ENGLISH LAW IN THE REPUBLIC OF IRELAND

by

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Henry II is said to have brought the English Common Law to Ireland in 1171[1] and six years ago the eight hundredth anniversary of that event was celebrated with varying degrees of enthusiasm throughout the island.[2] Set against that vast expanse of time, Irish independence is a comparatively recent phenomenon,[3] and perhaps it is not altogether surprising that a close continuum with the common law past has been preserved in what is now the Republic of Ireland. What is perhaps not a little surprising, however, is the fact that the common law, vilified in pre-independence days as a malign system imposed on the Irish people by an alien conqueror,[4] has been preserved in pretty much undiluted form.

During the War of Independence, the revolutionary side had instituted separate courts which successfully vied with the established courts in the administration of civil and criminal justice.[5] The law to be applied in these courts, pending the enactment of a new code by the revolutionary government, was to be that in existence on the date — Jan. 21st 1919 —

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1 This assertion contains a fair measure of 'historic licence' but Henry II did come to Ireland at the head of an invading army in the Autumn of 1171, and, not the least important ultimate consequence of that event, was the subjugation of Ireland to the common law.

2 The Northern Ireland Legal Quarterly marked the occasion by devoting an entire issue to reviews of English Law in Ireland during the succeeding eight centuries to which the present writer contributed a review of 'English Law and Irish Land in the Nineteenth Century' (1972) 23 *N.I.L.Q.*, 24.

3 The *Government of Ireland Act* (10 & 11 Geo. V. c. 67) which set up the two separate Irish states (the then Irish Free State and Northern Ireland) was enacted in 1920.

4 The strength of this sentiment was underlined in a letter addressed in the most robust terms by the President to a Judicial Committee of Dail Eireann: 'In the long struggle for the right to rule in our own country there has been no sphere of the administration lately ended which impressed itself on the minds of our people more than the system, the machinery, and the administration of law and justice... The body of laws and the system of judicature so imposed upon this nation were English (not even British) in their seed, English in their growth, English in their vitality. Their ritual, their nomenclature, were only to be understood by the people of Southern Britain. A remarkable and characteristic product of the genius of that people, the manner of their administration prevented them from striking root in the fertile soil of this nation.' (*Dail Eireann, Official Report* Vol. 5 at pp. 234-5).

5 See J. P. Casey 'Republican Courts in Ireland 1919-1922' (1970), 5 *Irish Jurist (N.S.), 321.*

on which that government first met. The constitution governing the courts also reflected an understandable degree of revolutionary euphoria by providing that cognisance should be taken of citations based on the early Irish Brehon codes, or any commentaries upon them, in so far as they might be applicable to modern conditions. The courts were also adjured to take cognisance of citations based on the *Code Napoleon,* the *Corpus Iuris Civilis* and other works embodying or commenting upon Roman Law, which citations however were not to have binding authority. The actual working life of the courts was conducted on a far less exalted level however and, one learned author tells us, 'there was a very limited acceptance of the invitation to be comparative or antiquarian'.[6]

In the event, no distinctly Irish jurisprudence, or the beginnings of such, emerged from the Republican courts. The Brehon codes were largely inaccessible to a generation of lawyers whose first and working language was English, and for those able to penetrate the archaic Irish of the codes it is scarcely surprising that a legal system, which had been abruptly terminated in the early seventeenth century[7] provided scant guidance to the solution of legal problems in the early twentieth century. It was inevitable, and understandable, that those lawyers who served in the Republican courts should turn to the common law which was both accessible and comprehensible.

The achievement of independence did not accelerate the decline of the common law but rather, somewhat paradoxically, ensured its survival. The defeat of the Republican side in the civil war, which followed independence, removed the more pristine revolutionary element from a central role in the creation of the new State and left that task to the lawyers and rehetoricians. The Dail[8] debates on the *Courts of Justice Bill,* 1924, which was the first major reorganisation of the courts since the union of judicature in 1877[9] contained a fair quota of revolutionary rhetoric but proposed little revolutionary change.[10] The new code envisaged in the constitution of the pre-independence Republican courts was not enacted and while the new court structure was to parallel that of the Republican courts there was to be little change in the substantive law applicable therein. More heat, and not a little unconscious humour,

6 Ibid, p. 329.

7 The Brehon Law had co-existed with the common law in a curious condominium until two decisions of the courts during the reign of James I sounded the death knell for the ancient Irish code. In the first, the *Case of Gavelkind* (1605) Dav. 49; 80 E.R. 535, the judges decided that the customary Irish mode of succesion had no legal status and a similar fate befell the mode of succesion called tanistry in the *Case of Tanistry* (1607) Dav. 28; 80 E.R. 516.

