

THE CASEMENT TREASON TRIAL IN ITS LEGAL CONTEXT*

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'For myself, I always feel anxiety in a court of justice when there is any possibility of the introduction of political passion. Justice is ever in jeopardy when passion is aroused.' (Lord Reading summing up for the jury in the Casement treason trial)

INTRODUCTION

The legal context in which the Casement trial occurred was inseparable from the military, constitutional and political circumstances out of which the case arose. As far as the first of these was concerned, the overriding shadow was not the Easter Rising but rather the great war, which had reached a crescendo of violence during the first half of 1916. The extraordinary and (for the time) unprecedented level of killing apparently necessitated by this conflict hung like a filthy odour over all public life during the period, rendering the smell of other, lesser savagery barely discernible in a moral climate that had been overwhelming by such noisome tragedy. The constitutional context was provided by Casement's avowal of views which were designed to lead to the dismembering and therefore to the destruction of the United Kingdom. It is bad enough at the best of times to want to destroy a country, but to do so having received one of its highest honours from its King and when the nation is at one of the lowest and most vulnerable points in its history struck its ruling elite as treachery *par excellence*. Thirdly there was the political context, which demanded punishment for Casement but not punishment of such a sort, or achieved in such a

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manner, that would alienate powerful British friends (mainly of course the Americans) in Britain's more general hour of need.

In the handling of the crisis which Casement's perceived treachery and subsequent extraordinary conduct involuntarily imposed on them, the British authorities played their hand as effectively as might have been expected and more efficiently than many would have predicted. Casement was executed, but only after a lengthy trial and an appeal. The event in itself radicalised neither Irish nor American opinion. The great war continued its undisturbed and bloody course for a further two years. Had Irish recidivist inclinations been permanently stunted by the failure of Easter 1916, we can be confident that Casement would now be little more than an occasional footnote in imperial and British-Irish history. But the man's Irish nationalism has proved luckier in death than in life, his side achieving many of its constitutional goals far quicker than could possibly have been imagined during 1916-7. With his knighthood, his very British name and his good works among colonial peoples, Sir Roger Casement might strike some as an incongruous patron saint of modern Irish nationalism. But, safely dead and therefore with his passions uncomplicated by any later need to take sides, this is what he has become. With each succeeding decade of the 20th century, the cult of Casement has gathered pace. The main focus inevitably has been on whether or not he had homosexual inclinations, a question that many of his greatest admirers seem devotedly anxious should be answered in the negative. This is not an issue that will be discussed here. But a second theme of greater contemporary appeal has latterly emerged: was Casement's trial a shallow affair conducted without proper due process or an appropriate sense of

fairness? Was he, to use the modern jargon, the victim of a “miscarriage of justice”? This paper is concerned with attempting to answer these questions.

THE CASE ITSELF

Roger Casement was charged with high treason in adhering to the King’s enemies “elsewhere than in the King’s realm, to wit, in the empire of Germany, contrary to the Treason Act 1351”.¹ That statute provided that it should be treason if a man were “adherent to the King’s enemies in his Realm, giving to them aid and comfort, in the Realm, or elsewhere.” Casement did not deny that his conduct was capable of being construed as treasonable as that phrase was commonly understood. He was an Englishman who had sought to assist the cause of Irish nationalism by joining forces with an enemy with whom at the time the United Kingdom was at war. As an Englishman, Casement had been loyal neither to Crown nor country; as an adopted Irishman of course he had been acting with patriotic zeal, but this was neither here nor there when facing a charge of treason in a British court that denied Ireland’s separate existence as a state. Nor did Casement deny the basic facts: he had landed in Kerry having been placed there with German assistance. He had certainly taken a strongly pro-Irish, anti-British line when in Germany. His purpose in coming to Ireland at this time was at very least to liaise with his revolutionary comrades intent upon an uprising against the established government, though whether this was in order not to

¹ *R v. Casement* (1916) 32 TLR 601 (K. B. Div.); (1916) 32 TLR 667 (C.C.A.).

