

The Eric Fines of Ancient Irish Law.

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IT is strange how very little attention is devoted by Irishmen to the study of the ancient laws of their country. These have been translated from the original Gaelic after the life-long labour of such distinguished scholars as O'Donovan and O'Curry, and published at a moderate price; but nobody takes the trouble to read them. The late Professor Richey, whose loss is so deeply felt by all who are interested in the scientific study of law, has contributed instructive prefaces to the later volumes, pointing out their importance, both as the true source for the study of the early history of Ireland, and, from the point of view of general jurisprudence, as affording us the most complete archaic code of law in existence. Yet even his high authority has not been sufficient to create any interest in them. Irishmen alone, of all the nations of the earth, consider their national history unworthy of study. The importance of these laws in the second point of view, namely, in reference to the study of ancient law generally, has been fully recognised, however, by Sir Henry Maine, who has devoted a considerable portion of his later works to their consideration. In his opinion they present to us a type of what in all probability the primitive law of all branches of the Aryan race originally was.

Of the various law tracts which have been translated, the most important is what is called the *Senchus Mór*, a complete code of the law which, according to the account given in its introduction, was compiled immediately after the coming into Ireland of St. Patrick. After the conversion of the whole island to Christianity, we are told, it was resolved to purge the law of everything opposed to the new religion. At a great assembly at Tara, Dubhthach Mac va Lugair, the royal poet, was ordered "to exhibit all the judgments and all the poetry of Erin, and every law which prevailed among the men of Erin to Patrick," and "what did not clash with the word of God in the written law, and the New Testament, and the consciences of believers, was confirmed in the laws of the brehons by Patrick, and by the ecclesiastics and chieftains of Ireland." Of course we cannot vouch for the truth of this account, but there seems every reason for believing that the work is of very ancient date. Sir Henry Maine indeed thinks it was compiled as late as the tenth or eleventh century, but the authority of all Irish scholars, including the translators, is against him on this point. There is one interesting internal evidence of its antiquity, namely that considerable portions of it are in verse. It is extremely unlikely that laws would be thus drawn up, except for the purpose of assisting the memory, in an age anterior to writing. The extremely archaic character of the law is exhibited in many things. The leading authority is the royal *poet*, "who exhibited all the judgments and all the poetry of Erin" to Patrick. Kings are spoken of as exercising judicial functions personally. There is no mention of coined money; the measure of value is a "cumhal," which originally meant a female slave, and then her value, which was considered to be equivalent to that of three cows. Kinship is the basis of society. The land is chiefly owned in common, although separate ownership is not unknown. The family, and even the tribe, are responsible for the crimes of individuals, and all crimes are commuted by a money payment. The strangest thing of all about these laws is that, side by side with the most archaic principles, we find extremely modern doctrines on some subjects—the latter, in all probability, having been adopted from the Roman law. Minute regulations, for instance, are laid down as to contracts, and the provisions regarding fraud remind us forcibly of the very elastic *exceptio doli mali* of the Roman system. On the whole, however, the laws were just and equitable. Hence the desire frequently shown by Norman or English settlers to adopt them—a tendency which it took all the energies of the parliament of the Pale to counteract and repress.

The *Senchus Mór* became the leading authority on law throughout Ireland, and continued to be such as long as the Irish tribes retained their independence. Its authority did not completely cease until the seventeenth century. During all this period of probably 1,000 years, the law underwent little or no alteration. Various causes produced this result, the chief one being the unsettled condition of Ireland, and the absence of any strong central authority to alter or develop the legal system. Hence its extremely archaic character, even in its latest development, and the interest which consequently attaches to it at the present day.

