10

Sir John Ross Bt

The Last Lord Chancellor of Ireland, 1921–1922

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Introduction

John Ross holds his place in history as the last Lord Chancellor of Ireland. He was also the only Presbyterian ever to hold that office.[1] Although his period as Lord Chancellor was comparatively short, the reported cases heard by him are of note. Ross's path to the metaphorical Irish Woolsack, while seemingly conventional, did differ from that of many of his predecessors and his consciousness of being a Presbyterian, his path to office and his retirement away from the limelight will all be examined.[2]

The events in Ireland during Ross's lifetime formed the backdrop to his career – the Land War from 1879 to 1882, the Home Rule debates between 1886 and 1914, the Easter Rising in 1916, and the ensuing Anglo-Irish War. The Government of Ireland Act 1920, although principally creating home rule parliaments for Southern Ireland and Northern Ireland also recast the role of Lord Chancellor of Ireland. The subsequent Anglo-Irish Treaty of 1921 and the creation of the Irish Free State in 1922 led to the complete abolition of the role, and the enforced, and not entirely happy, retirement of Ross.

Early Years

John Ross was born in Londonderry on 11 December 1853 where his father was the redoubtable Reverend Robert Ross, Minister of Fourth Derry

[1] N. Wells, Ross, Sir John, first baronet (1853–1935), Lord Chancellor of Ireland, in *Oxford Dictionary of National Biography* (Oxford, 2004).

[2] The Lord Chancellor of Ireland ceased to sit on the actual Irish Woolsack after the Act of Union 1800. The Irish Woolsack may still be seen in the former Irish House of Lords in Dublin.

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Presbyterian Church on Artillery Street within the city walls. During John's youth in Derry and later, Reverend Ross so expanded his congregation that in 1879 it moved outside the city walls to a new purpose-built church (designed by noted Belfast architects Young & Mackenzie) in Carlisle Road.[3] Reverend Ross became Moderator of the Presbyterian Church in Ireland in 1886.[4] John Ross published two volumes of memoirs in 1924 and 1927, and these provide us with a view of how he saw his world.[5] He describes his father as, variously, 'the most gentle of men', 'a man quite incapable of any lengthened belief in human wickedness', but one who 'strictly enforced' family worship and who was a Liberal in his politics.

Against this family backdrop, John Ross was educated at Foyle College, where he was a friend of Percy French, the poet and songwriter, composer of 'The Mountains of Mourne'. During his time at Foyle, Ross notes in his memoirs his encounter with Christopher Palles, the future Chief Baron of the Exchequer, and how this influenced him to enter the legal profession – of which more below. Ross entered Trinity College, Dublin in 1873 to read Classics, where he obtained a Foundation Scholarship in 1876. In his memoirs he notes that he was one of the first Presbyterians to do so, the religious tests having only recently been abolished by the University of Dublin Tests Act 1873. He graduated BA in 1877 and LLB in 1879.

Ross's interest in the law as a career was sparked while still a schoolboy in 1868 when he saw Christopher Palles QC in action in an election petition hearing.[6] The Conservative candidate, a son of the Duke of Abercorn, had lodged a petition against the victorious Liberal, Richard Dowse QC. However, acting for Dowse was Palles, who won the case. This was much to the admiration of the young Ross, who wrote that he was 'blown away' to such an extent that 'henceforth [he] lived for only one thing – to achieve success at the Bar of Ireland'. He developed and maintained a lifelong admiration for and friendship with Palles, whom he regarded as 'the greatest of the Irish judges', despite differences of religion and denomination.[7]

[3] P. Harron, *Architects of Ulster: Young & Mackenzie, a Transformational Provincial Practice 1850–1960* (Belfast, 2016), 148–149.

[4] 'Former Moderators' (*Presbyterian Church in Ireland*), www.presbyterianireland.org/Utility/About-Us/Historical-Information/Former-Moderators.aspx, accessed 10 June 2022.

[5] Sir John Ross, *The Years of My Pilgrimage* (London, 1924); and Sir John Ross, *Pilgrim Scrip: More Random Reminiscences* (London, 1927).

[6] Ross, 1924 (n. 5), 14.

[7] Ross, 1927 (n. 5), 15; and V. T. H. Delany, *Christopher Palles, Lord Chief Baron of Her Majesty's Court of Exchequer in Ireland 1874–1916, His Life and Times* (Dublin, 1960), ix, 153–154.

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On the other side of the political spectrum, Ross also enjoyed a close friendship with another lawyer, Edward Carson, forged during their time at Trinity College.[8] Initially, they followed similar paths: Ross followed Carson in being called to the Irish Bar in 1879 and they both became MPs – Carson for Dublin University and Ross for Londonderry City – in the 1892 general election.

