

Kennedy, Hugh

by Ronan Keane

Kennedy, Hugh (1879–1936), first attorney general and chief justice of the Irish Free State, was born 11 July 1879 in Dublin, eldest among five children of Hugh Boyle Kennedy (d. 1923) of 8 Great Denmark St., Dublin (a Donegal-born surgeon who had spent some years in the Society of Jesus before turning to medicine and ultimately becoming a surgeon in the Mater Hospital), and Mary Kate Kennedy (née Kennedy; not related), from Co. Tipperary.

Education Kennedy's father was a fluent Irish-speaker, and from him Kennedy acquired a lifelong love of the Irish language. He was educated privately at home by his father and at the Jesuit University College in Dublin, where he was the first editor of the student magazine, *St Stephen's*, in which some of the earliest works of his contemporary, James Joyce (qv), appeared. Relations between the two undergraduates were distinctly cool: Kennedy attacked a paper that Joyce delivered to the Literary and Historical Society on Ibsen and subsequently was victorious over him in the election for auditor of the Society. They clashed again when Joyce delivered another paper (this time on James Clarence Mangan (qv)) of which Kennedy disapproved. Kennedy graduated with a BA and LLB from the Royal University of Ireland, and was called to the bar in 1902.

Early career to 1924 His interest in Irish led to his joining the Gaelic League and he became honorary secretary of the Ard-Chraobh (central committee), where his fellow committee-members included Patrick Pearse (qv), Éamonn Ceannt (qv), and Eoin MacNeill (qv). He was a successful junior at the bar and took silk in 1920. Although he was not involved in the physical-force movement, his sympathies were nationalist and he was legal adviser to the Department of Local Government under the first dáil. His reputation as a lawyer and his nationalist background made him an obvious choice to be the law officer to the provisional government established under the provisions of the Anglo–Irish treaty of 1921. He was also a member of the committee that drafted the constitution of the new state. The provisional government experienced considerable difficulty in obtaining the approval of the British government for its proposals, and Kennedy was actively involved in frequent negotiations with his British counterparts. He achieved a notable success in ensuring that one provision in the constitution – under which litigants could appeal from the decision of the final court of appeal in the new state to the judicial committee of the privy council at Westminster (one of the requirements of the treaty) – was significantly diluted: the right of appeal was not unlimited, but could only be exercised where leave to appeal was granted. When the matter came to be tested before the judicial committee itself, Kennedy was the attorney general on whom it fell to argue the matter, and the court was satisfied by his arguments that, in the words

of Lord Buckmaster, 'as far as possible finality and supremacy are to be given to the Irish courts.'

Kennedy's tenure as law officer to the provisional government was, however, not altogether happy. During the civil war, which began with the bombardment of the Four Courts on 28 June 1922 when the anti-treaty forces occupying the building refused to leave it, draconian measures were adopted by the new government to bring the armed resistance to the treaty to an end. These included the trial (November 1922) before a military tribunal of Erskine Childers (qv) on a charge of unlawful possession of a revolver. He was sentenced to death and was executed by firing squad, although notice of an appeal had been lodged by his legal advisers against the refusal by the master of the rolls to grant an order of habeas corpus. Kennedy had advised the government that the execution should be postponed until the application for the order of habeas corpus had been dealt with in the high court; but while no written advice from him survives, it seems probable that he also advised that the execution could proceed despite the pending appeal. He was also a victim of the violent reprisals that marked that period in Irish history: his house at Waterloo Place was burned by opponents of the treaty in 1923. He was elected as a TD for Dublin South in the same year.

At a later stage in his career, when he was chief justice, Kennedy was in favour of striking down severely repressive legislation which the Éamon de Valera (qv) government employed to curb unrest, because he considered it violated the natural law, which (in his view) was acknowledged by the constitution of the Irish Free State. It has been suggested that his famous judgement in *The State (Ryan) v. Lennon* was an indication of the disquiet Kennedy felt at the measures to which, as he saw it, he was obliged to assent during the civil war.