The most prominent and, to the modern student, the most interesting feature of the Brehon law, is the system of eric fines, which formed the basis of the whole law of torts and crimes. Every offence—even murder—was punished by a fine, which varied in amount, partly according to the rank of the person injured, and partly according to that of the wrong-doer. The rules for calculating the amount and regulating the incidence of the fines were extremely complicated, and a great portion of the law tracts is taken up with their discussion. Now, bearing in mind that the Brehon law is an extremely good type of archaic law in general, it is natural to suppose, from the prominent position occupied by the fines, that we have here an instance of a very general ancient custom. And such is in reality the case. The eric fine affords us the real clue to the early history of criminal law in every community.

The custom of punishing homicide and other crimes by a fine was common to all ancient systems of law. Everywhere there are traces of it ; but in general it disappeared at such an early period in the development of the law, that we can learn little about it, or the way in which it originally sprung up. In Ireland, on the other hand, the law was, from various causes, stereotyped in its original form, and remained unchanged throughout the whole course of its history, so that this ancient custom continued to prevail here centuries after it had disappeared elsewhere. Thus when an English Deputy, during the reign of Elizabeth, informed MacGuire of Fermanagh that he must admit a sheriff into his territory, the Irish chief replied that the sheriff should be welcome, but at the same time inquired the amount of his " eric," that in case anybody should cut off his head he might levy it upon the country. To allow such a serious crime as murder to be commuted by a money payment was certainly an anachronism in the seventeenth century, and this probably contributed in a great degree to prevent the establishment of order throughout the native portion of Ireland. The English writers who denounced the custom of eric fines as "wicked" and "damnable," were probably unaware that a similar custom originally prevailed in every country of Europe, including their own. Still there is a considerable amount of truth, though some exaggeration, in the remark of Davis, that " the people which doth use it, must of necessity be rebelles to all good government, destroy the commonwealth wherein they live, and bring barbarism and desolation upon the richest and most fruitful land of the world." The continuance of such a custom would effectually prevent any real social progress in the nation.

Although every trace of the death-fine had long since disappeared from English law in the reign of Elizabeth, it at one time, under the name of *weregeld*, occupied almost as important a position therein as in the Brehon law ; while among the ancient Germans, Tacitus tells us, it prevailed universally. With the advance of feudalism, the custom gradually disappeared throughout Europe. Feudalism, however, made no progress in Ireland, and the death-fine continued to prevail in its pristine force. Its extremely archaic character may be judged from the fact that although it was unknown in the historical period in Greece, yet it is referred to more than once in Homer. A dispute about a death-fine is one of the scenes depicted on the

shield of Achilles, and in the ninth book of the *Iliad*, Ajax in reproaching Achilles for not accepting the offer of reparation made to him by Agamemnon, reminds him that even a brother's death may be appeased by a pecuniary compensation, and that the murderer, having paid the fine, may remain at home among his own people free. The Roman law, which developed very rapidly, contains no direct reference to it in any of the existing authorities; but there are indications that it once existed there also. Even in the Mohammedan law, we find from the *Koran* that it was a well recognised custom.

The amount of the eric fines varied, as I have said, according to the rank of the person killed; being highest in the case of a chief or a bishop, and next in the case of a poet. It was paid to the relatives of the deceased person in the proportion in which they were entitled to inherit his property. Different names are used in the laws for the fines, and there is some confusion as to the mode of calculating the amount. The terms *coipp-oipe* (*coirpdire*), *einaclann* (*enachlan*), and *eiric* (*eric*), are used indiscriminately. The *einaclann* or "honour price," as it is translated, was the price at which a man's life was assessed. Whether it was equivalent to the *eiric*, or was a separate payment, it is impossible to say. The amount of the honour-price depended on either wealth, family, or profession, and a man was allowed to elect by which it should be calculated; but having once made his election he was bound by it for ever. Some passages in the Laws assume that a king or chief might elect to base his honour-price on the amount of his possessions. This is an extremely interesting fact, as showing that the great importance of wealth is not, as is generally supposed, peculiar to modern society.