Ross's parliamentary career only lasted three years (1892–1895) and after that it was his judicial career that became more important, with his appointment in 1896 as a land judge in the Chancery Division of the High Court of Justice in Ireland.[9] Again, a trailblazer, he was the first Presbyterian to be appointed as a High Court judge in Ireland. Lawrence McBride has suggested that this appointment was solely because of lobbying on his behalf by the Duke of Abercorn (the older brother of the defeated election candidate in 1868).[10] Whether this is true or not, he was clearly a highly regarded lawyer by this time and described by F. E. Ball as 'able, courageous and consistent'.[11]

Northern Ambitions

While Ross made much in his memoirs of having been Lord Chancellor of Ireland, particularly the last person to hold that office, he omits any mention of his earlier efforts to secure another senior legal position – Lord Chief Justice of Northern Ireland (LCJNI).[12]

Despite being Dublin-based since his appointment to the bench in 1896, Ross maintained his connections with Ulster. Despite his tendency to anti-partitionism, he continued to identify with the Ulster Unionists. So, with the passing of the Government of Ireland Act 1920, Ross's first ambition was not to be Lord Chancellor of Ireland. This role was still held by Sir James Campbell. Instead, Ross, in a series of letters in summer 1920, lobbied Walter Long to become Lord Chief Justice of Northern Ireland.[13] Long had been leader of the Ulster

[8] H. Montgomery Hyde, *Carson, The Life of Sir Edward Carson, Lord Carson of Duncairn* (London, 1953).
[9] Ross, 1924 (n. 5), chapter XIV.
[10] L. McBride, *The Greening of Dublin Castle: The Transformation of Bureaucratic and Judicial Personnel in Ireland,1892–1992* (Washington, DC, 1991), 74.
[11] F. Elrington Ball, *The Judges in Ireland, 1221–1921*, vol. 2 (London, 1926), 324.
[12] Ross, 1924 (n. 5), 297.
[13] Two letters, dated May–June 1920, from Sir John Ross to Walter Long found in Wiltshire & Swindon Archives Ref. 947/336.

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Unionists from 1906 to 1910 and at the time of Ross's lobbying he was not only First Lord of the Admiralty but also chair of the so-called *Long Committee* of the British cabinet which had overseen the drafting and enactment of the 1920 Act.[14] In his letters to Long, Ross stated his desire to be the new Lord Chief Justice of Northern Ireland on the passing of the 1920 Act. He also displayed antipathy towards the then-incumbent Lord Chancellor, Campbell, by expressing to Long his refusal to acknowledge the consent of Campbell, as a precondition of such an appointment.

Sir James Craig, the holder of the new office of Prime Minister of Northern Ireland, appointed Denis Henry as Lord Chief Justice of Northern Ireland.[15] Whatever Ross's feelings about this, he was not to remain without a senior post and was even to conduct the swearing in of Henry as Lord Chief Justice of Northern Ireland while on holiday.

The Lord Chancellorship

The departure in June 1921 of Sir James Campbell as Lord Chancellor was reported as being 'startling'.[16] Ross wrote in his memoirs that he was 'astonished' at his own appointment and even believed that Campbell had not received any letter of removal.[17] Colum Kenny has provided a different outlook on some of Ross's machinations in 1919.[18] Given the sentiments expressed in Ross's letters to Walter Long, this astonishment may indeed be a little hard to believe. Nevertheless, the appointment of Ross was lauded, it being observed in *The Irish Law Times* that he was 'one of the most popular members of the Judiciary, and his appointment has been exceedingly well received by the profession'.[19] In fact, the reporter further enthuses:

[14] C. Moore, *Birth of the Border: The Impact of Partition in Ireland* (Dublin, 2019).
[15] É. Phoenix, 'The Life and Career of Denis Henry (1864–1925): Barrister, Ulster Unionist Politician and First Lord Chief Justice of Northern Ireland' in B. Dickson and C. McCormick (eds.), *The Judicial Mind: A Festschrift for Lord Kerr of Tonaghmore* (Oxford, 2021).
[16] Editorial, 'Week to Week', *The Irish Law Times* (Dublin, 2 July 1921), 162.
[17] Ross, 1924 (n. 5), 293.
[18] C. Kenny, '"Degradation of the Irish Bench" – Colum Kenny on Sir John Ross and a Private Plea in 1919', *The Irish Times* (Dublin, 9 August 2021), An Irishman's Diary, www.irishtimes.com/opinion/degradation-of-the-irish-bench-colum-kenny-on-sir-john-ross-and-a-private-plea-in-1919-1.4643048, accessed 21 February 2022.
[19] ILT (n. 16).

