in 1978, and is now the main source for research into the language of the early Irish laws. It is

43. *Id.*

44. *Id.*

45. *E.g., id.* at 196, reprinted in *CELTIC LAW PAPERS* at 74–75.

46. D.A. Binchy, *Irish History and Irish Law* (pt. 1), *supra* note 28, at 14.

47. See T.M. Charles Edwards, *Review Article: The Corpus Iuris Hibernici*, 20 *STUDIA HIBERNICA* 141, 143 (1980).

48. *Id.* at 143–44.

also the standard citation reference both for those writing about the laws and those producing edited texts and translations.⁴⁹

¶130 All of the manuscripts that Binchy used in compiling his *Corpus Iuris Hibernici* are either in Ireland (at Trinity, the Royal Irish Academy, and the National Library of Ireland) or England (at the British Library and the Bodleian in Oxford), with a lone manuscript in Copenhagen.⁵⁰ At the beginning of the *Corpus Iuris Hibernici*, Binchy included a list of the manuscripts he used and where each is printed in the *Corpus Iuris Hibernici*.⁵¹

¶131 While the manuscripts are available to researchers visiting the libraries where they are held, they are useful only for those familiar with the Irish language. Generally the manuscripts have been examined by scholars trying to create new textual editions. (Because the manuscripts are incomplete and partially damaged or obscured, creating a text is not simply a matter of transcribing what is on the page.)

Other Publications

¶132 Much current work in early Irish law builds on the *Corpus Iuris Hibernici*. The availability of a published, standardized version of the manuscripts has made it easier for scholars to edit and translate specific tracts. For example, *Bechbretha*⁵² makes available the text on the law of early Irish beekeeping. This book, the first in the Early Irish Law Series⁵³ from the Dublin Institute for Advanced Studies, includes facing pages of edited text and translation, followed by notes about the text. Neil McLeod's *Early Irish Contract Law*⁵⁴ is similar, but also includes a narrative discussing the substance of early Irish contract law and, in effect, serves as a treatise on the subject. Other writers have used their edited versions of texts to advance new theories about early Irish law. For example, *The Laws of the Irish*⁵⁵ uses the text of the law to argue that the brehon laws were strongly influenced by Christianity and canon law.⁵⁶

Analysis and Interpretation of Early Irish Law

¶133 The essential introductory work on early Irish law is Fergus Kelly's *Guide to Early Irish Law*.⁵⁷ Intended for the lay reader, the *Guide* contains an excellent

49. See, e.g., KELLY, *supra* note 32, at 264 (listing editions and translations of the law texts).

50. Most of these libraries have published guides to the Irish manuscripts in their collections, and the guides contain detailed descriptions of each manuscript, including content and condition. See, e.g., CATALOGUE OF THE IRISH MANUSCRIPTS IN THE LIBRARY OF TRINITY COLLEGE, DUBLIN (T.K. Abbott & E.J. Gwynn comps., 1921 (with addenda from a later date)).

51. I CORPUS IURIS HIBERNICI, *supra* note 31, at xxvi.

52. BECHBRETHA (Thomas Charles Edwards & Fergus Kelly eds., 1983).

53. Other books in the series are URAICECHT NA RÍAR: THE POETIC GRADES IN EARLY IRISH LAW (Liam Breatnach ed., 1987); KELLY, *supra* note 32; and FERGUS KELLY, EARLY IRISH FARMING (1997).

54. NEIL MCLEOD, EARLY IRISH CONTRACT LAW (n.d. [1993?])

55. Donnchadh Ó Corráin et al., *The Laws of the Irish*, 3 PERITIA 382 (1984).

56. See Fergus Kelly, *Early Irish Law: The Present State of Research*, 29 ÉTUDES CELTIQUES 15, 21 (1992).

57. KELLY, *supra* note 32.

introduction to the field and an overview of the law. The last part of the book focuses on the physical texts and their production, describing the manuscripts and the law schools where they were written. An appendix lists all the law tracts, stating their subject(s), where they are in *Corpus Iuris Hibernici*, and whether they have been edited or translated.⁵⁸ This is the most helpful source for locating a translation of a particular text, although the appendix is more than ten years old.

¶34 The field of early Irish law was long dominated by D.A. Binchy. In addition to his work editing texts and discussing the substance of the laws, Binchy wrote many articles explaining the brehon law in general. Two articles that provide a good introduction for the nonspecialist to both the laws and the development of scholarship in brehon law are *The Linguistic and Historical Value of the Irish Law Tracts*⁵⁹ and *Irish History and Irish Law*.⁶⁰ Binchy's articles are very helpful to the novice researcher; however, in recent years scholars have come to disagree with one of his main tenets: that the early Irish lawyers were non-Christians.⁶¹ Therefore, researchers who want to familiarize themselves with the latest developments in this area will need to read materials by such scholars as Liam Breatnach,⁶² Kim McCone,⁶³ and Donnchadh Ó Corráin.⁶⁴ There are good discussions of this literature in Kelly's *Guide to Early Irish Law*⁶⁵ and in the introductory sections of Stacey's *The Road to Judgment*.⁶⁶

¶35 There are two bibliographies that researchers interested in early Irish law will find helpful. The first is Barbara Pawloski's *Gaelic Law in Early and Medieval Ireland*,⁶⁷ which is quite comprehensive, though not annotated. A much more selective, but annotated, bibliography is Liam Ronayne, *Seandlithe Na nGael: An Annotated Bibliography of the Ancient Laws of Ireland*.⁶⁸

¶36 Numerous articles have been written on the substance of brehon law. Pawloski's bibliography contains citations to many of these, while more recent

58. *Id.* at 264.

59. Binchy, *supra* note 33.

60. D.A. Binchy, *Irish History and Irish Law* (pts. 1 & 2), 15 *STUDIA HIBERNICA* 7 (1975), 16 *STUDIA HIBERNICA* 7 (1976).

61. *See, e.g.*, Donnchadh Ó Corráin et al., *supra* note 55; Liam Breatnach, *Canon Law and Secular Law in Early Ireland: The Significance of Bretha Nemed*, 3 *PERITIA* 439 (1984).

62. *See, e.g.*, Liam Breatnach, *Lawyers in Early Ireland*, in *BREHONS, SERJEANTS AND ATTORNEYS: STUDIES IN THE HISTORY OF THE IRISH LEGAL PROFESSION 1* (Daire Hogan & W.N. Osborough eds., 1990).

63. *See, e.g.*, Kim McCone, *Dubthach Maccu Lugair and a Matter of Life and Death in the Psuedo-Historical Prologue to the Senchas Már*, 5 *PERITIA* 1 (1986).

64. *See, e.g.*, Donnchadh Ó Corráin, *Irish Law and Canon Law*, in *IRELAND UND EUROPA 157* (Próinséas Ní Chatháin & Michael Richter eds., 1984).

65. KELLY, *supra* note 32, at 232–36 (discussing the origins and authors of the early Irish law-texts).

66. ROBIN CHAPMAN STACEY, *THE ROAD TO JUDGMENT: FROM CUSTOM TO COURT IN MEDIEVAL IRELAND AND WALES 2–3* (1994).

67. Pawloski, *supra* note 2.

68. Ronayne, *supra* note 41. Some corrections and additions can be found in Neil McLeod, *Ronayne's "Seandlithe Na nGael": A Supplement*, 18 *IRISH JURIST* (n.s.) 360 (1983).

articles can be found in *Writings on British and Irish Legal History*⁶⁹ in the *Cambrian Law Review* and in other periodical indexes.

The Medieval Period through 1600: Existence of Two Legal Systems

¶137 The English came to Ireland between 1169 and 1172. The English (or actually Anglo-Norman⁷⁰) settlers brought with them a nascent system of common law. England wanted the English settlers to be governed by the common law rather than native Irish law, but the brehon law system was allowed to remain in use by the native population. For almost 500 years, the two systems coexisted, and the brehon law was not extinguished until the Tudor conquest of the seventeenth century.

¶138 This section addresses how the common law was applied to Ireland during this time period (the period until 1534 is usually referred to as the medieval period), the conflict between the two systems, and the influence each may have had on the other.