8 The Parliament of the independent Southern Irish state.

9 *Supreme Court of Judicature Act (Ireland)* 1877.

10 The question of language was a sensitive one and the following observations of Deputy Magennis are not untypical: 'Our determination was to keep Ireland Irish and, just as a beginning has been made in the Dail and in the University by promoting, or attempting to promote, the general use of the ancient language of the country, it is desirable that in the law courts especially a beginning should be made to use the national language for business purposes.' (*Dail Eireann, Official Report* Vol. 5 at p. 235).

was generated in the debates by the vexed questions of judicial dress and language than by any other single issue. A sample is provided by the following extract from a contribution by Deputy Professor Magennis:

> The question of robes is, after all, to be determined by experience, and everyone who has any experience of the Bar practice is well aware that the country litigant feels he has got a great deal more value for his money when the argument was conducted by a man with a wig on his head before another man with an even bigger wig on his head. That may be very faulty, very lamentable, and very regrettable, but it is incident to human nature. It is a psychological fact that people are impressed by costume.[11]

In the event, court business in the Republic of Ireland continues to be conducted by men with wigs on their heads in front of men with even bigger wigs on their heads.

There were reasons other than the inherent conservatism of the legal profession for the survival of the common law one of which is, I believe, inextricably linked with the type of legal education available in the new state. Such education was, for the most part, in the hands of senior practising barristers who had little time to develop syllabuses, or stimulate research, and little inclination to write books which would make their own, hard won, knowledge available to rivals at the Bar. An almost inevitable consequence of this state of affairs was that the bright aspirant barrister or solicitor was invariably encouraged to read a more academically respectable course at University, usually history or classics, prior to call as a barrister or admission as a solicitor. The necessary legal knowledge was acquired by attendances at cram courses, supplemented by notes of the nutshell variety.[12] It is not too much to say that the independent state has been served by a goodly number of able and competent lawyers who have emerged in spite of, rather than because of, this system of legal education.[13]

While the potential for the creation of a national legal literature in the new state was great, the actual achievement was minuscule with the inevitable result being that Irish students and practitioners, read English text books and, consequently, English authorities. Within six years of the achievement of independence the Chief Justice had occasion to chide the profession for its excessive reliance on English sources, 'Only too frequently, one observes with regret, even in this (Supreme) Court that diligence in the search for Irish precedent and authority is numbed by the facility of reference to the English text-books'.[14] Not the least serious consequence of that 'facility' was the virtual eclipse of the rich

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11 Ibid, p. 291.

12 Training for the English Bar has not been much different of course and the Irish, in this matter of legal education, inherited in full measure the English penchant for amateurism.

13 The system is still stubbornly defended by some senior practitioners, no doubt on the ground that the system to which they owe their success can have little radically wrong with it.

14 per Kennedy C.J. in *R. (Moore)* v. *O'Hanrahan* [1927] 1 I.R. 406, 422. See J. C. W. Wylie *Irish Land Law,* (1976) at p. 2.

legacy of nineteenth century Irish case law. The latter half of that century saw some immensely gifted Irishmen elevated to the Bench and names like Palles and Fitzgibbon still command respect throughout the common law world.[15] The principal beneficiary of their achievement should have been the new Irish State but this proved not to be the case and that achievement, with few exceptions, was sacrificed on the altar of professional expediency.

One such exception was the approach, robustly independent of English authorities, adopted by Gavan Duffy J. in determining whether or not certain religious trusts were legally charitable. Gavan Duffy J. was concerned to make the law of charities consistent with Irish *mores* and religious sentiment, and, to that end, in *Maguire* v. *Attorney General*,[16] he employed a subjective test, which involved acceptance of the belief of the donor and the doctrinal views of his Church, to determine whether or not a bequest for the establishment of a convent for the Perpetual Adoration of the Blessed Sacrament satisfied the criterion of public benefit necessary to sustain it as a charity. Palles C.B. had employed a similar test in *O'Hanlon* v. *Logue*[17] to determine whether or not a bequest for memorial masses to be celebrated for the happy repose of the souls of the testatrix and her late husband, was charitable, but the courts of the independent Irish state had confined the subjective test to bequests for memorial masses, and, in respect of bequests similar to that before the court in *Maguire* v. *Attorney-General*, had followed the English authority, *Cocks* v. *Manners*.[18] In the latter, case Wickens V-C. declined to hold charitable a bequest to a convent of Dominican nuns on the ground that the nuns were a group of women living together by mutual agreement in a state of celibacy for the purpose of sanctifying their own souls by prayer and pious contemplation and the bequest consequently lacked the necessary element of public benefit. Gavan Duffy J. took the view, in *Maguire*, that the decision in *Cocks* v. *Manners* was a finding of fact that Victorian England was not edified by the example of lives of cloistered piety; the same could not be said of contemporary Ireland.[19]