whip them up but rather to persuade them to desist from their enterprise was never clarified at the time.²

The technical problem with the treason charge brought against him was that Casement had been a model of decorum when actually on British (i.e. Kerry) soil; he had been arrested before he could put a seditious foot in any direction. The main argument of his counsel Serjeant Sullivan both at his trial and in the resultant appeal was therefore (in the words of Darling J.) that this Statute had “neither created nor declared an offence of treason by adherence to the King’s enemies beyond the realm”; and that the words meant that “the giving of aid and comfort outside the realm did not constitute a treason which could be tried in this country unless the person who gave the aid and comfort outside the realm, in the present case in the Empire of Germany, was himself within the realm at the time when he gave the aid and comfort.”³ The implications of such a defence were at first glance extraordinary: on this reading of it, the statute would permit persons to enter the United Kingdom having committed treason abroad and then remain at liberty and unhindered by the authorities as long as they behaved themselves within the jurisdiction. This would have been a lot to ask of an England even in its most self-confidently liberal of moods, much less one already brutalised by a savage war. The medieval Parliament that passed the Treason Act had hardly contrived such a tolerant lacuna in a far-sighted gesture of solidarity with future subversives.

² For the view that it was the latter, see Dudley Edwards, “Divided Treasons and Divided Loyalties: Roger Casement and Others” a lecture read at the Royal Historical Society on 11 September 1981 and afterwards published in (1982) *Transactions of the Royal Historical Society*, fifth series, p. 153; see esp. pp. 163-4.

³ See *Casement*, n. 1 above, at 669. The transcript of the remarks of Darling J. which is preserved in the official papers on the case differ slightly (but not materially) from what appeared in the law report published in *The Times*.

On the other hand, there were few precedents to hand in the law reports. Arrivals with a treasonable record usually did a few nasty things when they landed, enough to make themselves Kings or justify their execution on normal grounds. Casement was that most unusual of subversives, a man who, having plotted avidly abroad, poked around in a shed for a few hours on his arrival within the realm until his entirely peaceful apprehension. The defence could certainly have worked, but only with the greatest of difficulty: the judges might have chosen to interpret the statute in the very particular way required by Sullivan – it was technically possible. This would have required them to distinguish both case law authority⁴ and the unanimous view of legal scholars such as Coke, Hawkins, Hale and Stephens. These legal manoeuvres were also just about achievable. The allegations of pedantic obscurantism that would have followed a finding in favour of Casement could have been anticipated in their judgments by some solid civil libertarian rhetoric about the presumption of liberty and the commitment to freedom that made the common law - and by extension His Majesty's judges - so special. But consider the result which such creativity would have produced - excoriation by the British public for having contrived the acquittal of an admitted traitor on the most technical of technicalities. The case would have been more interesting had these been the various hurdles over which their lordships had had to jump in order to secure a *conviction* that the authorities and the people badly wanted.⁵

It is hard to believe that any member of Casement's legal team believed that their client was in with a chance of success. Owen Dudley Edwards is surely correct when he concludes that the "legal principle involved in the act of Edward III had almost

⁴ *R v. Cundell*, vol. 4, Newgate Calendar 62; *R v. Lynch* [1903] 1 KB 444.

⁵ *C.f. Joyce v. DPP* [1946] AC 347.