¶139 The standard history of the medieval period, in addition to volume two of the *New History of Ireland*,⁷¹ is *A History of Medieval Ireland* by A.J. Otway-Ruthven.⁷² However, historians also frequently cite to Curtis's *History of Medieval Ireland*⁷³ and Orpen's *Ireland Under the Normans*.⁷⁴ Curtis and Orpen have both been criticized, particularly with regard to their discussions of the shrinking English influence in Ireland during the fourteenth century. In *Approaches to the History of Fourteenth-Century Ireland*,⁷⁵ J.A. Watt succinctly discusses the historiography of this period, including criticisms of Curtis's and Orpen's works.⁷⁶

69. See *supra* ¶ 10 for a discussion of this bibliography.

70. Numerous terms are used in historical writings to describe the first Norman settlers of Ireland, especially when describing them in relation to the later English settlers: e.g., "Old English," "Anglo-Norman," or "the English of Ireland" (as opposed to "the English of England"). See Art Cosgrove, *The Writing of Irish Medieval History*, 27 IRISH HIST. STUD. 97, 102–04 (1990) (discussing the various terms and why *A New History of Ireland* chose to use the term "Anglo-Irish").

71. See *supra* note 17 and ¶ 14.

72. A.J. OTWAY-RUTHVEN, *A HISTORY OF MEDIEVAL IRELAND* (2d ed. 1980) (covering 1185–1495).

73. EDMUND CURTIS, *A HISTORY OF MEDIEVAL IRELAND: FROM 1086 TO 1513* (3d ed. 1978).

74. GODDARD H. ORPEN, *IRELAND UNDER THE NORMANS* (Clarendon Press 1968) (1911–20) (covering 1169–1333).

75. J.A. Watt, *Approaches to the History of Fourteenth-Century Ireland*, in 2 A NEW HISTORY OF IRELAND, *supra* note 17, at 303, 303–04.

76. There has been a debate in Irish historical circles on the historiography of medieval Ireland relating to the "nationalism" of various historians and the writings about the state of the English colony in Ireland in the late Middle Ages. For an interesting set of articles, see Michael Richter, *The Interpretation of Medieval Irish History, 1272–1377*, 24 IRISH HIST. STUD. 289 (1985); Steven G. Ellis, *Nationalist Historiography and the English and Gaelic Worlds in the Late Middle Ages*, 25 IRISH HIST. STUD. 1 (1986); Cosgrove, *supra* note 70 (replying to criticisms by Richter and Ellis; Cosgrove edited the medieval volume of *A New History of Ireland*). This debate is particularly relevant to those interested in Irish constitutional history, as Steven Ellis has written extensively on the relationships among the Irish Parliament, the English Parliament, and the Crown. See, e.g., S.G. Ellis, *Parliament and Community in Yorkist and Tudor Ireland*, in PARLIAMENT & COMMUNITY 43 (Art Cosgrove & J.I. McGuire eds., 1983).

¶140 P.W.A. Asplin prepared the bibliography for the medieval volume of *A New History of Ireland*,⁷⁷ which is the most current and comprehensive, although unannotated. An earlier version,⁷⁸ published in 1971 as an ancillary publication to the *New History*, contains annotations and remains useful for that reason. In addition to listing sources specific to medieval Ireland, it covers general histories of Ireland and general bibliographic works.⁷⁹

Development of the Common Law

¶141 The imposition of the common law was a gradual process in Ireland for a couple of reasons. First, the common law was not yet fully developed in England, and Irish law developed in tandem with the English. In fact, it can be argued that Ireland forced many developments in the common law because of the special circumstances of importing a developing legal system to a colony.⁸⁰ Second, the English did not conquer all of Ireland until the seventeenth century, so there were two legal systems coexisting on the island for hundreds of years. This led to situations where one system influenced the other and the practices of one were adopted by the other.⁸¹

Right of Irish to English Law (1331)

¶142 Though the English brought the common law to Ireland in the twelfth century, the common law was used only to govern the relations among the English. As F.H. Newark wrote:

[T]here was certainly no intention on anybody's part to give the mass of Irish people the right of access to the English king's courts. Outside Leinster the Irish kings continued to hold their kingdoms as nominal vassals of the King of England, and their Irish subjects remained under Irish customary law.⁸²

As the years went by, however, many Irish living within the Pale⁸³ felt themselves under a disability because they could not access the king's justice. In 1276 or 1277 there was even an offer by the Irish to buy the right to English law for all the Irish for some amount between 7,000 and 8,000 marks.⁸⁴ By 1280 the offer had gone up

77. P.W.A. Asplin, *Bibliography*, in 2 A NEW HISTORY OF IRELAND, *supra* note 17, at 827.

78. P.W.A. ASPLIN, MEDIEVAL IRELAND C. 1170–1495: A BIBLIOGRAPHY OF SECONDARY WORKS (1971) (Ancillary Publication I to *A New History of Ireland*).

79. The policy for *A New History of Ireland* is that the bibliographies in individual volumes do not contain works dealing with time periods covering more than two volumes of the series. These general works will be in the bibliographic volume, volume 10, which has not yet been published as of January 2001.

80. See Paul Brand, *Ireland and the Literature of the Common Law*, 16 IRISH JURIST (n.s.) 95, 112 (1981).

81. See *infra* ¶¶ 49–50 for sources discussing the interaction of the two legal systems.

82. NEWARK, *supra* note 6, at 106. Leinster is the province of Ireland that contains Dublin.

83. The Pale is the name given to the area controlled by the English around Dublin. See DONALDSON, *supra* note 8, at 38.

84. See Jocelyn Otway-Ruthven, *The Request of the Irish for English Law, 1277–80*, 6 IRISH HIST. STUD. 261, 261–62 (1949).

to 10,000 marks for all the Irish to have the “common law which the English have and use in Ireland and to be treated as these English are treated, alive and dead, in body and in real and personal property.”⁸⁵ Nothing further seems to have happened on the matter,⁸⁶ and it has been theorized that the purchase was held up by the Anglo-Irish, who did not want to give the Irish rights under the common law.⁸⁷

¶143 Until 1321 it was unclear which law the native Irish would be governed by in criminal matters. Because the brehon law usually imposed fines rather than punishment, even for serious offenses such as murder, Irish (as well as English) defendants naturally preferred criminal punishment under the Irish system. In 1321 those native Irish who had the right to English law were declared liable under English law as it governed “life and limb.” Previously they had the benefit of English law for civil matters and also the benefits of the Irish law in criminal matters.⁸⁸

¶144 In 1331 the common law was extended to all Irish living in English areas.⁸⁹ Though many historians accept that lack of access to the common law courts was a great disadvantage for the native Irish, some have questioned whether the Irish really felt this was a disability or whether they were just as happy under the authority of the brehon law.⁹⁰ Bryan Murphy has also questioned the effectiveness of the ordinance of 1331, since records show that individual grants of English law continued to be made even after it was enacted.⁹¹

Statutes of Kilkenny

¶145 In 1366, the Parliament in Kilkenny called by Lionel, Duke of Clarence, enacted a series of statutes designed to prohibit interaction between the native Irish and the Anglo-Irish, unless the Irish chose to live within the English colony and adopt English ways.⁹² The Statutes of Kilkenny consisted of thirty-six laws,⁹³ which prohibited such things as intermarriage between the Anglo-Irish and the native Irish, use of the Irish language, and certain types of Irish war games. Though

85. *Id.* at 263.

86. *Id.* at 265.

87. See G.J. HAND, ENGLISH LAW IN IRELAND 1290–1324, at 215 (1967); James Lydon, *Ireland and the English Crown, 1171–1541*, 29 IRISH HIST. STUD. 281, 288 (1995).

88. G.J. Hand, *The Status of the Native Irish in the Lordship of Ireland, 1272–1331*, 1 IRISH JURIST (n.s.) 93, 112 (1966). *But cf.* Bryan Murphy, *The Status of the Native Irish After 1331*, 2 IRISH JURIST (n.s.) 116, 119–20 (1967) (arguing that the ordinance can also be interpreted as giving the Irish protection under law against injuries to life and limb).

89. See Murphy, *supra* note 88, at 116 (citing STATUTES AND ORDINANCES, AND ACTS OF THE PARLIAMENT OF IRELAND. KING JOHN TO HENRY V, at 324 (H.F. Berry ed., 1907)).