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> His genial manner, his unvarying courtesy to the Bar and to solicitors, his manly independence, his fairness to litigants, and his patience in listening to the arguments addressed to him while they are to the point, have all contributed to make him a very popular judge. His strong common sense is perhaps his outstanding quality on the Bench; but this does not obscure his firm grasp of legal principles and his knowledge of case law and practice. He is also a man of affairs. We anticipate for him great success in his new office.[20]

Having lost out to Sir Denis Henry, Ross contented himself with the role of permanent Lord Chancellor for life, and President of the new High Court of Appeal for Ireland. One of his first functions as the new Lord Chancellor was, however, not a judicial one.

Speaker of the Senate of Southern Ireland

In an echo of the role of earlier Irish Lord Chancellors as Speaker of the Irish House of Lords until the Act of Union 120 years before, Sir John Ross became Speaker of the short-lived Senate of Southern Ireland. The Senate had been envisioned as the upper house of the legislature of Southern Ireland under the Government of Ireland Act 1920. *The Irish Times* provides an interesting account of the two meetings held by the Senate before it rose for the final time, labelling the totality of proceedings a 'hollow mockery'.[21] It is interesting to note that the 1920 Act, while appointing the Lord Chancellor an *ex officio* senator, made no specific mention of the Lord Chancellor becoming Speaker. However, at the opening meeting of the Senate it was taken as read that the Lord Chancellor should have that role. At that meeting, the Marquess of Sligo noted 'that unfortunately our Speaker, the Lord Chancellor, is, through illness, unable to attend'. Accordingly, the Senate elected another senator, Sir Nugent Everard, as Deputy Speaker. The account in *The Irish Times* of the second meeting on 13 July 1921 (the only one attended by Ross) was scathing: 'Except among casual passers-by, a police inspector, and a few constables the arrival of members went almost unnoticed. The cinematograph operators might as well have stayed at home . . . the entire proceedings being over in fifteen minutes.'[22]

[20] Ibid., 163.

[21] Duty reporter, 'The Southern Irish Parliament. Formal Opening Ceremony', *The Irish Times* (Dublin, 29 June 1921), 5.

[22] Duty reporter, 'Meeting of Southern Parliament. Senate thanks the King. Another Adjournment', *The Irish Times* (Dublin, 14 July 1921), 4.

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The Irish Times reported that Ross arrived at the offices of the Department of Agriculture and Technical Instruction preceded by two tipstaffs, as befitted the Lord Chancellor. No mention is made of whether one of the tipstaffs carried the Lord Chancellor's Mace. However, the Mace was to become an object of dispute in the following year. During the fifteen-minute sitting, Ross presided over the passing of two motions, one of which was for adjournment *sine die*.

What do we learn from this brief episode? Ross, according to his memoirs, was upset that his absence from the first sitting because of 'a slight return of a haemorrhage' stoked rumours of a deeper problem, even that he had 'had a stroke of apoplexy, and was in a dying condition'.[23] He does not mention the second meeting at all.

The High Court of Appeal for Ireland

Ross's judicial experience is demonstrated in the reported cases heard by the High Court of Appeal for Ireland, which, after 1920, was the only court in Ireland where the Lord Chancellor had a role. Ross himself contended that the High Court of Appeal 'got through a great deal of important work while it lasted'.[24] An analysis of these cases will show clear trends in the legal and jurisprudential direction Ross wished to pursue.

The role of Lord Chancellor assumed by Ross in 1921 was much changed from that of his predecessors. The Government of Ireland Act 1920 had redefined the role in terms much more equivalent to that of other senior judges than had been the case under the Supreme Court of Judicature (Ireland) Act 1877. The two most significant changes were that the Lord Chancellor now had tenure for life (in theory) and his judicial role was no longer in the Chancery Division but as president, *ex officio*, of the new High Court of Appeal. The reason for this change in tenure was that the Lord Chancellor was now no longer a member of the government (which he had been since the Act of Union 1800) and, as such, could retain his office despite political changes. The High Court of Appeal was established by section 42 of the Government of Ireland Act 1920 and was to sit above the Courts of Appeal for Southern Ireland and Northern Ireland. Its jurisdiction and composition were set out in section 43 of the Government of Ireland Act 1920. In addition to the Lord

[23] Ross, 1924 (n. 5), 294.
[24] Ibid., 295.

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Chancellor, the other (*ex officio*) judges of the court were Sir Denis Henry (LCJNI) and Sir Thomas Molony, technically the Lord Chief Justice of Southern Ireland but styled as the Lord Chief Justice of Ireland (CJ).[25] The Chief Justices could nominate another judge from their jurisdiction to sit in their stead.[26] There were provisions for additional judges to sit and for situations where the Lord Chancellor was unable to sit.[27] However, in the majority of the ten reported cases only three judges ever sat, although the reasons for this are not noted by the case reporters.