The fine for homicide being thus such a very archaic institution, if we could ascertain the way in which it originated we would probably learn the origin of law itself. The account given of the eric fine in the Brehon laws, and the references to it in the historical tales of the ancient Irish, enable us at once to solve this problem. The origin of law is stated by Sir Henry Maine to have been in all cases a voluntary submission to arbitration. This theory is based upon the forms of the *legis actio sacramenti* of the Romans, as described by Gaius, and has been confirmed by many indications in other systems of law; but the history of the eric fine shows us that there was a stage anterior even to this, in one branch of the law at least; and this we learn, not from any indistinct indications of it in the procedure of a more fully developed system, but from contemporary references, and from the provisions of the laws themselves. We stand here, it may be fairly said, on the very threshold of law, and see how it arose in a state of society where anarchy and disorder had previously prevailed. The idea of retaliation is deeply rooted in man's nature. A savage or a child naturally revenges an injury by inflicting a similar one upon the aggressor. Retribution in kind is viewed even in civilized societies with satisfaction. An eye for an eye, a tooth for a tooth. Whoso sheddeth man's blood, by man shall his blood be shed. Such is the rule in all early societies. The theory that the system of pecuniary fines immediately succeeded the custom of mere retaliation, which is considered probable by Sir Henry Maine, is completely confirmed by the accounts given of the eric fines in the Brehon laws, and in the historical tales of the ancient Irish Celts. But how did the fine come to take the place of retaliation? This we shall see from the way in which the fine was itself originally regarded. The payment is invariably treated in the laws as a satisfaction to the injured party for his surrender of his right of revenge, and when the fine is not paid, the right of revenge revives as of course.

In very early times the acceptance of the fine was even optional; the injured person if he preferred to revenge himself on his adversary might do so freely. A story contained in the Book of Lecain (about 1416 A.D.) illustrates this stage of legal progress. It is called the

"Fate of the Children of Turenn,' and is of very ancient date, being referred to in Cormac's *Glossary*, a work of the ninth or tenth century. The father of Luga, a powerful warrior, had been slain by the Children of Turenn. Luga, after celebrating the funeral rites, proceeded to Tara to the great assembly held there. Having taken his seat:—

"Luga asked the King that the chain of silence should be shaken, and when all were listening in silence, he stood up and spoke.—

"I perceive ye nobles of the Dedannan race that you have given me your attention, and now I have a question to put to each man here present what vengeance would you take of the man who should knowingly and of design kill your father?"

" They were all struck with amazement on hearing this, and the king of Erin said—

" What does this mean? For that your father has not been killed, this we all know well!"

"My father has indeed been killed,' said Luga, 'and I see now here in this hall those who slew him. And furthermore, I know the manner in which they put him to death, even as they know it themselves.'

" The sons of Turenn hearing all this said nothing, but the king spoke aloud and said—'If any man should wilfully slay my father, it is not in one hour or in one day I would have him put to death ; but I would lop off one of his members each day, till I saw him die in torment under my hands.'

All the nobles said the same, and the sons of Turenn in like manner.

" 'The persons who slew my father are here present, and are joining with the rest in this judgment,' said Luga, 'and as the Dedannans are all now here to witness, I claim that the three who have done this evil deed shall pay me a fitting eric fine for my father. Should they refuse, I shall not indeed transgress the King's law, nor violate his protection; but of a certainty they shall not leave this Hall of Micorta till the matter is settled.'

" And the King of Erin said ' If I had killed your father, I should be well content if you were willing to accept an eric fine from me."

" The sons of Turenn then declared their readiness to pay a fine, and Luga answered them —

" I shall accept an eric fine from you, though ye indeed fear I shall not: I shall now name before this assembly the fine I ask, and if you think it too much I shall take off a part of it."

The fine is then named and the story proceeds.