90. See generally Hand, *supra* note 88, at 94–98 (discussing the historiography of this issue in the writings of Curtis, Orpen, Otway-Ruthven, and others).

91. Murphy, *supra* note 88, at 121–22.

92. See CURTIS, *supra* note 20, at 231–36.

93. Sometimes these statutes are referred to as clauses of one Statute of Kilkenny. See, e.g., J.A. Watt, *The Anglo-Irish Colony under Strain, 1327–99*, in 2 A NEW HISTORY OF IRELAND, *supra* note 17, at 352, 382. Watt also mentions that H.F. Berry, in editing the statute, divided it into thirty-six sections rather than thirty-five, as had been done in the nineteenth century. *Id.* at 388.

many of the statutes dealt solely with the relations between the Irish and the Anglo-Irish, several dealt with questions common to both England and Ireland.⁹⁴ While the tone of the statutes implies a final triumph for the English colony in Ireland, the statutes were in fact passed at a time when the English Pale was at its weakest. They have been seen by historians as a last desperate act by the English to retain some control over what was left of the Lordship.⁹⁵

¶146 The text of the statutes is not included in any of the sets of the *Irish Statutes, Revised Edition*;⁹⁶ it has been speculated they were lost for some period, and no copy was available in Dublin.⁹⁷ The original version, in Norman French, along with the English translation, can be found in *Statutes and Ordinances, and Acts of the Parliament of Ireland. King John to Henry V.*⁹⁸ Portions, translated into English, are printed in *Irish Historical Documents, 1172–1922.*⁹⁹

Brehon Law in the Middle Ages

¶147 The English had established themselves in Ireland, but they had not conquered the whole island, and during the Middle Ages their influence waxed and waned. As discussed earlier, the native Irish legal system continued to function until the early seventeenth century.

¶148 Several worthwhile articles consider the nature of the native Irish legal system in its last stages. Gearóid Mac Niocaill's *Notes on Litigation in Late Irish Law*¹⁰⁰ discusses what he believes litigation was like in the late sixteenth century under brehon law. In *Brehon Law in Late Medieval Ireland: 'Antiquarian and Obsolete' or 'Traditional and Functional'?*¹⁰¹ Nerys Patterson considers whether brehon law was still a functional legal system in the Middle Ages or whether its reliance on tradition and the unchanging nature of the law had made it obsolete under changed social conditions, and concludes that the former was the case. Katherine Simms, in *The Brehons of Later Medieval Ireland*,¹⁰² describes the brehons operating at the same time as the English were imposing the common law

94. See G.J. Hand, *The Forgotten Statutes of Kilkenny: A Brief Survey*, 1 IRISH JURIST (n.s.) 299 (1966) (discussing the statutes dealing with questions common to England and Ireland and with reforming the administration of justice).

95. See, e.g., CURTIS, *supra* note 73, at 231–36. Until 1541, Ireland was a lordship rather than a kingdom, with the possibility that rule of Ireland could pass to someone other than the English ruler. However, in 1541 it was declared a kingdom under the rule of the King of England. See BRENDAN BRADSHAW, *THE IRISH CONSTITUTIONAL REVOLUTION OF THE SIXTEENTH CENTURY* 189 (1979).

96. See *infra* ¶¶ 86–90 for a discussion of the publication of Irish statutes.

97. David B. Quinn, *Government Printing and the Publication of the Irish Statutes in the Sixteenth Century*, 49 PROC. ROYAL IRISH ACAD., Sec. C, at 45, 70 (1943).

98. STATUTES AND ORDINANCES, AND ACTS OF THE PARLIAMENT OF IRELAND. KING JOHN TO HENRY V, *supra* note 89, at 430–69.

99. IRISH HISTORICAL DOCUMENTS, 1172–1922, at 52 (Edmund Curtis & R.B. McDowell eds., Barnes & Noble 1968) (1943).

100. Gearóid Mac Niocaill, *Notes on Litigation in Late Irish Law*, 2 IRISH JURIST (n.s.) 299–307 (1967).

101. Patterson, *supra* note 29.

102. Katherine Simms, *The Brehons of Later Medieval Ireland*, in BREHONS, SERJEANTS AND ATTORNEYS: STUDIES IN THE HISTORY OF THE IRISH LEGAL PROFESSION, *supra* note 62, at 51.

system. One of the best sources for a discussion of Gaelic society as a whole during the Middle Ages is Kenneth Nicholls's *Gaelic and Gaelicized Ireland in the Middle Ages*.¹⁰³

Relation of the Two Legal Systems

¶149 With two legal systems operating side by side, some interaction was inevitable. The law that resulted from a mixture of the two systems on the borders of the Pale was often referred to as the law of the march.¹⁰⁴ Each legal system also influenced the other. Gearóid Mac Niocaill has written several interesting articles on the influence of the common law and brehon law systems on each other.¹⁰⁵

¶150 The introductory chapter¹⁰⁶ to volume three of *A New History of Ireland* contains a general discussion of the state of the law in Ireland at the end of the medieval period and includes the claim that civil or Roman law seemed to have exerted a strong influence on brehon law.¹⁰⁷

The Palatinates

¶151 From the time of the original English conquest in the twelfth century until the seventeenth century there was a parallel system of law, in addition to brehon law and the common law, and thus another set of courts in what were called the palatinates or liberties.¹⁰⁸ The palatinates were lands given to nobles by the king, along with a delegation of royal authority for legal and administrative purposes.¹⁰⁹

¶152 Large areas of Ireland were designated as palatinates. The earls within them ran their own legal systems, which were based nominally on the common law, though it was alleged the earls used elements of both the common law and native Irish law, depending on which was more advantageous to them.¹¹⁰ With four exceptions (arson, rape, treasure-trove, and forestalling), the king's writ did not run in the palatinates.¹¹¹ A discussion of the liberties and how the law in them

103. NICHOLLS, *supra* note 14. Nicholls's approach has been criticized; see articles by Ellis and Richter cited *supra* note 76.

104. See G. Mac Niocaill, *The Interaction of Laws*, in *THE ENGLISH IN MEDIEVAL IRELAND* 105, 112 (James Lydon ed., 1982). Though frequently mentioned, no descriptions are available on the substance of the law of the march.

105. Gearóid Mac Niocaill, *The Contact of Irish and Common Law*, 23 *N. IR. LEGAL Q.* 16 (1972); Mac Niocaill, *supra* note 104.

106. D.B. Quinn & K.W. Nicholls, *Ireland in 1534*, in 3 *A NEW HISTORY OF IRELAND*, *supra* note 17, at 1.

107. "There is evidence the brehons were often well informed in Roman law, and although we cannot say whether it was actually taught in the same schools as the brehon law, it seems likely that it was." *Id.* at 27. *But cf.* W.N. Osborough, *Roman Law in Ireland*, 25–27 *IRISH JURIST* (n.s.) 212, 225 (1990–92), reprinted in W.N. OSBOROUGH, *STUDIES IN IRISH LEGAL HISTORY* 11, 23 (1999) (arguing that the evidence for the use of Roman law by the brehons is "debatable").

108. For a general description of the development of the palatinates, see J.A. Murnaghan, *The Lordship of Ireland and the Counties Palatine*, 2 *STUDIES* 846 (1913).