The High Court of Appeal was reported to have met for the first time on 15 December 1921.[28] However, in the House of Commons it was noted to have been active only from February 1922.[29] The ten reported cases in the *Irish Reports* contain varying amounts of detail, while *The Irish Law Times* provides a more journalistic record of the High Court of Appeal's proceedings. From an analysis of *The Irish Law Times* for the same period, at least fifteen cases were heard by the High Court of Appeal during its existence, Ross having heard the vast majority. Since 1866, the Law Reporting Council of Ireland had been the near sole provider of 'authorised' law reports, a system which had come in for criticism from various quarters.[30] Taking these sources together provides a more rounded insight into how Ross acted as Lord Chancellor. Of the ten reported cases, only eight contain reports of substantive judgments.[31] Of these, four concern insurance or compensation claims directly or indirectly related to the security situation in Ireland at the time.[32] The remainder concern matters of constitutional law/jurisdiction, court procedure, banking law and land law.

Before looking at the insurance and compensation cases, the most common case type in the reported judgments, an examination of *Leyburn v. Armagh CC (No. 1)* illustrates the stance that Ross took overall.[33] As mentioned, the civil unrest in Ireland at the time was to

[25] Government of Ireland Act 1920 (GIA 1920) s. 42(1).
[26] Ibid., s. 42(2).
[27] Ibid., s. 42(2)(a) & (b).
[28] *The Irish Law Times* (Dublin, 17 December 1921), 313.
[29] HC Deb, 16 February 1922, vol. 150 cc. 1189–90.
[30] E. G. Hall, *The Superior Courts of Law – 'Official' Law Reporting in Ireland 1866–2006* (Dublin, 2007), 74–155.
[31] The two cases with no substantive judgment reported are *Loughnan v. O'Sullivan* [1922] 1 IR 160 and *Re Keane* [1922] 2 IR 221.
[32] F. S. L. Lyons, 'The War of Independence, 1919–21' in W. E. Vaughan (ed.), *A New History of Ireland: Ireland under the Union, II 1870–1921*, vol. VI (Oxford, 1989).
[33] [1922] 2 IR 15.

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come into play in most of the reported cases heard by Ross and this is one on point. It dealt with an appeal by Armagh County Council from an order for criminal injuries compensation under the Local Government (Ireland) Act 1898. The original order was made on 28 June 1921 by the Armagh County Court Judge and then appealed to the Court of Appeal in Ireland sitting in Dublin. This appeal was made before the commencement, on 1 October 1921, of the relevant provisions of the Government of Ireland Act 1920.[34] After that date, the Court of Appeal in Ireland was deemed to be the Court of Appeal for Southern Ireland: the judgment of the Court of Appeal in Ireland (by then the Court of Appeal for Southern Ireland) was delivered on 9 November 1921. As a result, a further appeal was then possible to the new High Court of Appeal for Ireland. Ross sat on this case with Chief Justice Molony and Lord Justice Andrews, their decision being unanimous. Initially, Ross dealt with an issue touching on the jurisdiction of the High Court of Appeal for Ireland, it being argued that the former Court of Appeal in Ireland had final jurisdiction. Interestingly, Ross began his judgment by looking to Lord Selborne's judgment in an English case containing the dictum that 'where there are general words in a later statute . . . you are not to hold that earlier . . . legislation . . . [is] altered . . . merely by force of such general words'.[35] Following on from this, Ross entered into a discussion of the constitutional framework, as interpreted by him, engendered by the Government of Ireland Act 1920. His conclusion was that the court was, in effect, a constitutional court 'for the determination of the mutual rights and obligations of the component parts of [Ireland] '.[36] He went on to clarify that the jurisdiction of the (former) Court of Appeal in Ireland has been transferred to the Courts of Appeal in Southern Ireland and Northern Ireland. The jurisdiction of the High Court of Appeal for Ireland was entirely novel, being a creation of the Government of Ireland Act ('a Court separate and distinct').[37] For a political unionist, Ross concluded his judgment with an altogether rather unusual statement: 'In view of the ultimate unity of the country . . . uniformity of the law is of the first importance . . . and that could only be secured by

[34] Order in Council fixing Appointed Days for certain purposes under the Government of Ireland Act 1920 (Statutory Rules &Orders 1921/1527).
[35] *Leyburn v. Armagh CC* [1922] 2 IR 15, 17.
[36] Ibid., 18.
[37] Ibid., 19.

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the action of the High Court of Appeal exercising jurisdiction over all Ireland.'[38]

However, it is not really that unusual a statement for Ross to have made. It was well known that he opposed the creation of two differing jurisdictions and the resulting splits.[39] Ross, by his words, appears to be, if not anti-partition entirely, certainly averse to its implications for the legal world. This places him, despite being an Ulsterman, more in the Southern Unionist mindset than that of the Ulster Unionists. This is perhaps a reason why Sir James Craig did not appoint him to be Lord Chief Justice of Northern Ireland.

