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BOOK REVIEWS

Mr Justice McCardie (1869–1933): Rebel, Reformer, and Rogue Judge. By ANTONY LENTIN. [Newcastle upon Tyne: Cambridge Scholars Publishing, 2016. xvii + 202 pp. Hardback £61.99. ISBN 978-1-44389-780-8.]

This book is an excellent example of the well-known adage that history is best studied through biography. The historical emphasis of the book is twofold: primarily it sheds some interesting light on the turbulent public life of Henry Albert McCardie, a controversial and, perhaps, too clever and over proud High Court judge in the inter-war years. The subplot tells us about the complications of his private life, revealing some fascinating aspects of a bygone age of English social history.

The conventional view is and always has been that Her Majesty's judges should not court publicity and, in particular, as first instance resolvers of disputes and interpreters of the law, should refrain from judicial activism or judicial creativity. There can be no doubt that McCardie was a remarkable exception to this view. His commitment to what was, in its time, the unconventional, on a wide range of social issues, was unswerving and it caused grave damage to his reputation amongst his fellow judges and the contemporary legal, religious and political establishments.

On and off the bench McCardie expressed strong views on what he took to be the antiquated state of the divorce laws. He also made known his views on abortion, on contraception and eugenics. There are many examples, well identified by the author, of McCardie being ahead of his time as a critic of applicable laws which had long since been overtaken by changing values. In many cases legislation subsequently intervened to right a variety of the wrongs which had been subjected to McCardie's withering criticisms. The chapter devoted to his famous judgment in the case of *Place v Searle* [1932] 2 K.B. 497 is a good example.

This was an action taken by the aggrieved husband, Mr. Place, against Dr. Searle who, it was alleged, had enticed Mrs. Place from the matrimonial home depriving Mr. Place of his wife's "consortium", a quaint expression meaning the husband's legal right to the "wifely comfort and society" of his spouse. McCardie left it to the jury to decide whether there was a case for Dr. Searle to answer but in his summing up he went out of his way to make it clear that he personally had "grave doubts" whether the evidence was sufficient to justify a finding of enticement as opposed to a free and independent decision taken by Mrs. Place to develop her friendship with the defendant. Mrs. Place, said McCardie, "is a citizen and not a serf. She can exercise her own judgment. She can choose her own part. She can decide her own future … a woman's body does not belong to the husband. It is her own property: it is not his".

In the event the jury, which must – as was his intention – have been impressed with McCardie's words, was unable to reach a unanimous verdict and McCardie was able to proceed, in a reserved judgment, to rule in favour of Dr. Searle, rejecting case law going back to 1745. The Court of Appeal was exasperated with McCardie and unanimously overruled him, carefully dodging discussion about the crude nature of the underlying legal rule, and strongly criticising the judgment in unusual and highly personal terms. The chapter ends with extracts from the correspondence which followed, inter alios, between McCardie and Lord Hanworth M.R., the former complaining bitterly about the animosity shown towards him by Lord Justice Scrutton in connection with that appeal, both in his judgment and in his subsequent extra-judicial observations directed at McCardie personally.

The antique action for enticement was duly abolished by legislation but that post-dated the death of McCardie and took another 40 years.

McCardie's forward looking views on the treatment of women in the law in the 1920s and 1930s contrast sharply with his views as to how society should deal with what he called "mental defectives". He was a strong believer in the then popular cult of eugenics. He called publicly for "a greater measure of segregation or sterilisation" and wanted to see the issue dealt with by legislation. It can, no doubt, be said that McCardie's views on this subject must be understood in context but the association of his strong belief in a key feature of Nazi thinking is inescapable and shocking.

In 1924 the controversial libel case, *O'Dwyer v Nair*, was tried by McCardie sitting with a jury. In April 1919 the Punjab City of Amritsar was subject to mob violence with Europeans "prey to riot, arson and murder". Martial law had been declared by Sir Michael O'Dwyer, the Lt Governor, and (confusingly) General Reginald Dyer was sent to restore order. On 13 April General Dyer ordered his company of Sikh and Gurkha riflemen to fire on an excited but unarmed 20,000 crowd of Indians. After 15 minutes shooting 400 lay dead and 1,200 were wounded. This appalling episode gave rise to strong divisions of opinion. There was outrage across India but Dyer was nevertheless honoured by Anglo-Indians and by the Sikhs of Amritsar. Opinion in England was also deeply divided. The Government-appointed on-the-spot Hunter Commission condemned Dyer "for a grave error of judgment" but, in striking contrast, both Houses of Parliament approved Dyer's conduct and denounced the Government.