We see from this interesting anecdote that a voluntary submission to arbitration was not the first stage in the development of law, but that there was a stage earlier even than this, namely—that of an ordinary agreement or bargain between the parties, settling the amount of the damages. The fine is not imposed by any recognised authority. The king claims no jurisdiction in the matter—not even suggesting the amount of the fine—a question which the parties settle between themselves. One of them has suffered a wrong, and demands to be paid compensation as the price of his renouncing his right to revenge. He appeals to those around to say whether what he asks is fair compensation, and they merely give their opinion without attempting to arbitrate or interfere in the matter in any way.

We are here at a much earlier stage of law than that which is exhibited in the fictitious *legis actio sacramenti* of the Romans. There is no command to the parties to desist, corresponding to the *mittite ambo hominem*. The injured person merely demands compensation, and it is perfectly optional with him to take it or not. The primitive right to retaliation has not yet disappeared, nor is there any moral or legal restraint on its exercise, provided the peace or protection of another is not violated thereby. The progress of the law from this beginning is not difficult to conjecture. If the parties could not agree as to the amount of the damages,

nothing would be more natural than that it should be referred to the poet or brehon who attended the chief of the tribe, to decide. His duty was to recite the history of the tribe at the various tribal gatherings, and he would consequently be able to say what had been given and accepted in similar cases. If either party after having agreed to submit the matter to him refused to abide by his decision, such breach of faith would naturally be severely condemned by the whole tribe, and means would probably be taken to inflict punishment. In this way a regular legal system would spring up.

Although in the legal action described by Gaius, the idea of law has been much more fully evolved than here, still we find in an earlier period of the Roman law, a striking parallel to the Irish *eric fine*. The fragments of the Twelve Tables (the oldest record of the Roman law) which remain, contain no provision regarding homicide, but the punishment for bodily injuries is specified, and ancient law invariably deals with these in the same way as with homicide. The words of the eighth table are, *Si membrum rupit, ni cum eo pacit talio esto*—"Retaliation against him who breaks the limb of another and does not offer compensation." Now if the words *talio esto* mean, as I presume they may, "let the injured person retaliate," we are precisely at the same stage as that which the story of the children of Turenn displays to us in the Irish law. In the case of homicide indeed we are informed by Pliny that death was the punishment inflicted by the Twelve Tables; but it is not a very extravagant conjecture to assume that the *talio esto* was qualified in the same way in this case as in the other. The law in Mohammedan countries is in general based on entirely different principles from those prevailing in Europe, yet strange to say we find there also an exact parallel to the *eric fine*. Mr. Sale tells us, in a note to the second chapter of the Koran, that it is a common practice in Mohammedan countries, particularly in Persia, when a man is murdered, that the relations of the deceased should have their choice, either to have the murderer put into their hands to be put to death, or to accept a pecuniary satisfaction. Here we have a striking confirmation of the theory that Penal law originated everywhere in the system of buying off revenge by the payment of a sum of money.

The close connection between the *eric fine* and private revenge explains also the singular custom of levying the fine on the relations of the murderer, if the latter absconded or was unable to pay. Those who seek vengeance are not over-scrupulous as to the persons upon whom they inflict it; and the revenge would naturally be directed in the first instance against the relatives of the wrong-doer. It is their interest then to buy it off, both in order to save themselves and, to protect one of their number. Hence when the custom becomes a law, the fine is levied not alone upon the person who is morally guilty, but on his innocent relatives as well. If the fine was paid, a promise was made not to further seek vengeance, and the bargain was complete. In the case of an habitual criminal, the family could relieve themselves from responsibility for his acts by formally expelling him from their body. Probably this was a provision introduced into the laws at a somewhat late period.