109. V.T.H. Delaney, *The Palatinate Court of the Liberty of Tipperary*, 5 *AM. J. LEGAL HIST.* 95, 97 (1961).

110. Mac Niocaill, *supra* note 104, at 110.

111. HAND, *supra* note 87, at 113.

interacted with the general legal system of Ireland can be found in Otway-Ruthven's *History of Medieval Ireland*.¹¹²

The Dominance of English Common Law

Historical Development

¶153 For historians, the defeat of Hugh O'Neill, the Earl of Tyrone, in 1603, and the Flight of the Earls in 1607 mark the end of the native Irish system and the beginning of Ireland's complete domination by England. Until the end of the sixteenth century, Ulster was considered the most unconquered and Gaelic part of Ireland by the English. This ended with the submission to the Crown by Hugh O'Neill in 1603 and his flight from Ireland, along with many other Gaelic nobles ("The Flight of the Earls"), in 1607.¹¹³

It was now possible for the crown to begin to give effect to its centuries-old aim of extirpating the social and political system of the native Irish, and of gathering into its own hands the private jurisdictions of the Irish chiefs. . . . For the first time, the native population as a whole was brought within the purview of English law, and the county framework was extended over the whole island.¹¹⁴

¶154 Ulster was now seen as susceptible to domination, and the English were determined to conquer and rule all of Ireland. With this goal, brehon law was outlawed in 1603.¹¹⁵ Beginning in the early seventeenth century, and until the Act of Union in 1800, Irish legal history is defined by England's determination to exterminate relics of the brehon law; the use of penal laws against Catholics; and struggles for power among the Irish Parliament, the Parliament at Westminster,¹¹⁶ and the Crown.¹¹⁷

¶155 General historical background on the period beginning with the seventeenth century can be found in Beckett's *The Making of Modern Ireland*.¹¹⁸ R.F. Foster's *Modern Ireland*¹¹⁹ concentrates on the atmosphere of the times and how subsequent events have affected the modern Irish view of that period. Louis Cullen's *The Emergence of Modern Ireland*¹²⁰ takes more of an economic perspective. W. Nial Osborough's review of recent writings on modern Irish legal his-

112. OTWAY-RUTHVEN, *supra* note 72, at 181–87.

113. See R.F. FOSTER, *MODERN IRELAND, 1600–1972*, at 36–45 (1988).

114. T.W. MOODY, *The Irish Parliament under Elizabeth and James I: A General Survey*, 45 *PROC. ROYAL IRISH ACAD.*, sec. C, at 41, 49–50 (1939).

115. PATTERSON, *supra* note 29, at 43.

116. Because this parliament has over the years been that of England, Great Britain, and the United Kingdom, in most cases I refer to it simply as the Parliament at Westminster.

117. On this issue, see *infra* ¶¶ 72–80.

118. J.C. BECKETT, *THE MAKING OF MODERN IRELAND, 1603–1923* (new ed. 1981).

119. FOSTER, *supra* note 113.

120. L.M. CULLEN, *THE EMERGENCE OF MODERN IRELAND, 1600–1900* (1981).

tory¹²¹ (from the sixteenth century forward) provides good sources for further research and indicates subject areas where further research would be fruitful.

¶156 Researchers may find Hans Pawlisch's book¹²² on this period enlightening as a study of how law can be used as a tool of imperialism. Pawlisch writes about Sir John Davies, who served as both Solicitor General and Attorney General of Ireland in the early part of the seventeenth century. He contends that many cases argued for the Crown by Davies were intended to complete the English conquest of Ireland by invalidating the native forms of landholding and descent.¹²³

¶157 After the English took control of Ireland, official policy was that the two legal systems would proceed in lock-step. However, this was not always possible because of differing conditions in the two countries.¹²⁴ There is an interesting discussion of the divergent substantive development of the English and Irish legal systems after the Act of Union¹²⁵ in 1800 in *The Legal Systems, North and South*.¹²⁶ The report points out that many British statutes enacted during the period of the Union dealt specifically with Ireland and could be seen as an attempt to solve Ireland's social problems using methods the legislators were not willing to experiment with in Great Britain.¹²⁷

¶158 In addition, even after the Act of Union, the legal system in Ireland was not identical to that of Great Britain. Because of the unrest in Ireland, many statutes were passed solely to deal with Irish problems and were in effect only in Ireland. In fact, the vast majority of all statutes for Ireland in the British statute books were passed in the nineteenth century.¹²⁸

Penal Laws

¶159 The term "penal laws" is used for a variety of statutes passed between the sixteenth and eighteenth centuries that were intended to convert the Irish to Protestantism and to penalize them if they remained Catholic. Penal laws prohibited Catholics from owning land and from practicing law, from voting or serving

121. W. Nial Osborough, *Recent Writing on Modern Irish Legal History*, 8 ZEITSCHRIFT FÜR NEUERE RECHTSGESCHICHTE 180 (1986).

122. HANS S. PAWLISCH, *SIR JOHN DAVIES AND THE CONQUEST OF IRELAND: A STUDY IN LEGAL IMPERIALISM* (1985). Davies was solicitor general in Ireland from 1603 to 1606 and attorney general from 1606 to 1619. *Id.* at 4. He also was the editor of the first set of published Irish court reports. *See infra* ¶ 91.

123. Davies had earlier written a tract in which he argued that one of the major reasons for the failure of the conquest was the failure of the English to give the benefits of the common law to the Irish. JOHN DAVIES, *A DISCOVERY OF THE TRUE CAUSES WHY IRELAND WAS NEVER ENTIRELY SUBDUED* (Irish University Press 1969) (1612). *See* Pawlisch, *supra* note 122, at 31.

124. *See* NEW IRELAND FORUM, *THE LEGAL SYSTEMS, NORTH AND SOUTH* 55 (n.d. [1984?]).

125. *See infra* ¶ 62 for a discussion of the Act of Union.

126. NEW IRELAND FORUM, *supra* note 124, at 9–11.

127. *Id.* at 9–10.

128. "[O]f the total corpus of statute law affecting Ireland enacted between 1310–1921, over 10,000 enactments, almost 6,500 were legislated in the 1801–1921 period." *Id.*

in Parliament. A Catholic could not even own a horse worth more than £5.¹²⁹ Though many of the penal laws were repealed at the end of the eighteenth century, it was not until 1829, under pressure from Daniel O'Connell and his supporters, that Catholics were again allowed to serve in Parliament.¹³⁰

¶160 Unfortunately, no source considers the penal laws in detail throughout their period of existence, although there is a good overview in *A New History of Ireland*.¹³¹ The researcher will find them mentioned in most general histories of the time, while more specialized discussions focus on specific time periods. For example, Edwards's *Church and State in Tudor Ireland*¹³² covers the period until 1603, although it is rather dated. Maureen Wall's pamphlet, *The Penal Laws*,¹³³ focuses mainly on the eighteenth century. A recent article by Charles McGrath¹³⁴ considers the circumstances that led to the passing of several penal laws at the end of the seventeenth century (including the notorious one prohibiting horse ownership referred to above) and concludes that they were an understandable reaction to the aftermath of the Williamite war.

¶161 Wall's work, though limited in its coverage, was considered to be pioneering in its investigation of how strictly the penal laws were actually enforced. This question has long been debated by historians, along with the question of the true economic and political effect of the penal laws. For example, Louis Cullen has argued that the transfer of land ownership in the eighteenth century from Catholics to Protestants was caused by factors other than the existence of the penal laws.¹³⁵

The Nineteenth Century

¶162 In 1800, the Irish Parliament voted itself out of existence by agreeing to the Act of Union,¹³⁶ which provided that Ireland would become part of the United Kingdom and members of Parliament for Ireland would serve in the Parliament at Westminster.¹³⁷ From then until Irish independence in 1922, the governance and legal system of Ireland were ostensibly the same as that of Great Britain.¹³⁸

¶163 Perhaps because of the union of the legal systems of Britain and Ireland, little has been written about the Irish legal system during the nineteenth century.

129. An Act for the Better Secureing the Government by Disarming Papists and Reputed Papists, 1 W. & M., c. 15 (1688) (Eng.).

130. R.F. Foster, *Ascendancy and Union*, in THE OXFORD HISTORY OF IRELAND, *supra* note 19, at 158.

131. J.G. Simms, *The Establishment of Protestant Ascendancy, 1691–1914*, in 4 A NEW HISTORY OF IRELAND, *supra* note 17, at 1, 16–21.

132. ROBERT DUDLEY EDWARDS, CHURCH AND STATE IN TUDOR IRELAND: A HISTORY OF PENAL LAWS AGAINST IRISH CATHOLICS 1534–1603 (n.d. [1935?]).

133. MAUREEN WALL, THE PENAL LAWS, 1691–1760 (2d ed. 1967).

134. Charles Ivar McGrath, *Securing the Protestant Interest: The Origins and Purpose of the Penal Laws of 1695*, 30 IRISH HIST. STUD. 25 (1996).

135. See Louis Cullen, *Catholics under the Penal Laws*, 1 EIGHTEENTH CENT. IR. 23, 24 (1986).

136. See FOSTER, *supra* note 113, at 282–84.

137. See DONALDSON, *supra* note 8, at 15, 55.

138. *But see* NEW IRELAND FORUM, *supra* note 124, at 56.