certainly been resolved correctly, and against Casement.”⁶ But is he correct when he asserts that the accused “did not have a fair trial, and its unfairness was inimical in the extreme to the high Irish expectations of British justice ...”⁷ It may be that (perhaps it might be thought paradoxically) the rebellious Irish had high expectations of British justice but even if they did, could it not be said that the Casement trial acquitted itself reasonably well on this score? Here was a country in the midst of a brutal war, which nevertheless devoted four days, three senior judges and a jury to Casement’s trial, and then five equally elevated members of the judiciary to the hearing of his appeal. Reading C.J., Atkin, Avory, Bray, Darling, Horridge, Lawrence and Scrutton JJ. all had their chance to immerse themselves in Casement’s argument and to test its credibility in their own minds. The summing up to the jury in the trial, by the Lord Chief Justice was not noticeable for its partisanship; indeed it was less polemical and far less biased than the words of many trial judges in Irish “terrorism” cases from our, supposedly more enlightened era. Casement’s final speech was permitted by the Bench after he had been convicted. Of course that highly political lawyer F. E. Smith who led for the Crown was combative and aggressive in his handling of the case, but then that was what he was for: the adversarial system requires two sides to attack each other’s positions while the neutral adjudicator keeps the proceedings within predetermined bounds of fairness. It would be quite wrong to deduce from Smith’s conduct that the trial was unfair: he was only doing his job - which (on this occasion) was as a lawyer not a politician.

⁶ Dudley Edwards, n. 2 above, at p. 168.

⁷ *Ibid.* at p. 173

THE WIDER LEGAL CONTEXT

If the Casement trial was fair, then, this might be because justice and magnanimity are easier when the outcome is assured. On appeal, the judges neither heard from the Attorney General nor took time to consider their decision, both of which facts were less likely to be indicators of a flawed process than that they were pointers to the clarity of the tribunal's collective, made-up mind. When his technical virtuosity had led nowhere, with the trial court having ruled against him on his primary submission about the breadth of the Treason Act, Serjeant Sullivan's final effort on behalf of his client was aimed at broadening the case so as to infiltrate into the minds of the jurors a political dimension that might favour his client when the time came for their decision. This tactic drew a magisterial rebuke from the Lord Chief Justice in his summing up to the jury:

For myself, I always feel anxiety in a court of justice when there is any possibility of the introduction of political passion. Justice is ever in jeopardy when passion is aroused.⁸

To which, had he been inclined to reckless honesty, Sullivan could now doubt have replied that in a court of law passion is indeed the last refuge of the hopeless case, the very worst emotion upon which to depend, but sometimes - when the evidence is overwhelming and the law clear - it is the only rhetorical route down which it is possible to go if silence is to be avoided.

Reading's explicit rejection of any role for passion in the law was, in contrast, something that only the powerful or the very confident could afford to have done.

⁸ (1916) 32 TLR 601 at 613.

The success of the law lies in its capacity to transform feelings into rules enforceable by neutral agents of the State. For what is law other than the institutionalised passion of the powerful in society, bottled up and branded as law for greater effectiveness? Whether or not always clear as a general proposition, this view of the law was on startling public display at the time of the Casement trial. As a very first response to the Easter Rising the Lord Lieutenant Lord Wimborne had proclaimed an immediate state of martial law in Dublin city and county.⁹ Under this authority, the British army's commander-in-chief in the area, General Friend, issued martial law regulations, which imposed a curfew and declared that any civilian carrying arms was liable to be fired upon without warning. Martial law was then almost immediately extended over the whole of Ireland. Only in the most tenuous way could these initiatives be described as legal; rather they were the lashings out of a State under stress.

They were also largely unnecessary, because the authorities had available to them war-time powers which were also quickly diverted to deal with Ireland's revolutionary crisis. At the outset of the first world war, Parliament had passed a number of defence of the realm Acts which had by Easter 1916 been consolidated and under which an extensive array of regulations had been promulgated. It was as a result of one of these that press censorship was imposed in Ireland immediately the revolt commenced.¹⁰ More relevantly from the perspective of the Casement trial, on the same day that martial law was proclaimed, a further proclamation suspended the right to jury trial that had been protected despite war time conditions by the Defence of the Realm (Amendment) Act 1915, and which was now set aside as far as Ireland

⁹ H. C. Debs., 26 April 1916, col. 2483 (H. H. Asquith).