Shortly thereafter the distinguished former judge of the Madras High Court and highly influential Indian, Sir Sankaran Nair, published *Ghandhi and Anarchy* in which he said: "it was in the power of [O'Dwyer], a single individual, to commit the atrocities in the Punjab." The position of the author at trial was that Dyer's conduct amounted to an atrocity "which had the consent of [O'Dwyer] before it was committed and his practical approval afterwards. One of the questions which will have to be considered ... is whether the condemnation of General Dyer was right or wrong".

McCardie had strong personal views on the merits of the case which he made no effort to conceal. As the author explains: "[McCardie became] actively engaged. Not for him the sphinx-like inscrutability of the umpire, the passionless observer of the litigation game .... For him the task of the Judge was that of ascertaining the truth and to see that justice was done." McCardie throughout was concerned to protect the reputation of General Dyer although he (Dyer) was neither a party to the action nor called as a witness: he was, by then, a gravely sick man and was unable to attend even as a spectator.

In his lengthy summing up to the jury at the end of a several week trial, McCardie directed them to consider "whether General Dyer's conduct was an atrocity". In the key passage McCardie said: "The question for the jury is whether General Dyer acted rightly or wrongly, whether he was guilty of an atrocity or not. Subject to your judgment, speaking with full deliberation and knowing the whole of the evidence given in this case, I express my view that General Dyer, under the grave and exceptional circumstances, acted rightly, and in my opinion, upon the evidence, he was wrongly punished by the Secretary of State for India."

In the result the parties agreed to accept an 11 to 1 jury verdict. O'Dwyer was awarded damages of £500 and £20,000 in costs.

The author makes no criticism of the summing up. On the contrary he praises it as "fair" and, because the jury was warned to make up its own mind, McCardie (he says) had acted strictly in accordance with his judicial function and "was fully entitled to say what he did say". This conclusion is supported by the fascinating

fact that the dissenting juror was Prof. Harold Laski of LSE fame who, in Laski's own words, admired McCardie's "magnificent impartiality".

No doubt McCardie's observations quoted above must be read in their time but to the modern eye they were entirely inappropriate. McCardie descended into the arena and told the jury what he thought they should decide. To add the mantra "of course it's a matter for you members of the jury" fails to meet the point because the jury would inevitably be profoundly influenced in their deliberations by the judge's unambiguous expression of his own opinion on the key point they were supposed to decide for themselves. McCardie's "advocacy" had even beguiled Laski; an achievement in itself.

As to the subplot, McCardie's personal life was quite unlike that of his brethren on the bench. He was educated at King Edward's School, Birmingham. He left aged 15 and never attended university. He nevertheless came top, winning the certificate of honour, in the bar exams in 1894. After practising at the Birmingham bar for 10 years he moved to chambers in London. He quickly built a large practice and in 1910 aged 41 he applied for silk. He became disheartened because he thought Lord Loreburn, the Lord Chancellor of the day, had wrongly delayed his appointment and when the offer eventually came McCardie, extraordinarily, declined it. This behaviour smacks of great arrogance which must have displeased Loreburn and would have been widely known in the legal establishment. That episode nevertheless did not inhibit McCardie's career path. In 1916 he was offered and accepted an appointment to the High Court. By convention only the Treasury Devil – standing counsel to the Crown – was permitted to skip the Q.C. rung of the judicial promotions ladder. McCardie's appointment directly to the bench must have been the subject of much debate at the Inns of Court lunch tables.

McCardie never married. This fact was cruelly deployed by Lord Justice Scrutton in the *Place v Searle* litigation in his castigation of McCardie for having commented upon marital matters of which, according to Scrutton, McCardie would have had only "a theoretical knowledge". The bachelor judge certainly enjoyed the company of women. He had affairs with both daughters of the widow of a German-Jewish doctor whom he met in Switzerland. The affair with the younger one was brief but the elder, Rosie Falkenheim, settled in England and became his long term mistress. Together they took occasional breaks in the south of France under assumed names.