Outside the field of religious charity, however, Gavan Duffy J. proved to be no less susceptible to English authorities than his confreres and, in *Grealish* v. *Murphy*,[20] a case in which undue influence was pleaded, he chose to rely on the principle laid down by Lord Hatherley in his dissenting speech in *O'Rorke* v. *Bolingbroke*[21] despite an impressive array

15 Christopher Palles spent a remarkable forty two years on the Bench as Chief Baron of the Exchequer (1874-1916) and one learned author has written of him; 'It was worth suffering Henry II that in due time the common law in Ireland should blossom in the person of Christopher Palles'. (1972) 23 *N.I.L.Q.*, 15.

16 [1943] I.R. 238.

17 [1906] 1 I.R. 247.

18 (1871) L.R. Eq. 754.

19 See generally the present author's, *Religion and the Law of Charities in Ireland* (1976) at pp. 88 *ff*.

20 [1946] I.R. 35.

21 (1877) 2 A.C. 823.

of nineteenth century Irish authorities.[22] *O'Rorke* v. *Bolingbroke* reached the House of Lords by way of an appeal from the Irish Court of Appeal, which fact may well account for the awareness of it by the profession in Ireland, but scarcely qualifies it as an Irish authority. Gavan Duffy J. said of Lord Hatherley's principle,

> The principle has been applied to improvident grants, whether the particular disadvantage entailing the need for protection to the grantor was merely low station and surprise (though the grantors rights were fully explained): *Evans* v. *Llewellin*,[23] or youth and inexperience: *Prideaux* v. *Lonsdale*,[24] *Everitt* v. *Everitt*,[25] or age and weak intellect, short of total incapacity with no fiduciary relation and no 'arts of inducement' to condemn the grantee: *Longmate* v. *Ledger*;[26] *Anderson* v. *Elsworth*.[27] Even the exuberant or ill considered dispositions of feckless middle-aged women have had to yield to the same principle: *Phillipson* v. *Kerry*;[28] *Wolleston* v. *Tribe*.[29] [30]

It was inevitable that Gavan Duffy J. should trace the history and rationale of the principle of undue influence in English case law since the origins of that principle, like so much else of modern equity, are to be found in English Chancery decisions of the eighteenth century.[31] It is arguable, however, that the subsequent development and refinement of the principle by the Irish courts, in the latter half of the nineteenth century, gave it a distinctive Irish colour. Gavan Duffy J. said of a particular transaction which the plaintiff Peter Grealish[32] was seeking to have set aside on the ground of undue influence, 'The transition was shocking and the two men did not stand on equal terms, so that I think I might, following Lord Hatherleys principle, or perhaps the even more emphatic language of Sullivan M.R. in *Slator* v. *Nolan*[33] against any party taking undue advantage of another, uphold the plaintiff's claim, without any regard to the peculiar relation of the parties'.[34] It is to be regretted that Gavan Duffy J. seemed to regard *Slator* v. *Nolan* merely as a species of longstop since it is arguable that Sullivan M.R.'s more 'emphatic language' represented a widening of the principle to be found in the English cases. The precise language of the Irish Master of the Rolls is worth quoting,

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22 *Slator* v. *Nolan* (1876) I.R. 11 Eq. 367; *King* v. *Anderson* (1874) I.R. 8 Eq. 147, 625; *Rae* v. *Joyce* (1892) 29 L.R. Ir. 500; *Butler* v. *Miller* (1867) I.R. 1 Eq. 195.
23 1 Cox Cas. 333.
24 1 de G.J. & S. 433.
25 (1870) L.R. 10 Eq. 405.
26 2 Giff. 157.
27 3 Giff. 154.
28 32 Beav. 628.
29 (1869) L.R. 9 Eq. 44.
30 [1946] I.R. 35, 50.
31 See Lord Hardwicke's judgment in *Earl of Chesterfield* v. *Janssen* (1750) 2 Ves. Sen. 125.
32 Gavan Duffy J. observed of the plaintiff that he was 'afflicted with a worse than Boeotian headpiece and a very poor memory; a long life has not taught him sense'. [1946] I.R. 35, 37.
33 I.R. 11 Eq. 367.
34 [1946] I.R. 35, 53.