Leyburn No. 1 was the prelude to the much lengthier *Leyburn v. Armagh CC (No. 2)*, the first of the insurance/compensation cases that will be examined.[40] *Leyburn No. 2* covers not only compensation issues but also further matters of jurisdiction and constitutional law and, as such, shows how these issues were being considered by Ross against the backdrop of the political and security situation in 1921–22. In this case, the High Court of Appeal for Ireland heard the substantive claim concerning the theft of weapons and ammunition and the destruction of two hats during a raid on the home of a special constable in Tynan, County Armagh. The Court of Appeal in Southern Ireland (previously the Court of Appeal in Ireland) had earlier decided that compensation (totalling £19) for both the stolen weapons and the damaged hats should be paid under the Malicious Injuries Code. Ross, in a unanimous judgment for the High Court of Appeal, held that as the weapons were only stolen and not destroyed compensation was not payable in respect of them; compensation was only payable in respect of the damaged hats (£1). The judgment of the Court of Appeal in Southern Ireland was reversed. This judgment goes to show Ross's conservatism when dealing with issues connected with what he stated to be public money. As to the jurisdiction of the High Court of Appeal for Ireland, Ross again underlined that the:

> High Court of Appeal has a more extensive jurisdiction than any appellate tribunal that has hitherto existed in Ireland. It is not a substitution for any former appellate Court. It is the High Central Court which is necessary for the determination of the mutual rights and obligations of the component parts of the federal system contemplated by the [Government of Ireland

[38] Ibid.
[39] Kenny (n. 18).
[40] [1922] 2 IR 58.

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> Act 1920]. It is the supreme guardian of the Constitution and the pivot upon which all the Constitutional machinery was intended to turn.[41]

Ross went further in his analysis and compared the transfer of jurisdiction under the Government of Ireland Act 1920 to the Courts of Appeal in Southern Ireland and Northern Ireland from the Court of Appeal in Ireland to the transfer of jurisdiction under section 23 of the Judicature Act 1877 from the Court of Appeal in Chancery (and the other previous appellate courts) to the Court of Appeal in Ireland. He reasoned that since the High Court of Appeal was 'separate and distinct' it was not 'bound by [the] decisions' of the previous Court of Appeal.[42] However, he acknowledged that the Court 'is bound to consider with the utmost reverence and respect the decisions' of the previous Court of Appeal. In this case, Ross noted that the Malicious Injuries Code only provided for compensation where property had been destroyed, not stolen. He cited *McDowell v. Dublin Corporation* for the proposition that public authorities cannot be made responsible for compensation for theft.[43] Other cases were considered, particularly *Kirby v. Kerry CC*, where Ross overruled the decision of the (former) Court of Appeal,[44] and agreed with the view of Molony CJ at Assizes that 'compensation should not be given for . . . goods stolen'.[45] Molony CJ was one of the assenting judges in the High Court of Appeal in *Leyburn (No. 2)* – it is possible that Ross was influenced by this. *The Irish Law Times* remarked that in their view Ross's judgment 'settles authoritatively the question whether compensation can be claimed in cases of pure larceny, though it leaves the question whether compensation can be claimed in cases of malicious injury combined with larceny, one of some doubt'.[46] This contemporary commentary also illustrates Ross's caution in making judgments beyond the law familiar to him.

The question of compensation occasioned by the ongoing civil disturbance in Ireland and paid by a local government authority was again considered in *McKnight v. Armagh CC*.[47] In this case, a police barracks in Camlough, County Armagh was attacked and, in the course of relieving

[41] Ibid., 62.
[42] Ibid.
[43] [1903] 2 IR 541.
[44] [1921] 2 IR 388.
[45] *Leyburn No. 2* (n. 34), 64.
[46] *The Irish Law Times* (Dublin, 18 March 1922), 65.
[47] [1922] 2 137.

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the barracks, certain other premises were destroyed by the army and police. The question before the High Court of Appeal was whether compensation was not due because the damage was caused by the military acting under lawful orders or was due because it was the result of the original malicious attack. Ross noted that the law was unequivocally 'that the damage must be the direct consequence of the wrongful act'.[48] He considered *Noblett v. Leitrim CC* and in particular the judgment of Campbell, Lord Chancellor of Ireland (LCI) who interpreted previous judgments of Chief Baron (CB) Palles.[49] Ross was very clear that he disagreed with Campbell LCI (a contemporary of his at university and during his legal and political career) and, in particular, with Campbell's analysis of Palles CB's judgment in *Ballymagauran Dairy Society v. Cavan CC*.[50] Ross distinguished *Noblett* because it was grounded upon 'legal ideas and conditions of society which have passed away'.[51] Ross bemoaned the state of Ireland in a lengthy peroration:

> Armed bands in large numbers were contending all over the country; they were inflicting reprisals by destroying the property of persons supposed to be in sympathy with one side or other; they frequently came long distances in motor cars; the ordinary criminal courts had ceased to be operative; the inhabitants were powerless to suppress the crimes or to attempt to bring the offenders to justice.[52]

He went on to state that while he had sympathy with the 'innocent sufferers' in this case it would be 'unjust and unreasonable' to place the burden of compensation on the ratepayers. This is another example of Ross's conservatism when dealing with the spending of public money.