¹⁰ See the comments of A. Birrell at H. C. Debs., 26 April 1916, col. 2484 and the short adjournment debate on the topic at H. C. Debs., 27 April 1916, cols. 2575-80.

was concerned on account of the existence of a “special military emergency arising out of the present war”.¹¹ The effect of this change was to bring into operation two types of military justice, a general court-martial and a field general court-martial. The latter was a particular form of the first of these and it was turned to “in times of crises when it [was] impossible to have such a high degree of formalism as is observed at a general court-martial”¹² – much less we might add (with Casement in mind) the formalism inherent in a full jury trial.

In the weeks that followed the Easter Rising, a total of 183 civilians were tried by courts-martial for their alleged involvement in the rebellion, with the death sentence being passed on ninety prisoners.¹³ Fifteen of these capital punishments were carried out during the first two weeks of May 1916 before the Prime Minister H. H. Asquith ordered that they be immediately brought to an end.¹⁴ There seems to have been no attempt made to test the lawfulness of these executions while they were being carried out, but later efforts to challenge executive power in Ireland under the defence of the realm regulations ended in conspicuous failure. Two cases may in particular be mentioned.

In the first of these, *R v. Governor of Lewes Prison, ex parte Doyle*,¹⁵ the applicant argued that his conviction without a jury was bad because it related to conduct in which he had engaged before the dispensing with jury trial in the 26 April

¹¹ Defence of the Realm (Amendment) Act 1915, s. 1(7).

¹² *R v. Governor of Lewes Prison, ex parte Doyle* [1917] 2 KB 254 at 260 per Sir F. E. Smith, putting the argument for the governor in the case.

¹³ Much of the detail that follows is drawn from Ewing and Gearty, *The Struggle for Civil Liberties. Political Freedom and the Rule of Law in Britain, 1914-45* (Oxford University Press, Oxford, 2000), esp. ch. 7.

¹⁴ Following a famous parliamentary debate, which can be read at H. C. Debs., 11 May 1916, cols. 935-70. Dudley Edwards, n. 2 above, at p. 173, considered the executions injurious to Irish “expectations of British mercy”.

¹⁵ [1917] 2 KB 254.

proclamation. The Lord Chief Justice (Viscount Reading) rejected this submission easily, asserting that the “Proclamation certainly took effect from the time it was published, notwithstanding that the offence had been committed before the date of the Proclamation.”¹⁶ Doyle’s second argument, that his court-martial had been procedurally defective because it had been held in secret, met with a similar lack of success. This was despite the fact that a then recent House of Lords authority, *Scott v. Scott*,¹⁷ appeared to rule that open justice was to be strongly presumed unless exceptional circumstances existed and that this principle had seemingly been embedded in unequivocal terms in the relevant rules of procedure under the Army Act 1881, which had laid down that open proceedings were required. In *Doyle*, however, and despite these precedents, secrecy was to be preferred because (in the words of the Lord Chief Justice) it was “abundantly plain” that the *in camera* proceedings were within *Scott v. Scott*, it being “quite possible to conceive a number of persons coming into court, if the public had been admitted, who might have terrorized, possibly even have shot, witnesses.”¹⁸

Our second case, *R v. Governor of Wormwood Scrubs, ex parte Foy*,¹⁹ comes from a later phase of the troubles ignited by Easter 1916 and the great war. Foy was interned under defence of the realm regulations which (naturally) depended for their legal validity on the fact of continuing war. When he was picked up, 14 January 1920, war had effectively been over for some time and a formal peace with Germany had been signed just a few days before. Nevertheless the Lord Chief Justice and his

¹⁶ *Ibid.* at 268.

¹⁷ [1913] AC 417.

¹⁸ [1917] 2 KB 254 at 272.