A question has frequently been asked—What was the ultimate sanction of the law at this early period? Supposing a man contemptuously refused to pay the fine which was assessed by the brehon, what was done to him? The Brehon law in this as in so many other points, gives us, I think, a correct illustration of the growth of law in all ancient communities. The right to receive fines was always correlative with the duty of paying them. The persons who were entitled to receive the fine in the case of the death of any individual, were the same persons on whom the onus of paying would have fallen if that individual had committed a crime himself. He who refuses, however, to bear the burden is not entitled to partake of the

benefit of the law; and so we find that where a crime was committed, for which eric fine was not paid, the criminal was permanently deprived of his right to honour-price. This was tantamount to outlawry—an exceedingly severe sentence in a disturbed condition of society. The life of the criminal was then at the mercy of anyone who bore enmity towards him, or who had any interest in his death. " The life of every law-breaker is fully forfeited/' says the Book of Aicill. " There are four dignitaries of a territory/' says the *Senchus Mór* , "who may be degraded: a false-judging king, a stumbling bishop, a fraudulent poet, an unworthy chieftain who does not fulfil his duties. *Dire-fine is not due to them.*"

The commentary which follows this passage was in all probability written at a much later period; it deals not only with the more serious crimes for which the whole of the honour-price was forfeited at once, but also with lesser offences on account of which a part only was taken away, unless the offence was repeated, thus :—

"False judgment, and false witness, and false testimony, and fraudulent pledging, and false proof, and false information, and false character-giving, and bad word, and bad story, and lying in general, whether in the case of the church or the laity—every one of these deprives the man who is guilty of such of half his honour-price up to the third time, but it does not deprive him with regard to all until the third time ; and it takes away even this half honour-price from everyone from the third time out And he may lose this half honour-price by a different person; and he thus loses full honour-price with respect to the latter person, or with respect to the person against whom he had committed the first injury. Theft or eating stolen food in the house of one of any grade, or having stolen food in it constantly; and treachery, and fratricide, and secret murder—each of these deprives a person of his full honour-price at once."

This system of depriving persons of honour-price, either wholly or partially for offences, marks a completely new epoch in the law. Society now for the first time intervenes in the matter. We pass at once from the era of torts to that of crimes. The true difference between a tort and a crime lies in the remedy, not in the nature of the act All offences are offences against individuals, and all more or less cause alarm and apprehension amongst others, lest they should suffer in the same way. But in some cases the remedy is left in the hands of the individual wronged, in others the state imposes the penalty. In the first case we speak of the offence as a tort; in the latter as a crime. This deprivation of honour-price was probably proclaimed at a tribal meeting. There is no reference indeed, so far as I know, in the Irish law to anything like a public trial; still, some passages manifestly imply it. Entire exemption from fine, for instance, is allowed in the Book of Aicill to a person who kills " a condemned outlaw."

We are thus enabled to trace the custom of eric fines in the Brehon law from its earliest origin until it became a regularly formed system of criminal law; and as we know that the death-fine was a custom universal amongst ancient communities, we thus learn the primitive history of criminal law generally. The principle of simple retaliation is the universal custom in primitive society. The first step in the origin of law is the custom of buying off revenge ; the payment being made either by the individual himself, who has inflicted the injury, or by his tribe. A pecuniary payment thus comes to be looked upon as a satisfaction for a crime. When the custom of pecuniary compensation becomes general, disputes naturally arise as to the amount of the compensation. Hence the custom of referring the question to the arbitration of some impartial person— the second stage in legal progress. The person most likely to be

selected is the poet of the tribe, whose duty it is to record its history, for he is familiar with what has been paid in similar cases previously.

The positions of poet and judge thus come to be looked on as identical; and the ancient Irish law expressly tells us that in former times the legal jurisdiction was vested in the poets. It was the royal poet, Dubhthach, who exhibited "all the judgments and all the poetry of Erin "to Patrick, and was the principal compiler of the *Senchus Mór* . The next step is the direct interference of the tribe itself, or of its chief; and this occurs at first only when one of the parties refuses to refer the dispute to arbitration. Gradually, however, as the central authority gathers strength, its direct interference becomes the general mode of punishing crime, and the system of fines disappears altogether. The Brehon law never arrived at this latter stage of development—hence the permanence of the eric fines.

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