Concurrently with his affair with Rosie, McCardie also sustained a long term relationship with Mayna Archer, the daughter of the owners of a boarding house in Hunstanton, Norfolk where he would often spend weekends. In 1919, when he was 50, Mayna, who was a good deal younger than him, produced their son, Henry Archer, but Henry was never told that McCardie was his father. Many years later, in 2003, Henry Archer published the story in his book, *Mr Hardie*, which he was brought up to believe was McCardie's name. In public McCardie never acknowledged these relationships. Neither woman knew of the existence of the other and he never took either of them out in London.

The clear implication is that McCardie was a complex and selfish man: he was a lonely and sad figure and a snob. It would (he must have imagined) have been beneath his dignity to be associated publicly with Ms Falkenheim as a Jewess and Ms Archer as the daughter of boarding house owners and the mother of his only child.

In addition to these complicated flaws in his character it seems that McCardie was also an inveterate gambler. "For years," we are told, "he had squandered thousands upon thousands on dogs, horses, cards and reckless speculations on the stock exchange until there was nothing left." He was forced to borrow in order to pay

the rent "and find the wherewithal to send [his clerk] out to buy sandwiches, cigars and a newspaper".

On 26 April 1933, aged 63, McCardie committed suicide by shooting himself at his flat in Queen Anne's Mansions in Westminster. As the author points out, McCardie was possessed of an addictive personality and suffered increasing bouts of deep depression: "the evidence points to a downward spiral of morbidity leading McCardie to the abyss."

This book is well written, highly readable and thoroughly researched. One suspects that McCardie would have been better placed as a politician and pamphleteer rather than a High Court judge but that was not to be. McCardie's story has now been told. Unlike most judges who, we are told, "languish unmourned, consigned to oblivion", this particular judge had a bard to tell his tale.

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Political Jurisprudence. By Martin Loughlin [Oxford University Press, 2017. viii + 191 pp. Hardback £50.00. ISBN 978-01-98810-22-3.]

Political Jurisprudence is a collection of essays that engage with the question of the relation of public law and politics. Readers of Martin Loughlin's previous work on the history and theory of public law will be familiar with the key theme presented here: public law theory must acknowledge the political roots of public law if it is to arrive at a satisfactory account of the sources of legal authority. In the volume under review, Loughlin sets out to explicate the theoretical background of this thesis and to deliver "a fuller statement of the subject of political jurisprudence" (p. v).

This statement, alas, consists for the most part of chapters offering exegetical work on authors Loughlin takes to belong to the tradition of political jurisprudence (Bodin, Hobbes, Rousseau, the Levellers, Burke, Santi Romano and Carl Schmitt). There are also two chapters with a thematic focus; one that offers a history of French political jurisprudence and another that aims to clarify the relation between political jurisprudence and the early modern discourse of reason of state. All these pieces are informative and valuable contributions to the history of constitutional ideas, but readers who expect a sustained systematic exposition of the project of political jurisprudence will have to make do with a very concise introduction and a short first chapter.

Loughlin introduces political jurisprudence as a response to two competing jurisprudential projects. Political jurisprudence, we are told, "rejects both legal positivism and normativist anti-positivism" (p. 4). Loughlin describes positivism as a jurisprudential approach that "begin[s] by presupposing the authority of the legal order" (p. 2). This characterisation might be taken to suggest that positivists attribute legitimate authority to every legal order. Of course, this would be a misunderstanding of contemporary legal positivism, but it is hard to make out whether Loughlin intends to endorse it. He describes normativist anti-positivism as the view "that law has intrinsic moral authority" (p. 3). That description entails, presumably, that positivists deny the claim that law has intrinsic moral authority. Loughlin, then, might simply want to point out that positivists do not aim to assess the soundness of the law's claim to authority, at least not in the context of their legal-theoretical inquiry.

Still, it seems odd to express this familiar point in potentially misleading terms. Loughlin chooses his rather peculiar characterisation of positivism because he wants