¹⁹ [1920] 2 KB 305.

colleagues, relying on a piece of legislation passed in 1918,²⁰ held that the war could only end when the government, through the King in Council, said it was over, and this had yet to occur; hence “the war is not at an end; we are still in a state of war.”²¹ Foy was no less unfortunate with his second line of attack on his incarceration, to the effect that the proclamation that had dispensed with jury trial on 26 April 1916 was no longer valid because the special military emergency that had given rise to it had long ceased to exist. The Lord Chief Justice replied that “even if it is material to consider whether the military emergency has come to an end, it [was] not a matter which this Court can consider; whether the emergency continue[d] to exist or not [was] for the executive alone to determine.”²²

The way in which Lord Reading and his colleagues managed the law in both these cases was in stark contrast to the way in which the Casement proceedings were handled. Doyle and Foy were not celebrity litigants in the way that Casement was; their names were unknown to the general public; no international agitation was raised on their behalf; and the legal cases which both initiated have long been forgotten. Of course neither was fighting for his life in the way Casement was but the ninety prisoners who faced death after courts-martial in Ireland were in a similar predicament, and as we have seen (compared to the Casement furore) little or no issue has been made of the unfairness of their trials in the years since independence. Yet the *Doyle* and *Foy* cases raised serious legal points which would have had an effect on many persons who had been subject to the same treatment under the defence of the realm regulations. Their legal submissions were certainly stronger than those of Serjeant Sullivan on behalf of Casement, forcing the Lord Chief Justice to confront

²⁰ Termination of the Present War (Definition) Act 1918.

²¹ [1920] 2 KB 305 at 312.

²² *Ibid.* at 311.

recent precedent (in the case of *Doyle*) and the reality of the situation around him (in *Foy*). Of course neither litigant was successful but their failure forced the partisanship of British justice a little further into the light. The judges could not afford to indulge their predilection for the rhetoric of English justice or the importance of civil liberties, least it result in the men before them going free, an outcome to their proceedings that they clearly predetermined was unacceptable. No such inhibitions held them back in the *Casement* case. The facts meant that they could be as grandly committed to the rule of law as they desired, and still deliver the result that the State required.

THE LAW ON CIVIL LIBERTIES IN BRITAIN

There can be little doubt that, historically, *Doyle* and *Foy* represent the normal approach of the British judges when dealing with political subversion emanating from Ireland. To the Irish student of British constitutional law, for every general civil libertarian rule that he or she is minded to applaud, there is invariably lurking in the small print a substantial exception especially for Ireland. Thus, as we have seen, *Scott v Scott* inevitably produced *ex parte Doyle*, just as, a generation earlier, the much-praised statement of principle in *Beatty v. Gilbanks*²³ was undermined as far as Ireland was concerned by *O'Kelly v. Harvey*.²⁴ These habits of illiberalism were carried forward into the new Northern Ireland sub-state, established in 1922. In *R. (O'Hanlon) v. Governor of Belfast Prison*,²⁵ an hotelier's internment was upheld without any reason having been given to him as to why he was being detained, other than that the police had "reliable information" that he "was a member of an unlawful

²³ (1882) 9 QBD 308.

²⁴ (1883) 15 Cox CC 435.

²⁵ (1922) 56 ILTR 170.

association”, though what that reliable information was the court was not told. In justifying his deferential approach to the executive power of internment, the Northern Ireland Lord Chief Justice Sir Denis Henry drew support for his position from a House of Lords case decided during the first world war, *R v. Halliday*²⁶. He presented this case as having “decided that the Home Secretary had power to make such orders, and that the Court was prevented from interfering with them.”²⁷

Now *Halliday* is indeed a very important decision, a case epitomising the generally anti-civil libertarian line that the judges took during the 1914-18 period.²⁸ Significantly for the purposes of this essay, however, it is not a case involving any Irish dimension. Nor were the great majority of the decisions of this period which were inimical to civil liberties. Even before the great war, the suffragettes had found that they could not rely on the courts to protect them from over zealous police officers determined to disrupt their deployment of direct action in pursuit of the franchise, even if such protest was being pursued in a wholly peaceful manner.²⁹ After the war, Communist Party agitators ran into all sorts of trouble with the British authorities including the judiciary,³⁰ just as they and other radical agitators did when they attempted to hold their public meetings³¹ and their marches³² and to organise themselves in the 1930s³³. There was nothing particularly *ad hominem* about the assaults on the civil liberties of the Irish separatists that was part and parcel of British law in the first two decades of the twentieth century. It was the way British law

²⁶ [1917] AC 260.