There are, however, a few sources worth mentioning, including W.N. Osborough's survey article on the Irish legal system.¹³⁹ Osborough ends with the passage of the Supreme Court of Judicature Act (Ireland),¹⁴⁰ an act that reorganized the Irish court system. J.C. Brady's *Legal Developments, 1801–1879*,¹⁴¹ focuses on the substance of Irish law during the period from 1800 to 1879. Brady concentrates on developments in the area of land law, particularly the relationships between landlords and tenants. Land reform and the rights of tenants would become increasingly important and acrimonious as the nineteenth century wore on.¹⁴²

¶164 R.B. McDowell's book on the Irish administration from 1801 to 1914¹⁴³ contains a chapter on the court system in the course of examining many other aspects of the British governmental administration in Ireland.

Development of Modern Irish Law

1919–1924

¶165 The years 1919–1924 encompass a number of crucial events in Irish history, culminating in the division of Ireland into the Irish Free State and Northern Ireland (which remained part of the United Kingdom). A brief outline of the period, focusing on the legal system, is all that is possible here; more detail can be found in any history of the period. F.S.L. Lyons, *Ireland Since the Famine*,¹⁴⁴ covering the period from the 1840s to 1969, is an excellent starting point.

¶166 In 1920 the Government of Ireland Act¹⁴⁵ (originally scheduled to be implemented in 1914, but delayed by the First World War) came into effect. The act divided Ireland into two jurisdictions, Southern and Northern Ireland, each of which was to be semi-autonomous. It also provided for some areas of joint responsibility between the two jurisdictions and anticipated eventual reunification. In reality the act affected only Northern Ireland, since the southern part of Ireland in 1920 was immersed in the Anglo-Irish War for independence from Great Britain.

¶167 The Anglo-Irish War lasted until 1921, when a truce was signed with Britain. During 1921, a treaty was negotiated, allowing for the partition of Ireland and agreeing that Ireland would be a Free State, with some relationship to Britain, rather than a totally independent Republic.¹⁴⁶ In January 1922, the Anglo-Irish

139. W.N. Osborough, *The Irish Legal System, 1796–1877*, in *THE FOUR COURTS: 200 YEARS* 33(1996), reprinted in OSBOROUGH, *supra* note 107, at 239.

140. Supreme Court of Judicature Act (Ireland), 1877, 40 & 41 Vict., c. 57 (Eng.).

141. J.C. Brady, *Legal Developments, 1801–1879*, in 5 *A NEW HISTORY OF IRELAND*, *supra* note 17, at 451.

142. For an excellent discussion of the historical background of Irish land law, including the statutory developments of the nineteenth century, see J.C.W. WYLIE, *IRISH LAND LAW* 8–58 (3d ed. 1997).

143. R.B. McDOWELL, *THE IRISH ADMINISTRATION, 1801–1914* (1964). See also R.B. McDowell, *The Irish Courts of Law, 1801–1914*, 10 *IRISH HIST. STUD.* 363 (1957).

144. F.S.L. LYONS, *IRELAND SINCE THE FAMINE* (1981). Part three focuses on the struggle for independence.

145. Government of Ireland Act, 1920, 10 & 11 Geo. 5, c. 67 (Eng.).

146. Irish Free State (Agreement Act), 1922, 12 Geo. 5, c. 4, sched. 1 (Eng.).

Treaty was narrowly approved in the Dáil,¹⁴⁷ and the drafting of a constitution of the country that was now known as the Irish Free State began.¹⁴⁸ In 1922–23, civil war ensued between the new Irish Army and the forces known as the Irregulars, who opposed the Treaty and demanded an Irish Republic encompassing the whole island. By 1924, the Irish Provisional Government had won, and the new Irish constitution, which included a new court system, was implemented. W.N. Osborough's *Law in Ireland 1916–26*¹⁴⁹ is an excellent starting point for research on this era, detailing of the changes in the legal system that accompanied Irish independence.

¶168 In 1919, the Irish, though still part of Britain, established a Provisional Government with many institutions paralleling those of the British government. The Dáil was first constituted in 1919 (made up of M.P.s elected to serve at Westminster, but who refused to sit in the British Parliament). In the same year, alternative courts were set up so that the British courts could be boycotted. These Dáil or Republican courts began as arbitration courts, but eventually rules were issued and they became more official, with appointed judges and an appellate court structure. The courts were governed by a set of rules and forms known as the *Judiciary*.¹⁵⁰ After the signing of the Anglo-Irish Treaty, the Irish chose to revamp and continue the formerly British court system rather than continue the Dáil courts.¹⁵¹ The business of the Dáil courts was concluded under the process- es outlined in the Dáil Éireann Courts (Winding Up) Act.¹⁵²

¶169 The most extensive study of the Dáil courts is *Retreat from Revolution: The Dáil Courts, 1920–24*, by Mary Kotsonouris.¹⁵³ Two articles by James Casey, *Republican Courts in Ireland 1919–1922*¹⁵⁴ and *The Genesis of the Dáil Courts*¹⁵⁵ are also worth consulting. Cahir Davitt, who served as a circuit judge of the Dáil Courts, has written an article providing an interesting perspective on the operation of the courts and the politics behind their dissolution.¹⁵⁶

The Irish Constitution

¶170 The drafting of the Constitution of the Irish Free State in 1922 was difficult

147. The Irish have a two-chambered legislature, called the Oireachtas. The Dáil Éireann is the lower house and is the equivalent of the House of Commons in Great Britain. The upper house is the Seanad Éireann (or Senate).

148. The Constitution can be found in the Irish Free State Constitution Act, 1922 (Session 2), 13 Geo. 5, c. 1, sched. 1 (Eng.); and the Constitution of the Irish Free State (Saorstát Eireann) Act, 1922, no. 1, sched. 1 (Ir.).

149. W.N. Osborough, *Law in Ireland 1916–26*, 23 N. IR. LEG. Q. 48 (1972), reprinted in OSBOROUGH, *supra* note 107, at 270.

150. See Cahir Davitt, *The Civil Jurisdiction of the Courts of Justice of the Irish Republic, 1920–22*, 3 IRISH JURIST (n.s.) 112, 112–21 (1968).

151. See Osborough, *supra* note 149, at 50–51, reprinted in OSBOROUGH, *supra* note 107, at 271–72.

152. Dáil Éireann Courts (Winding Up) Act, 1923, no. 36 (Ir.).

153. MARY KOTSONOURIS, *RETREAT FROM REVOLUTION: THE DÁIL COURTS, 1920–24* (1994).

154. James Casey, *Republican Courts in Ireland 1919–1922*, 5 IRISH JURIST (n.s.) 321 (1970).

155. J.P. Casey, *The Genesis of the Dáil Courts*, 9 IRISH JURIST (n.s.) 326 (1974).

156. Davitt, *supra* note 150.

both politically and legally. The drafters had to prepare a workable constitution, and one that would be approved by both the British government and the voters in the Irish Free State. Two multipart articles detail the drafting of the Irish Constitution and both contain the text of various drafts.¹⁵⁷

¶171 One of the main differences between the Irish and British legal systems is that the Irish have a written constitution. This has given the Irish scope to develop their jurisprudence in a direction different from that followed by the British. In *Irish Nationalism as a Legal Ideology*,¹⁵⁸ Gerard Hogan describes how several judges on the Irish Supreme Court in the 1960s decided to try to create a uniquely Irish jurisprudence.¹⁵⁹ He stresses that Ireland's written constitution and the court's power of judicial review allowed the court to depart from the English common law on which the system had so long relied. It has been said that Irish law for several decades after independence was even more dependent upon British law than before. Until the 1960s virtually no Irish legal treatises were published, for the lawyers all relied on those books published in Britain.¹⁶⁰

Development of Institutions and Constitutional History

Parliament

¶172 A persistent question throughout Irish constitutional history concerned the power of the Irish Parliament and the debate over whether other institutions, i.e., the Westminster Parliament, had the right to legislate for Ireland. The Irish Parliament existed from the thirteenth century through the Act of Union in 1800, but was always considered, at least by the English, as subordinate to the Westminster Parliament. One of the key developments in this area was the passage of Poyning's Law in 1495, which required the Irish to obtain permission from the king and council to hold parliament, and that all proposed statutes be approved by the king and his council. This political situation was used by both the English and the Anglo-Normans ruling in Ireland to their advantage at various times.¹⁶¹

¶173 In 1719, the English Parliament passed the Declaratory Act¹⁶² (often called the "sixth of George I"), which attempted to end the debate by stating that

157. D.H. Akenson & J.F. Fallin, *The Irish Civil War and the Drafting of the Free State Constitution* (pts. 1–3), *ÉIRE-IR.*, Spring 1970, at 10; *ÉIRE-IR.*, Summer 1970, at 42; *ÉIRE-IR.*, Winter 1970, at 28; Brian Farrell, *The Drafting of the Irish Free State Constitution* (pts. 1–4), 5 *IRISH JURIST* (n.s.) 115, 343 (1970); 6 *IRISH JURIST* (n.s.) 11, 345 (1971). It is interesting that these two articles were published at the same time, but appear to be wholly unrelated.