> It is an idle thing to suppose that the relation of trustee and cestui que trust, or guardian and ward, or attorney and client, or some other confidential relation must exist to entitle a man to get aid in this court in setting aside an unconscionable transaction. I take the law of this court to be that if two persons — no matter whether a confidential relation exists between them or not — stand in such a relation to each other that one can take an undue advantage of the other, whether by reason of distress or recklessness or wildness or want of care, and where the facts show that one party has taken undue advantage of the other, by reason of the circumstances I have mentioned — a transaction resting upon such unconscionable dealing will not be allowed to stand: and there are several cases which show, even where no confidential relation exists, that, where parties are not on equal terms, the party who gets a benefit cannot hold it without proving that everything has been right and fair and reasonable on his part.[35]

The principle of undue influence was not the only equitable principle which had been acquiring a distinctive Irish colour in the late nineteenth century and one other was the principle that a person in a fiduciary position is unable to use his position to obtain a benefit for himself.[36] The latter principle was known to the Irish courts as the doctrine of graft.[37] The splendid possibilities of that doctrine, which were not realised by the courts of the independent Irish state, have recently been revealed, the present writer believes, by developments in Lord Denning's English Court of Appeal which have had important consequential effects in Ireland. The Irish Courts, largely prompted by recent decisions across the water, have shown a preparedness to use the constructive trust as a straightforward remedial device in the American sense, to achieve justice *inter partes*.[38] The American concept of unjust enrichment which undergirds this use of the trust concept has, the present writer believes, a certain affinity with the Irish doctrine of graft. It is true that Fitzgibbon L.J. confined the operation of the latter doctrine to *Keech* v. *Sandford*[39] type situations, but, it is at least arguable, that in the hands of a skilful judicial manipulator like the current Master of the Rolls in

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35 I.R. 11 Eq. 367, 386-7.

36 See, e.g. *Dempsey* v. *Ward* [1899] 1 I.R. 463; *Moore* v. *M'Glynn* [1894] 1 I.R. 74; *O'Brien* v. *Egan* (1880) 5 L.R. Ir. 633.

37 In *Dempsey* v. *Ward* [1899] 1 I.R. 463, 471 Lord Ashburne C. observed: 'The question of graft plays a considerable part in the argument, but I am not going through all the cases on the doctrine of graft in detail. A man taking a new letting who is in a fiduciary position, that is one case; a man who is an executor taking a new letting, that is another; or a guardian of a minor, or a person who is a limited owner, and who gets the new letting by virtue of the position in which he stands in relation to the property; these are other instances in which the new letting has been held a graft.'

38 In two recent, and as yet unreported, High Court cases, *Heavey* v. *Heavey* (judgment delivered on 20th December, 1974) and *Conway* v. *Conway* (judgment delivered on 3rd June, 1975) Kenny J. preferred to employ what he termed the 'flexible concept' of the constructive trust in the resolution of property disputes between husband and wife.

39 (1726) 2 Eq. Gas. Abr. 741; Cas. temp. King 61. Fitzgibbon L.J. observed in *Dempsey* v. *Ward* [1899] 1 I.R. 463, 474, 'The vital principle of all the cases is to be found in *Keech* v. *Sandford*'.

England it could have led the Irish courts to something like the current position, independently, and much earlier.

One of the more bizarre consequences of the excessive reliance on English authorities by the profession in Ireland is to be found in case law arising from certain questions affecting the relationship of landlord and tenant. The law governing the relationship in Ireland was substantially the same as that in England, until 1860, when the *Landlord and Tenant Law Amendment (Ireland) Act*,[40] commonly called *Deasy's Act*,[41] changed the basis of the relationship in Ireland. Section 3 of *Deasy's Act* provided that, henceforward, the relation of landlord and tenant, 'shall be deemed to be founded on the express or implied contract of the parties, and not upon tenure or service, and a reversion shall not be necessary to such relation, which shall be deemed to subsist in all cases in which there shall be an agreement by one party to hold land from or under another in consideration of any rent'.