Linked to these cases are those concerning insurance claims for vehicle theft directly or indirectly as a consequence of the security situation. These received much attention by W. N. Osborough as test cases concerning such claims.[53] The first is *Cooper v. General Accident Assurance Corporation*, where the insurance company defendant wished to rely on an exception to the insurance policy which excepted liability 'for loss or

[48] Ibid., 146.
[49] [1920] 2 IR 143.
[50] [1915] 2 IR 85.
[51] *McKnight* (n. 47), 148.
[52] Ibid.
[53] W. N. Osborough, 'Forcibly Commandeered and Owners' Insurance: The Deciding of Two Test Cases in the 1920s', in W. N. Osborough, *Studies in Irish Legal History* (Dublin, 1999), 296–314.

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damage occasioned through riot or civil commotion within the land limits of Ireland'.[54] At first instance the trial judge had held for the plaintiff, stating that the area concerned was not subject to 'riot or civil commotion'. The King's Bench Division dismissed an appeal by the defendants; the defendants then appealed unsuccessfully to the Court of Appeal in Southern Ireland. In a lengthy judgment, Ross allowed the appeal 'deeply conscious of our responsibility in overriding seven Judges of distinction'. However, in overturning the decision of those judges, Ross showed that he was not averse to taking potentially controversial decisions. His fellow judges hearing this case, Sir Charles O'Connor, Master of the Rolls and Andrews LJ concurred. The final case in this group was *Boggan v. Motor Union Insurance Co*.[55] This case, concerning the insurance of a car stolen by armed men, was the last reported judgment of the High Court of Appeal for Ireland. Ross sat with Sir Charles O'Connor MR and Henry LCJNI, the report merely stating that 'after argument the Court affirmed the order of the Court below'.[56] This, 27 November 1922, was the last time Ross sat as Lord Chancellor and just over a week later the statute abolishing his office and his court received the Royal Assent.[57]

Of course, not everything was dominated by the political and security situation – normal life continued and disputes arose. In *Coneys v. Morris*, we see Ross having to consider quite detailed points of banking law.[58] The brief facts were that Morris was the principal on a promissory note to the National Bank on which Coneys, a customer of the bank, was surety. Some years after the death of Morris, the bank set off the amount of the note (which was payable but unpaid) against monies due to Coneys from the bank. Coneys claimed, as a creditor of Morris, the ability to administer Morris's estate in respect of the indebtedness due under the note. The bank's counsel argued that the bank had a lien over the assets of its customer (Coneys) and, consequently, was able to recover from the estate of the principal (Morris). The Court of Appeal in Southern Ireland upheld the judgment of the High Court that Coneys was not a creditor in respect of the monies which the bank had applied discharging the note.

[54] [1922] 2 IR 38, 39.
[55] [1922] 2 IR 222.
[56] Ibid.
[57] HC Deb, 5 December 1922, vol. 159 c. 1609.
[58] [1922] 1 IR 136.

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Ross, hearing the appeal on this case with Sir Charles O'Connor MR and Henry LCJNI, dismissed the appeal.[59] Ross expressed 'a difficulty in understanding how there can be a lien by bankers on customers' money'.[60] He cited an authority referenced in *Harte's Law of Banking* as having provided him with guidance.[61] Having concluded that no lien could exist in this case because there were no assets to which a lien could attach, he went on to consider specifically whether the banker's right of set-off (rather than other classes of set-off) could apply. He held that it could not, stating that 'the banker's ... right of set-off ... can only be exercised where there are in existence legal enforceable debts'.[62] In Ross's view, there were no such debts and, as such, the banker's right of set-off did not arise. His judgment shows knowledge of a complex area and his readiness to consult one of the leading texts of the time as well as case law. The case is unaffected by the civil unrest underlying life in Ireland, unlike some of the subsequent cases heard by Ross.