158. Gerard Hogan, *Irish Nationalism as a Legal Ideology*, 75 *STUDIES* 528 (1986).

159. *But cf.* W.N. Osborough, *Scholarship and the University Law School: Thoughts Prompted by a Recent Canadian Study*, 7 *DUBLIN UNIV. L.J.* 1 (1985) (discussing whether developing a "distinctive" legal system is a worthwhile goal for a country such as Ireland).

160. *See* Boyle & Twining, *supra* note 4, at 54.

161. *See* R.W. DUDLEY EDWARDS & MARY O'DOWD, *SOURCES FOR EARLY MODERN IRISH HISTORY, 1534–1641*, at 32 (1985).

162. An Act for Better Securing the Dependency of the Kingdom of Ireland upon the Crown of Great Britain, 6 Geo., c. 5 (1719) (Eng.).

the Parliament at Westminster had the power to legislate for Ireland. However, only sixty years later, in 1782, the Repealing Act¹⁶³ repealed the Declaratory Act and gave sole power for Irish legislation to the Irish Parliament. The brief period from 1782 until the Act of Union in 1800 is known as “Grattan’s Parliament.” In 1800 the Irish Parliament agreed to vote itself out of existence by approving the Act of Union with Great Britain.¹⁶⁴ From then until the Irish declared independence in 1919 and set up the Dáil Eireann, Irish M.P.s sat in the Parliament at Westminster.¹⁶⁵

¶174 The definitive work on the Irish Parliament during the medieval period is H.G. Richardson and G.O. Sayles, *The Irish Parliament in the Middle Ages*.¹⁶⁶ Their work was considered groundbreaking at the time it was written and has not been superseded. A review of the Richardson and Sayles book by Aubrey Gwynn also contains a great deal of substance on the subject.¹⁶⁷

¶175 In the 1970s, the records of the Irish Parliament from 1613 to 1800 were published in microfilm by Trans-Media.¹⁶⁸ The printed guide published in connection with the records contains narrative descriptions of the materials contained in the records and notes any missing materials.¹⁶⁹

Poyning’s Law

¶176 In a parliament held in Drogheda between December 1494 and February 1495, the Irish Parliament passed a statute severely limiting its own powers.¹⁷⁰ This is always referred to as Poyning’s Law,¹⁷¹ named after Sir Edward Poyning, the deputy lieutenant and effective ruler of Ireland at that time. Poyning’s Law placed severe restrictions on the powers of the Irish Parliament, requiring the king to issue a license before parliament could be held, and all Irish bills to be

163. An Act to Repeal an Act, Made in the Sixth Year of the Reign of his Late Majesty King George the First, entitled, An Act for Better Securing the Dependency of the Kingdom of Ireland upon the Crown of Great Britain, 22 Geo. 3, c. 53 (1782) (Eng.).

164. An Act for the Union of Great Britain and Ireland, 39 & 40 Geo. 3, c. 67 (1800) (Eng.).

165. FOSTER, *supra* note 113, at 282.

166. H.G. RICHARDSON & G.O. SAYLES, *THE IRISH PARLIAMENT IN THE MIDDLE AGES* (1952).

167. Aubrey Gwynn, *The Irish Parliament in the Middle Ages*, 42 *STUDIES* 209 (1953).

168. *THE PRINTED RECORDS OF THE PARLIAMENT OF IRELAND, 1613–1800* (Trans-Media 1975) (46 microfilm reels).

169. DERMOT J.T. ENGLEFIELD, *THE PRINTED RECORDS OF THE PARLIAMENT OF IRELAND, 1613–1800: A SURVEY AND BIBLIOGRAPHICAL GUIDE* (1978).

170. An Act that No Parliament be Holden in this Land until the Acts be Certified into England, 10 Hen. 7, c. 4 (1495) (Ir.), *reprinted in* 1 *THE STATUTES AT LARGE PASSED IN THE PARLIAMENTS HELD IN IRELAND* (1786) (covering 1310–1786).

171. Some confusion is caused by the fact that another statute, passed slightly later in 1495, is also often referred to as Poyning’s Law. This statute declared that all English statutes “late-made” and for the “common and public weal” would now be in effect in Ireland. An Act Confirming All the Statutes made in England, 10 Hen. 7, c. 22 (1495) (Ir.), *reprinted in* *THE IRISH STATUTES, REVISED EDITION: 3 EDWARD II TO THE UNION, AD 1310–1800* (W.N. Osborough ed., 1995) (1885). *See also* D.B. Quinn, *The Kildare Hegemony, 1494–1520*, in 2 *A NEW HISTORY OF IRELAND*, *supra* note 17, at 638, 640–42. The discussion of Poyning’s Law here refers to the earlier statute governing the actions of the Irish parliament.

approved first by the Irish privy council, and then the English privy council, before they could be considered by the Irish Parliament.

¶177 W.J. Johnston's article, *The English Legislature and the Irish Courts*,¹⁷² discusses the conflicts that led to the passing of Poynings' Law: "It says much for Poynings' and Deane's diplomatic skill that they were able not only to persuade the Irish Parliament to pass the statute, but to convince the Anglo-Irish public the legislation was in the best interests of the country, a conviction that survived and became an established tradition."¹⁷³

¶178 Although it was amended several times, Poynings' Law remained in effect until the Act of Union. A group of three articles covers the workings of the law from 1494 to 1641: David Quinn, *The Early Interpretation of Poynings' Law, 1494–1534*,¹⁷⁴ covers the early period; R. Dudley Edwards and T.W. Moody, *The History of Poynings' Law: Part I, 1494–1615*,¹⁷⁵ focuses on the period after 1534; and Aidan Clarke, *The History of Poynings' Law, 1615–1641*,¹⁷⁶ deals with the period up to 1641. Edwards and Moody promised a second part to their article, covering until 1782, but it was never published.

¶179 For Irish constitutional history in general, Donaldson's *Some Comparative Aspects of Irish Law*¹⁷⁷ gives an excellent overview of the constitutional relationship between the two countries. Bradshaw's *Irish Constitutional Revolution*¹⁷⁸ offers good coverage of the sixteenth century, while Steven Ellis has written about the Yorkist and Tudor parliaments.¹⁷⁹ Neil York has written about the century leading up to the Act of Union in 1800,¹⁸⁰ and J.C. Beckett has published an article about Grattan's Parliament which discusses constitutional development both before and after 1782, when the Declaratory Act was repealed and Poynings' Law amended.¹⁸¹

¶180 Entwined with questions about legislative powers were questions of the right to appeal either to the Irish or the British House of Lords and what the relationship was between these two bodies. Andrew Lyall, *The Irish House of Lords as a Judicial Body, 1783–1800*,¹⁸² focuses on Grattan's Parliament, but also provides

172. W.J. Johnston, *The English Legislature and the Irish Courts*, 40 LAW Q. REV. 91 (1924).

173. *Id.* at 103.

174. David B. Quinn, *The Early Interpretation of Poynings' Law, 1494–1534*, 2 IRISH HIST. STUD. 241 (1941).

175. R. Dudley Edwards & T.W. Moody, *The History of Poynings' Law: Part I, 1494–1615*, 2 IRISH HIST. STUD. 415 (1941).

176. Aidan Clarke, *The History of Poynings' Law, 1615–41*, 18 IRISH HIST. STUD. 207 (1972–73).

177. DONALDSON, *supra* note 8, at 37–76.

178. BRADSHAW, *supra* note 95.

179. Ellis, *Parliament and Community in Yorkist and Tudor Ireland*, *supra* note 76.

180. NEIL LONGLEY YORK, NEITHER KINGDOM NOR NATION: THE IRISH QUEST FOR CONSTITUTIONAL RIGHTS, 1698–1800 (1994).

181. J.C. Beckett, *Anglo-Irish Constitutional Relations in the Later Eighteenth Century*, 14 IRISH HIST. STUD. 20 (1964).