Kennedy became the first attorney general of the Irish Free State in March 1923. One of the first tasks on which he was engaged was the establishment of a new court system. He was a member of the committee that advised the executive council (as the cabinet was called) on the form the new system should take. Kennedy played a prominent part in the committee's deliberations, but his relations with its chairman, Lord Glenavy (qv), a former lord chancellor, were somewhat strained. In particular, they disagreed sharply on a proposal by Kennedy (subsequently adopted by the government) that the rules of court, to be prepared by committees of judges and lawyers, would have to be approved by the minister for home affairs (as the minister for justice was then called).

Chief justice 1924–36 The changes proposed by the committee and adopted by the government included the replacement at local level of the lay magistrates and grand juries by professionally qualified district justices. The old county court was replaced by the circuit court, with a greatly increased jurisdiction. The high court and the supreme court completed the new judicial hierarchy, and on 6 June 1924 the government announced that Kennedy was to be the first chief justice. He made the

declaration required by the constitution in the presence of the governor general, T. M. Healy (qv), on 11 June and then, in a ceremony in Dublin Castle, the other judges of the high court and supreme court made a similar declaration in his presence and in the presence of W. T. Cosgrave (qv), president of the executive council, and other members of the government.

In his capacity as chairman of the rules committee for the supreme court and the high court, Kennedy campaigned vigorously for the replacement of the wigs and gowns traditionally worn by judges and barristers, which he regarded as the trappings of an alien regime, with robes inspired by the costumes worn by the brehons or judges of old Gaelic Ireland. He was enthusiastically supported by W. B. Yeats (qv), who recommended that the robes might be designed by the English artist Charles Shannon. Ultimately, Kennedy obtained sketches for the new robes from Shannon and sought to persuade the judges of their merits. However, he received little support from the judges or the government and the traditional dress was retained, although some district judges adopted a form of head-dress favoured by Kennedy and modelled on that worn by the Venetian doges. Kennedy himself declined to wear his wig when sitting in the supreme court: he carried it in his hand and placed it on the bench, apparently regarding that as a sufficient compliance with the rules.

Kennedy has been generally regarded as one of the ablest judges to have graced the Irish bench since independence. His powerful opinion in *The State (Ryan) v. Lennon* has already been referred to; although he was in the minority on that occasion, his eloquent rejection of the legal positivism then in fashion in Ireland, as in the United Kingdom, foreshadowed the developments in Irish constitutional law that were to be such a notable feature of the 1960s and subsequent decades. In another notable case, *Lynham v. Butler (No. 2)*, where the powers of the Irish land commission were challenged on the ground that they were purporting to engage in the administration of justice, his judgement has long been regarded as authoritatively defining the nature of the judicial power under a constitution based on the tripartite distribution of powers between the legislature, executive, and judiciary. In *Moore and others v. Attorney general and others*, a case in which a number of fishermen in Donegal claimed to be entitled to a right of fishing in the River Erne, he delivered a notably erudite judgement on the vexed question of whether the brehon law in Donegal had been superseded by the provisions of Magna Carta.

Kennedy's colleagues on the supreme court until his death in 1936 were Gerald Fitzgibbon and James Murnaghan (qv). One can surmise that he enjoyed good relations with the latter: Murnaghan came from the same northern nationalist catholic background as Kennedy's father did. The same could not be said of his relations with Fitzgibbon, who had represented Dublin University as a unionist in the house of commons and in Dáil Éireann. This is apparent from Kennedy's account in his diary of a delicate problem with which he was confronted when, as chief justice, he was required to decide whether Sir James O'Connor (qv), who had been a member of the

old court of appeal but on his retirement from the bench had practised as a solicitor in England, could be admitted to practice as a solicitor in the Free State. Kennedy, after some anxious consideration, eventually decided that he could, but recorded his exasperation in his diary at the attempts by Fitzgibbon to persuade him to accede to O'Connor's application.