Ross had spent much of his judicial career (1896–1921) as a land judge in the Chancery Division of the High Court of Ireland, so with *Wycherly v. Flynn* he returned to familiar territory.[63] This case concerned the provisions of a lease, particularly as to the reduction in rent where the tenant could pay a lower amount if he paid all taxes, rates, charges, and impositions affecting the land. Ross, sitting with Andrews LJ and Dodd J, held that the provision in the lease was not a covenant but merely an option. As such, the tenant could not pick and choose which provisions suited him and he had to comply with all of the specified provisions, including payment of all rates and taxes, and performance of certain other acts, in order to obtain a reduction in rent in accordance with the terms of the lease.[64]

As seen from the analysis of the above cases, Ross had a penchant for detail and the final reported case of his which will be considered, *James Crean & Son Ltd v. McMillan*, played to that strength.[65] This case concerned an appeal relating to the taxation of costs on a commercial

[59] Charles O'Connor (31 December 1854–18 October 1928), last Master of the Rolls in Ireland and Sir Denis Henry Bt (7 March 1864–1 October 1925), first Lord Chief Justice of Northern Ireland.
[60] *Coneys v. Morris* (n. 57), 137.
[61] *Roxburghe v. Cox* (1881) 17 Ch. D 520 (CA).
[62] *Coneys v. Morris* (n. 57), 137.
[63] [1922] 2 IR 169.
[64] Ibid., 170.
[65] [1922] 2 IR 105.

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case in respect of the sale of goods. The claim and counterclaim were both dismissed with costs, yet the plaintiff objected to the method of taxing the defendant's costs. The High Court of Appeal in Ireland heard the appeal in relation to the taxation of costs from the Court of Appeal in Southern Ireland. Ross observed that at 'first sight this would appear to be a very simple matter', and that it 'is the duty of this Court to settle matters of principle to be applied in the taxation of costs'.[66] However, he was reluctant to declare general principles for wider application and restricted himself to deciding in respect of the facts alone. Despite this, he stated that 'in strict justice it would appear that each party should pay the costs of the matter in which he fails'.[67] He stated that rules for taxation must be not only 'rough rules' but also 'definite rules', so giving the impression of simultaneously wanting a general and specific approach. He cited an English case of 1879, *Saner v. Bilton*, which set out the 'clear and simple' rule which had been followed in Ireland as well.[68] His subsequent discussion of the English and Irish cases led him to conclude that where a counterclaim is not a true, independent claim but merely a form of defence to the claim, 'the Taxing Master should not apportion [costs], but simply allow such extra costs as have been incurred by reason of [the] counterclaim'.[69] This provides evidence of Ross's desire to follow established precedent in England as well as his inclination to avoid using one case to change rules of general application. It also illustrates his conservative and cautious legal outlook even in a time of great political and constitutional change.

From the analysis of these reported cases, it can be seen that Ross applied himself to a variety of legal problems. In his judgments he reveals himself at first as being forceful in his defence of his role and the place of the new High Court of Appeal for Ireland. However, his judgments on other matters display a degree of caution and conservatism. As a consequence of events, the existence of Southern Ireland as an entity (if only as an inchoate one) was short-lived.[70] With only Northern Ireland emerging from the Government of Ireland Act, there was no need for the High Court of Appeal for Ireland so that, going forward, appeals from the Court of Appeal in Northern Ireland went to the Judicial

[66] Ibid., 128.
[67] Ibid., 129.
[68] (1879) 11 Ch. D 416.
[69] *Crean v. McMillan* (n. 63), 130.
[70] A. S. Quekett, *The Constitution of Northern Ireland* (Belfast, 1928).

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Committee of the House of Lords. The Irish Free State (Consequential Provisions) Act 1922 abolished both the High Court of Appeal for Ireland and the office of Lord Chancellor of Ireland on 5 December 1922.[71]

Ross's judgments often display a degree of caution and conservatism. The legacy of the High Court of Appeal for Ireland has been considered by others.[72] Ross's personal contribution still resonates, notably his conscious desire to position the High Court of Appeal firmly as the 'guardian of the constitution'.

The Lord Chancellor's Mace, Abolition and Final Years

One interesting note to Ross's time as Lord Chancellor comes from the rather testy correspondence he entered into in late 1922 with Hugh Kennedy, at the time chief legal adviser to the Provisional Government of the Irish Free State, with regard to the Lord Chancellor's mace.[73] Ross refers in his memoirs to be 'past understanding' Kennedy's justifications for the Lord Chancellor's mace being retained by the Provisional Government.[74] Kennedy wrote in his letter of 23 October 1922 that it was 'the view . . . [of] the late [Michael] Collins . . . [and] the view of the [Provisional] Government . . . that the mace, which was properly the symbol of the Lord Chancellor's authority as Speaker of the House of Lords, was no longer appropriate to that office' as section 44 of the Government of Ireland Act 1920 had transformed the Lord Chancellor into 'a purely judicial personage'.[75] Indeed, Ross acknowledged this state of affairs in his judgment in *Leyburn v. Armagh CC*.[76] In his letter of 24 October 1922, Ross set out five numbered arguments as to why the Lord Chancellor's mace should be his property[77]:

1. Under no circumstances could the mace be the property of *one* of the two Governments existing in Ireland.

[71] *The Irish Law Times* (Dublin, 2 December 1921), 289.
[72] Osborough (n. 52), 296.
[73] R. Keane, 'Hugh Kennedy', *Dictionary of Irish Biography* (Dublin, 2012), www.dib.ie/biography/kennedy-hugh-a4483, accessed 16 February 2022.
[74] Ross, 1924 (n. 5), 297.
[75] Letter, dated 23 October 1922, from Hugh Kennedy to John Ross found in National Archives of Ireland (NAI), Department of the Taoiseach (TSCH)/3/S4257.
[76] Ibid.
[77] Letter, dated 24 October 1922, from John Ross to Hugh Kennedy found in NAI, TSCH/3/S4257.