182. Andrew Lyall, *The Irish House of Lords as a Judicial Body, 1783–1800*, 28–30 IRISH JURIST (n.s.) 314 (1993–95).

a history of the Irish House of Lords and its relationship to the Westminster Parliament.

Court System

¶181 The Irish court system developed along lines very similar to the court system in England, although some of the special purpose courts differed, reflecting differing conditions in the two countries. Newark's *Notes on Irish Legal History* is an excellent source on the development of the common law court system in Ireland.¹⁸³ R.B. McDowell's article and book chapter on the courts of law in the nineteenth century are helpful for those interested in the court system during that time.¹⁸⁴

¶182 Aside from simply imposing the common law system on Ireland, the English used other means to keep the two legal systems in step. For instance, most judges appointed to the Irish bench were English or of English descent,¹⁸⁵ and English legal training was required for all Irish lawyers. It was not until 1885 that Irish lawyers could be called to the bar without serving terms at one of the London Inns of Court, even though the King's Inns (the Irish Inn of Court) had existed in Dublin since 1539.¹⁸⁶ *The Greening of Dublin Castle*¹⁸⁷ details the change in judicial and other personnel in the Irish government between 1892 and 1922.

Legal Profession

¶183 A number of interesting studies have been written on the Irish legal profession and judiciary. The best known is F.E. Ball's, *The Judges in Ireland*,¹⁸⁸ a study of the Irish judiciary from 1221 to 1921. The book is divided into chronological sections, each of which has a narrative overview, a "succession" of the judges during that time, and a catalogue of biographical entries for each judge. In addition to biography the book provides extensive description of and anecdotes about the Irish legal system.

¶184 Though Ball's is the most comprehensive study, it is clearly out-of-date and suffers from the fact that he did not list his sources of information.¹⁸⁹ *The Administration of Ireland, 1172–1377*¹⁹⁰ provides lists of Irish administrators, including judicial officers and judges, along with reference to where the authors found the information in the manuscript sources. The book also contains a description of the development of the common law court system in Ireland.

183. NEWARK, *supra* note 6, at 211–24.

184. McDowell, *supra* note 143; McDOWELL, *supra* note 143, at 104.

185. F. ELRINGTON BALL, *THE JUDGES IN IRELAND, 1221–1921*, at viii (1926).

186. See DAIRE HOGAN, *THE LEGAL PROFESSION IN IRELAND, 1789–1922*, at 14 (1986).

187. LAWRENCE W. MCBRIDE, *THE GREENING OF DUBLIN CASTLE: THE TRANSFORMATION OF BUREAUCRATIC AND JUDICIAL PERSONNEL IN IRELAND, 1892–1922* (1991).

188. BALL, *supra* note 185.

189. See Paul Brand, *The Birth and Early Development of a Colonial Judiciary: The Judges of the Lordship of Ireland, 1210–1377*, in *EXPLORATIONS IN LAW AND HISTORY* 1, 2 (W.N. Osborough ed., 1995).

190. H.G. RICHARDSON & G.O. SAYLES, *THE ADMINISTRATION OF IRELAND, 1172–1377* (1963).

¶185 Several recent books discuss the development of the Irish legal profession and the King's Inns. Daire Hogan's *The Legal Profession in Ireland*¹⁹¹ concentrates on the nineteenth century, particularly focusing on reform of legal education and the development of the Law Society, while Colum Kenny has written a history of the King's Inns from their beginning in the sixteenth century until the Act of Union.¹⁹² Kenny has also written an article on the exclusion of Catholics from the legal profession during the time of the penal laws.¹⁹³ Even more comprehensive in scope is *Brehons, Serjeants and Attorneys*,¹⁹⁴ a collection of essays on various aspects of the legal profession in Ireland from the time of the brehons through the nineteenth century.

Primary Sources of Law

Effect and Publication of Statutes

¶186 With two parliaments passing statutes for Ireland, and a series of ambiguous laws from Westminster determining which of the English statutes applied in Ireland,¹⁹⁵ it was always difficult to determine precisely which statutes governed the Irish. F.H. Newark provided a list of all the categories of statutes that were supposed to be in effect in Ireland in 1921, and indicated how some of them were impossible to ascertain.¹⁹⁶ For example, no one has ever been able to determine which statutes are referred to in the second statute known as Poyning's Law¹⁹⁷—those that are “late-made” and for the “common weal.” Newark concluded, however, that this uncertainty did not have any real consequences for modern Irish law.¹⁹⁸

¶187 Two sources are useful in describing statute publication before 1800.¹⁹⁹ David Quinn's *Government Printing and the Publication of the Irish Statutes in the Sixteenth Century*²⁰⁰ contains an excellent description of the politics involved in producing the first edition of the Irish statutes in 1572. The information in Quinn's article is expanded upon and brought up to the Act of Union by W.N. Osborough in his introductory essay included in the reprint of *The Irish Statutes*,

191. DAIRE HOGAN, *THE LEGAL PROFESSION IN IRELAND, 1789–1922* (1986).

192. COLUM KENNY, *KING'S INNS AND THE KINGDOM OF IRELAND: THE IRISH "INN OF COURT," 1541–1800* (1992).

193. Colum Kenny, *The Exclusion of Catholics from the Legal Profession in Ireland, 1537–1829*, 25 *IRISH HIST. STUD.* 337 (1987).

194. *BREHONS, SERJEANTS AND ATTORNEYS: STUDIES IN THE HISTORY OF THE IRISH LEGAL PROFESSION*, *supra* note 62.

195. *See* NEWARK, *supra* note 6, at 226.

196. *Id.*

197. *See supra* note 171.

198. NEWARK, *supra* note 6, at 226.

199. From 1800 until 1921, there was no Irish Parliament, and statutes were published in the British statute compilations; after 1921, the subject of the publication of statutes is covered in the general sources listed for modern Irish law. *See supra* note 4.

200. Quinn, *supra* note 97.

Revised Edition.²⁰¹ Osborough also covers the original publication of *The Irish Statutes, Revised Edition* in 1885. An article by John Furlong in *The Law Librarian* contains detailed bibliographic information on sources for both older and recent Irish statutes.²⁰²

¶188 In the early twentieth century, H.F. Berry began publication of an edition of the statutes from 1204 called the *Irish Record Office Series of Early Statutes*. This edition was intended to be comprehensive, unlike the selected version first published in 1572 and described in detail by Quinn. Thus far, four volumes have been published, three by Berry and one by James F. Morrissey in 1939,²⁰³ covering the period up to 1482. More volumes are planned, but have not yet been published.

¶189 Several articles have also attempted to fill in the gaps of legislation during the Middle Ages. David Quinn collected “all the accessible materials for the projected and actual legislation of Irish parliaments during the reigns of Henry VII and Henry VIII” with minor omissions.²⁰⁴ Stephen Ellis then published a supplement and corrections to this article almost forty years later.²⁰⁵ Quinn’s compilation notes that he tried to assemble “from scattered transcripts and notes the unprinted items on the [Statute] Rolls from 1494 to 1543 which were destroyed in 1922.”²⁰⁶

¶190 Another compilation of Irish statutes began in 1786.²⁰⁷ The set was intended to contain all statutes passed during parliaments held in Ireland between 1310 and 1786, but it continued to be published until the Act of Union in 1800.

Law Reporting

¶191 Law reporting in Ireland began relatively late (compared to England), and not much has been written of its history. The first reports to be published were those of Sir John Davies.²⁰⁸ This was a publication, in Norman French, of Irish equity

201. W. N. Osborough, *The Legislation of the Pre-Union Parliament*, in *THE IRISH STATUTES, REVISED EDITION: 3 EDWARD II TO THE UNION, AD 1310–1800*, *supra* note 171, at A, *reprinted in* OSBOROUGH, *supra* note 107, at 81.