²⁷ (1922) 56 ILTR 170 at 172.

²⁸ See generally Ewing and Gearty, n. 13 above, ch. 2.

²⁹ See for e.g. *Despard v. Wilcox* (1910) 26 TLR 118; *Lansbury v. Riley* [1914] 3 KB 229.

³⁰ See *Inkpin v. Roll* (1922) 86 JP 61.

³¹ See *Thomas v. Sawkins* [1935] 2 KB 249; *Duncan v. Jones* [1936] 1 KB 218.

³² See generally Ewing and Gearty, n. 13 above, ch. 5.

³³ See *Elias v. Pasmore* [1934] 2 KB 164.

behaved towards those who challenged the state. The interesting point about the Irish cases is that they provided a base from which illiberal rulings were allowed to slide sideways into the mainstream common law.³⁴ It is the very lack of uniqueness of these cases therefore that is their most important characteristic.

The judges involved in the Casement trial and appeal were the same men who gave the British judiciary such a repressive corporate personality during the first half of the twentieth century. Reading was of course the best known of them. A former Liberal MP and member of the government, he was used extensively by the authorities as an adviser and sometime emissary even while holding the office of lord chief justice.³⁵ The two judges who sat beside him during the trial were Horridge and Avory JJ. The first of these, Thomas Gardner Horridge, had presided over the jailing of the printers and publishers of *The Syndicalist* in 1912,³⁶ and twenty years later upheld police powers of search and seizure in *Elias v. Pasmore*.³⁷ Sir Horace Edmund Avory, sat with Reading on the *Foy* case, discussed above. During his long tenure on the bench, he confirmed the binding over order imposed on George Lansbury for his suffragist activities in 1913,³⁸ upheld the legitimacy of police use of search powers during the first world war,³⁹ sanctioned the imprisonment of Communist Party general secretary Albert Inkpin in 1921,⁴⁰ and extended police powers in respect of private meetings in 1935.⁴¹

³⁴ Note for example that Irish cases were cited with approval in among other decisions: *Lansbury v. Riley*, n. 29 above, at 234-5 (Bray J.) and 236-7 (Avory J.); *Elias v. Pasmore*, n. 33 above, at 169-70 (Horridge J.); and *Thomas v. Sawkins*, n. 31 above, at 254 (Hewart L.C.J.).

³⁵ The details are in Ewing and Gearty, n. 13 above, at pp. 82 and 408-9.

³⁶ *R v. Bowman* (1912) 76 JP 271.

³⁷ N. 33 above.

³⁸ *Lansbury v. Riley*, n. 29 above.

³⁹ *Ex parte Norman* (1916) 114 LT 232.

⁴⁰ *Inkpin v. Roll*, n. 30 above.

⁴¹ *Thomas v. Sawkins*, n. 31 above.

The presiding judge in Casement's appeal was Darling J., a former Conservative MP who had been elevated to the High Court in 1897 and who was a close colleague of Reading's, often covering for the lord chief justice during his many absences abroad on political business. In one war-time case, Darling had described the impugned regulation before him as "part of legislation passed hurriedly while the country [was] at war" and one therefore that should be construed "according to the maxim *salus populi suprema lex*".⁴² During his time on the bench, Darling developed the habit of publishing letters and poems, usually anonymously, on issues of the day. In one remarkable letter to *The Times* he advised that the crews of stricken German submarines should be left to perish at sea, there being no "legal obligation to rescue them from the drowning deserved." His remark, when considering the argument in *Doyle*, that the applicant's court-martial should have been heard in public, that it would have been "grotesque" so to have acted while the "ruins in Dublin were still hot cinders" were perfectly in judicial character.⁴³ Casement got Mr Justice Darling very much on his very best behaviour.