Kennedy also had the presumably not altogether agreeable experience, for a serving chief justice, of being reversed on at least two occasions by his colleagues on the supreme court, led in each case by Fitzgibbon. This was because under the then law it fell to him to exercise the wards-of-court jurisdiction formerly vested in the lord chancellor. In the case of *Re Westby minors*, he decided that the interest of one of his wards, a scion of a relatively wealthy Anglo-Irish family, required that he be educated in a school in the Free State, i.e. St Columba's; a majority in the supreme court, consisting of Fitzgibbon and Murnaghan, reversed his decision and held that the boy's welfare required that he should be educated in an English public school in accordance with his mother's wishes.

Kennedy's relations with the executive were also not entirely free from difficulty. On 12 October 1931 the Four Courts, now completely restored, reopened. Kennedy had pressed the minister for justice to cooperate in a ceremonial opening of the building, involving a judicial procession into the Round Hall under the dome and a formal handing over of the keys by the minister to the chief justice. The minister, James Fitzgerald-Kenney (qv), adamantly refused to cooperate in any such ceremony on two grounds: that it would be too expensive and that, in any event, it would be an incentive to the forces of disorder to blow up the building again. The minister had his way and there was no formal reopening of the building. Kennedy also clashed with Éamon de Valera when the latter, as president of the executive council, sought to avoid the appointment of a successor to James McNeill (qv) as governor general. De Valera regarded this office as one of the most objectionable features of the treaty, and it was ultimately to disappear when the new constitution was enacted in 1937. In the interim, he wanted the chief justice to discharge the official functions vested in the governor general, but Kennedy declined to cooperate in any way with the proposal because he saw it as almost certain to involve the office of chief justice in political controversy, and it was quietly abandoned.

Kennedy was a small and rather portly man, whose scholarly and aesthetic interests were reflected in his being a fellow and vice-president of the Royal Society of Antiquaries of Ireland and a governor of the National Gallery. He was also a member of the first delegation from the Irish Free State to the League of Nations in 1923, and in 1930 presided over an arbitration arising out of a conciliation treaty between the USA and Romania. Kennedy was also an avid reader and theatre-goer and seems to have enjoyed a busy social life, although in later life he complained in his diary that the predilection of people in Dublin for engaging in gossip in his presence made it difficult for him to go out as much as he would have liked.

Hugh Kennedy married in Dublin (1911) Clare Murphy (d. 1975) of Spetchley, Liverpool, a daughter of John Murphy, a successful Liverpool Irish timber merchant; they had no children. They lived first at 23 Waterloo Place, and later at Newstead on the Clonskeagh Road. Their relationship seems to have been a happy one. Kennedy died suddenly on 12 December 1936 of a heart attack at the comparatively early age of 57. He left a considerable volume of papers to UCD, where they are housed in the archives department. Since he was a voluminous correspondent and diarist, the Kennedy archive is a major documentary source for the history of the Irish Free State and, particularly but by no means exclusively, its legal institutions. There is a fine portrait in oils by Leo Whelan (qv) in the Benchers' Room of the King's Inns, of which Kennedy was elected a bencher on his appointment as attorney general in 1922.

UCD, Hugh Kennedy papers; *Irish Reports*, 1924–36; *Irish Law Times and Solicitors Journal*, lxx (1936), 341–3; Boylan (2nd ed.); Thomas Towey, 'Hugh Kennedy and the constitutional development of the Irish Free State', *Ir. Jurist*, xii (1977), 355–70; Deirdre McMahon, 'The chief justice and the governor general controversy in 1932', *Ir. Jurist*, xvii (1982), 145–67; Gerard Hogan, 'Chief Justice Kennedy and Sir James O'Connor's application', *Ir. Jurist*, xxi–xxiv (1986–9), 144; John Wyse Jackson and Peter Costello, *John Stanislaus Joyce* (1997), 223, 226–7, 392; Donal McCartney, *UCD: a national idea* (1999); Ronan Keane, 'The voice of the Gael: Chief Justice Kennedy and the emergence of the new Irish court system 1921–1936', Finbarr McCauley and David O'Keeffe (ed.), *Essays in honour of Geoffrey J. Hand* (*Ir. Jurist*, xxxi (1996)), 205, 225