202. John Furlong, *Sources of Irish Statute Law and Official Publications*, 27 *LAW LIBR.* 139 (1996).

203. *STATUTES AND ORDINANCES, AND ACTS OF THE PARLIAMENT OF IRELAND. KING JOHN TO HENRY V*, *supra* note 89; *STATUTE ROLLS OF THE PARLIAMENT OF IRELAND, REIGN OF KING HENRY THE SIXTH* (Henry F. Berry ed., 1910); *STATUTE ROLLS OF THE PARLIAMENT OF IRELAND FIRST TO THE TWELFTH YEARS OF THE REIGN OF KING EDWARD THE FOURTH* (Henry F. Berry ed., 1914); *STATUTE ROLLS OF THE PARLIAMENT OF IRELAND, TWELFTH AND THIRTEENTH TO THE TWENTY-FIRST AND TWENTY-SECOND YEARS OF THE REIGN OF KING EDWARD THE FOURTH* (James F. Morrissey ed., 1939).

204. David B. Quinn, *The Bills and Statutes of the Irish Parliaments of Henry VII and Henry VIII*, 10 *ANALECTA HIBERNICA* 71, 73 (1941).

205. S.G. Ellis, *Parliaments and Great Councils, 1483–99: Addenda and Corrigenda*, 29 *ANALECTA HIBERNICA* 96 (1980).

206. Quinn, *supra* note 204, at 74. *See infra* ¶ 94 for a discussion of the destruction of the Statute Rolls in 1922.

207. *THE STATUTES AT LARGE PASSED IN THE PARLIAMENTS HELD IN IRELAND (1786–1800)*. Details surrounding the publication of this set are found in Osborough, *supra* note 201, at k–m.

208. Boyle & Twining, *supra* note 4, at 47.

cases from 1604 to 1612. The first English edition was published in 1672.²⁰⁹ From then until the latter part of the eighteenth century virtually no Irish court reports were published,²¹⁰ leaving Irish judges dependent on English reports for precedent.

¶192 Paul O'Higgins's *A Bibliography of Irish Trials and Other Legal Proceedings*²¹¹ has the most comprehensive listing of Irish court reports and is an indispensable source in this area. There is also a brief article, *The History of Law Reporting in Ireland*,²¹² discussing the history of Irish court reports, although it is written from a rather antiquated perspective. Most sources on contemporary Irish legal research also cover the historical and current publication of court reports.²¹³

The Public Records of Ireland

¶193 In addition to published statutes and case reports, researchers interested in primary sources will want to investigate Ireland's public records. Until the middle of the nineteenth century, records from courts and government departments were scattered in various locations in Dublin and throughout Ireland. In 1867 the new building for the Public Record Office was opened in Dublin next to the Four Courts building, and many of the scattered records were moved there.²¹⁴ In 1919, Herbert Wood published his guide to the contents of the Public Record Office of Ireland,²¹⁵ which, in addition to listing materials contained therein, also describes the development of each government department that created those records. The guide is a good resource for brief descriptions of the Irish common law courts and the types of records they produced.

¶194 In April 1922, during the Irish Civil War, Irregular (antigovernment) forces began occupying the Four Courts. In July, the building was almost completely destroyed by an explosion and fire. Many of the documents in the Record Office that did not burn were scattered over Dublin.²¹⁶ A fuller description of the circumstances surrounding the fire can be found in an article Wood wrote in 1930.²¹⁷ The fifty-fifth and fifty-sixth reports of the Deputy Keeper of the Public Records of Ireland detail the destruction of the office as well as listing the records that were salvaged from the fire, though even many of these were partially burned

209. *Id.*

210. See T.C. Barnard, *Lawyers and the Law in Later Seventeenth Century Ireland*, 28 IRISH HIST. STUD. 256, 260 (1993); W.W.S. Breem, *Primary Sources: Law Reports*, in MANUAL OF LAW LIBRARIANSHIP 125, 177 (Elizabeth M. Moys ed., 2d ed. 1987).

211. PAUL O'HIGGINS, *A BIBLIOGRAPHY OF IRISH TRIALS AND OTHER LEGAL PROCEEDINGS* (1986).

212. *The History of Law Reporting in Ireland* (pts. 1 & 2), 3 IRISH L. TIMES & SOLIC. J. 659, 673 (1869).

213. See, e.g., Furlong, *supra* note 4, at 256–58; O'MALLEY, *supra* note 3, at 18–24.

214. HERBERT WOOD, *A GUIDE TO THE RECORDS DEPOSITED IN THE PUBLIC RECORD OFFICE OF IRELAND*, at xv (1919). See *The Public Records (Ireland) Act, 30 & 31 Vict., c. 70* (1967) (Eng.) for a list of the types of records that were to be transferred to the new Public Records Office.

215. WOOD, *supra* note 214.

216. The explosion was so strong that records were found as far away as the Hill of Howth, seven miles from the center of Dublin. Herbert Wood, *The Public Record Office of Ireland Before and After 1922*, 13 TRANSACTIONS ROYAL HIST. SOC'Y (ser. 4) 17, 34 (1930).

217. Wood, *supra* note 216.

or survive only as fragments.²¹⁸ In the years since, some of the material has been reconstituted from records in London, or from transcripts that were made from the originals before the fire.²¹⁹ However, the destruction of the Record Office has certainly made research, particularly on medieval Irish law, difficult. The destruction increased the value of Wood's 1919 guide, as it is the only published record of what existed before the explosion and fire.

¶195 Margaret Griffith's guide to the contents of the office in 1964 is the most current general guide to the collection as it stands after 1922.²²⁰ The Public Record Office has since been renamed the National Archives and now also includes the records from the former State Paper Office.

¶196 As the Public Record Office in London now contains one of the largest collections of primary source material for studying Irish history before 1900,²²¹ guides to the holdings of that office are also essential. Alice Prochaska has written a guide to the sources relevant to Irish history for the period after 1700,²²² while the three-volume *Guide to the Contents of the Public Record Office*²²³ is a general description of what is held by that office and the best source for locating earlier material. Volume one is devoted to legal records, and volume three updates the first two volumes from 1960 to 1966.

Conclusion

¶197 This article has only touched the surface of the variety of sources available for researching Irish law and legal history. Hopefully it has provided enough background so that interested researchers can understand the outline of Irish legal history and find a starting point for more detailed investigation. While there are substantive areas of Irish legal history that could use more research, and an overall study of the subject would certainly be helpful, perhaps the resource most sorely needed is a continuing, annotated bibliography of sources on the subject.

218. THE FIFTY-FIFTH REPORT OF THE DEPUTY KEEPER OF THE PUBLIC RECORDS AND KEEPER OF THE STATE PAPERS IN IRELAND (1928) (covering 1922–23); THE FIFTY-SIXTH REPORT OF THE DEPUTY KEEPER OF THE PUBLIC RECORDS AND KEEPER OF THE STATE PAPERS IN IRELAND (1931) (covering 1924–28).

219. See, e.g., STATUTE ROLLS OF THE PARLIAMENT OF IRELAND, TWELFTH AND THIRTEENTH TO THE TWENTY-FIRST AND TWENTY-SECOND YEARS OF THE REIGN OF KING EDWARD THE FOURTH, *supra* note 203. The preface of Morrissey's volume states: "As the original Rolls perished in the fire by which the great bulk of the records were destroyed in 1922, the text of the volume is printed . . . from the transcripts made by the Irish Record Commissioners in the first quarter of the nineteenth century." *Id.* at lxxv. Ironically there is another note at the front of the volume: "Since the Preface was sent to Press the type of the Text and Translation of the Statutes was destroyed by the fire at Messrs. Browne and Nolan's Printing Works in August, 1935. The duplicate revised proofs of the Text and Translation preserved in the Record Office were however available." *Id.*

220. MARGARET GRIFFITH, A SHORT GUIDE TO THE PUBLIC RECORD OFFICE OF IRELAND (rev. ed. 1964). An earlier version was published at 8 *Irish Hist. Stud.* 45 (1952).

221. ALICE PROCHASKA, IRISH HISTORY FROM 1700: A GUIDE TO SOURCES IN THE PUBLIC RECORD OFFICE 5 (1986).

222. PROCHASKA, *supra* note 221.

223. GUIDE TO THE CONTENTS OF THE PUBLIC RECORD OFFICE (1963–68).