CONCLUSION

It may not be improbable that at least some of the men who sat in the Casement case were consciously anti-Irish, but even if they were it is not obvious this was a factor which affected the way in which they discharged their judicial obligations in that case. The problems with the English bench of this period went far deeper than a mere antagonism to a particular ethnic minority within the United Kingdom. From the perspective of civil libertarian principle, the judges totally failed in their duty to

⁴² See *Michaels v. Block* (1918) 34 TLR 438.

⁴³ *R v. Governor of Lewes Prison, ex parte Doyle*, n 12 above, at 273 and 274.

protect the expression of certain political sentiments from attack by the State. In case after case, the courts permitted, and by permitting legitimised, the consistent efforts of the police and the executive authorities to destroy the capacity for political expression of members of the Communist Party and other left wing radical groups. The Irish nationalists too were attacked in the same way until, during 1916 and again from 1919 to 1921, the seriousness of their challenge provoked a proportionately stronger State response. But Irish nationalists were not treated uniquely badly by English law; they were just one of a number of groups for whom the rhetoric of British liberty rang hollow. Lord Reading and his colleagues were at the helm of a legal ship of State which was indeed full of passion, but it was not the passion of the desperate advocate. Rather it was the carefully controlled passion of the powerful against the weak, and of those committed to the status quo against others who threatened change in the name of what they called justice. Only those in full command of the forces of a State can boast that they are dispassionate while arranging the execution of their political opponents. Lord Reading and the judges on the bench with him enjoyed that luxury in the Summer of 1916.

Caseant seems fully to have understood this. Freed by his conviction from the rigours of his pedantic legal submission, his long statement from the dock after his conviction had been affirmed draws on the rhetoric of English law in order to make a very specific point: “And what is the fundamental charter of an Englishman’s liberty? That he shall be tried by his peers. With all respect I assert this Court is to me, an Irishman, not a jury of my peers to try me in this vital issue, for it is patent to every man of conscience that I have a right, an indefeasible right, if tried at all under this statute of high treason, to be tried in Ireland, before an Irish court and by an Irish

jury.”⁴⁴ He went on to promise that if placed “before a jury of [his] own countrymen, be it Protestant or Catholic, Unionist or Nationalist, Sinn Feineach or Orangeman” he would “accept the verdict and bow to the statute and all its penalties.”⁴⁵

But there was of course a very good reason why Casement had been dragged half way across the United Kingdom from Kerry to London in order to stand trial. It was precisely in order to avoid a trial before an Irish judge and jury. In such a context, the same legal rules as convicted him so effortlessly in London would almost certainly have led to his acquittal. Even as early as 1916, it was clear that Irish juries and even the local magistrates were – from the British government perspective – unreliable. The Royal Commission that enquired into the 1916 revolt found that “[s]o seditious had the country become during 1915, that juries in Dublin, and magistrates in various parts of the country – through fear or favour – could not be trusted to give decisions in accordance with the evidence”.⁴⁶ This was why the right to a jury had been abandoned with such enthusiasm the moment the Easter rebellion had got under way. In the years after 1916, the country became even more “ungovernable” as the magistrates, juries and eventually even some High Court judges⁴⁷ indulged themselves in conduct which from a narrowly legal perspective was increasingly perverse and irrational. But this was only an example of the subversion of the rule of law that inevitably occurs when those who administer it lose confidence in the legitimacy of the coercive power that it encapsulates. For all its ostentatious lack of passion and its loudly-proclaimed moral neutrality, the law in general, and the

⁴⁴ See (1916) 32 TLR 601 at 615.

⁴⁵ *Ibid.* at 616.

⁴⁶ See Ewing and Gearty, n 13 above, at p. 341n.

⁴⁷ Notably *Egan v. Macready* [1921] 1 IR 265.

rhetorical notion of the rule of law in particular, is little more than the sum of the emotional force of those who enact, interpret and enforce it.