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2. There is no connection between the office of Speaker in the Irish House of Lords and the function of the Lord Chancellor as a member of the Executive.
3. Where there is no express regulation, custom and use are conclusive. The mace has always been exhibited in the court where the Lord Chancellor has jurisdiction as a judge.
4. After the Act of 1920, nobody ever thought of depriving the Lord Chancellor of his mace. The question would never have been raised had it not been for the events occurring at the destruction of the Four Courts.
5. In the Act of 1920 the great seal is expressly mentioned and there are no general words; therefore things should remain as before.

Despite stating that he had other arguments which he will not raise he added that '[t]he last holder of an office on the disappearance of his office would by custom – nobody having a better title – retain the symbol as an heirloom; as for instance, in the case of the great seal on the Sovereign's death, the mace of the Irish House of Parliament [sic]'.[78]

After the Act of Union 1800, the mace of the (defunct) Irish House of Commons had come into the ownership of the last Speaker of that chamber, John Foster.[79] However, none of Ross's arguments were specifically addressed by Kennedy. The matter concludes with Kennedy forwarding the correspondence with Ross to the Secretary to the Provisional Government, stating that the mace 'should not be handed over to the Lord Chancellor in the altered circumstances of his office'.[80] If this is what Ross described as 'past understanding', it is perhaps more evidence that he either did not understand or did not want to understand that what was taking place was a more full-scale legal and constitutional change than that effected by the Act of Union. This is illustrated by his views following the Treaty and the abolition of his office, which left him without a role. His memoirs allude to his hatred of the settlement under the Treaty. In the first volume of his memoirs, he quips: 'Then came the Treaty, which I do not discuss'.[81] He assails the merits and necessity of the Treaty in an entire chapter of the second volume of his memoirs.[82]

[78] Ibid.
[79] P. Thorne, *The Royal Mace in the House of Commons* (London, 1990).
[80] Memorandum, dated 26 October 1922, from Hugh Kennedy to the Secretary to the Provisional Government found in NAI, TSCH/3/S4257.
[81] Ross, 1924 (n. 5), 295.
[82] Ross, 1927 (n. 5), chapter XVI, 244–254.

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Despite all of that, the Lord Chancellor's mace ended up with the National Museum of Ireland in 1925.[83] It can today be seen in a cabinet in a corner of the National Museum of Ireland at the Collins Barracks in Dublin.

After the events of 1922, Ross sold his Dublin residence and initially moved to London, where he was unable to find a judicial position. He therefore retreated to the new Northern Ireland and the estate he had inherited from his father-in-law in south Tyrone. He became increasingly frustrated with his isolation from his former Dublin life. For example, his invitations to Thomas Bodkin, Director of the National Gallery of Ireland to come to Sixmilecross (ostensibly to see Ross's art collection) were repeatedly rebuffed.[84] Nevertheless, according to the newspaper reports of his illness and death he kept busy in his local area. He passed away on 17 August 1935, and it is fitting to conclude with the evocative report of his funeral from *The Londonderry Sentinel*:

> Amid the heather-clad hills of Tyrone and surroundings in which he had lived for many years, honoured, loved, and respected by all, the remains of Sir John Ross . . . distinguished son of Londonderry, last Lord Chancellor of Ireland, brilliant advocate and judge were laid to rest in Dunmoyle churchyard.
>
> The funeral was of the simplest character and an expression of the personality of a great man who valued and loved the simple things of life. Apart from the members of the family . . . there were only a few distinguished friends, including His Grace the Governor of Northern Ireland, who had been associated with him either on the bench, at the bar, or in political life.[85]

Conclusion

In a different era, Sir John Ross may have gone on to become one of the most influential judges of his generation. That he was able, despite his background as an Ulster Presbyterian, to ascend through the ranks of the Dublin legal world to the position of Lord Chancellor of Ireland is testament to his drive and determination. Proof of his skill as a lawyer, and in particular as a judge, is evident in the few judgments he was able to deliver in Ireland's last all-island superior court.

[83] NAI, TSCH/3/S4257.
[84] Library of Trinity College Dublin (IE TCD MSS) 7007 945–974 Sir John Ross.
[85] 'Funeral of Sir John Ross', *The Londonderry Sentinel* (Londonderry, 22 August 1935), 4.

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