Section 12 provided that every, 'landlord of any lands holden under any lease or other contract of tenancy shall have the same action and remedy against the tenant, and the assignee of his estate or interest, or their respective heirs, executors or administrators, in respect of the agreements contained or implied in such lease or contract, as the original landlord might have had against the original tenant, or his heir or personal representative respectively...'. The language of s. 12, on the face of it, seemed to make irrelevant the requirement, which dated back to *Spencer's* case[42] in the late sixteenth century, that a covenant would run only if it touched or concerned that which was demised. In the event the Irish courts were to display a curious aversion to the express language of s. 12. In *Fitzgerald* v. *Sylver*[43] the High Court, consisting of Sullivan P. and O'Byrne J., had to decide the express point whether the benefit of a lessee's covenant ran with the reversion. The lessee of a store had covenanted with the lessor to build a store on the lessor's land to compensate the latter for the inconvenience arising from the letting of his existing store. The lessor had assigned to the plaintiff who was now seeking to have the covenant performed. Counsel for the defendant cited *Spencer's* case and contended that the covenant being one to build on land which was not comprised in the letting was not a covenant running with the reversion. This argument won the day with Sullivan P. and O'Byrne J. who held that the plaintiff could not enforce the covenant. It appears from the rather brief report of the case in the *Irish Law Times* that spencer's case was the only authority cited and no reference was made to s. 12 of *Deasy's Act*.

This curious ignorance of, or at the very least, indifference to, *Deasy's Act*, is all the more surprising when one considers that the relation of

40 23 & 24 Vict. c. 154.

41 The Act was named after Richard Deasy, the Irish Attorney-General who, along with the Chief Secretary, Edward Cardwell, was responsible for it.

42 5 Co. Rep. 16 (a).

43 (1928) 62 I.L.T.R. 51.

landlord and tenant held the centre of the political stage for a great part of the nineteenth century and coloured much recent Irish history.[44] That relation continues to have strong political connotation and to touch deep chords in the national psyche, in contemporary Ireland.[45] Among the first major pieces of legislation in the independent state was the *Landlord and Tenant Act* 1931[46] which, by providing security of tenure and compensation for improvements, greatly reduced the unfairness of the principle, *quicquid plantatur solo, solo cedit,* for the urban tenant.[47] Subsequent legislation has strengthened the statutory bias of the relation of landlord and tenant in Ireland and made reliance on English authorities such a hazardous business that it is unlikely that the kind of result achieved in *Fitzgerald* v. *Sylver* will be repeated.[48]

The relation of landlord and tenant is no longer the only hazardous area for the Irish practitioner or student who continues to exercise the 'facility' derided by Chief Justice Kennedy. The nineteen sixties, which was a time of growing national self confidence and national self assurance in Ireland, proved to be an extraordinarily fruitful period of law reform and important and innovative statutes were enacted in such disparate areas as Civil Liability,[49] Charities,[50] Registration of Title,[51] Succession[52] and Landlord and Tenant.[53] In all of these areas English textbooks are now, at best marginally useful, and, at worst downright misleading for Irish practitioner and student alike, and hopefully the growing volume of indigenous legislation will provoke the national legal literature which will be necessary to sustain a distinctive Irish jurisprudence. The omens are good and, last year, the first comprehensive book on Irish land law, since the inception of the state, was published.[54]

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44 See generally 'English Law and Irish Land in the Nineteenth Century' (1972) 23, *N.I.L.Q.*, 24.

45 The current campaign for the abolition of ground rents, which draws support from all sections of Irish society, is fuelled in no small measure by resentment at a surviving reminder of the system imposed by the alien conqueror.

46 No. 55 of 1931.

47 The rural tenant had held the centure of the political stage for much of the nineteenth century, by the end of which rural Ireland was well on the way to being a tenant proprietary. Relief for the urban tenant began with the *Town Tenants Act* of 1906, a modest measure which provided limited compensation for disturbance from business premises.

48 See *Landlord and Tenant (reversionary Leases) Act,* 1958; *Rent Restrictions Act,* 1960; *Rent Restrictions (Amendment) Act,* 1967.

49 *Civil Liability Act,* 1961.

50 *Charities Act,* 1961.

51 *Registration of Title Act,* 1964.

52 *Succession Act,* of 1965.

53 *Landlord and Tenant (Ground Rents) Act,* of 1967.

54 J. C. W. Wylie, *Irish Land Law, op. cit.*

Legal education is now, for the most part, the business of full time academics and the beneficial effects of that change are already manifest.[55] The first colony of the common law is now set, inexorably, on the path of decolonialisation, a process which can only be accelerated by the recent appointment of a permanent Law Reform Commission.[56]

55 Most noticeably in the contributions now being made to the creation of a national legal literature by full time academics, examples of which are to be found in the new series of a revived and rejuvenated *Irish Jurist*, which is published from University College, Dublin.

56 *Law Reform Commission Act*, 1975. Section 4 (1) provides, 'The Commission shall keep the law under review and in accordance with the provisions of this Act shall undertake examinations and conduct research with a view to reforming the law and formulate proposals for law reform'.