THE BENCH AND BAR IN IRELAND*

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So much that is wise and witty has already been written about the history, traditions, work—and eccentricities—of the law in Ireland that it can only be with trepidation that anyone can attempt to write more. Perhaps it is only because of contact with the kindliness and courtesy of the profession in Ireland, which has been, and still is, deeply convinced of the need to take a chance—with the arm or the elbow—that I dare to do so at all. Not to speak because one knows little is surely a poor reason for not speaking; it would certainly be regarded as no reason at all by many Irish witnesses. I concur.

In this short paper I have tried to say something of the introduction of the common law into Ireland, the growth of the common law courts and a little of the lives of some of the men whose task it has been to administer the law as counsel or judges. More than once I have had to digress into general history and politics, since I believe it is impossible to underestimate the contribution to Irish life made by the members of the legal profession in Ireland, or to understand what manner of men these were save against the stormy pattern of Irish history. I make no apology for these digressions, only for their inadequacy, and my own failure to be as fair and objective as so many Irish lawyers of all political persuasions have been in the past, and are still.

1. EARLY BEGINNINGS: THE BREHON AND BREHON LAW

In Ireland the tradition of a profession of legal experts is older than Christianity. Of the Druids of Ireland who composed this profession we know little since almost all of the records of ancient times were destroyed during the English campaigns ranging from the fourteenth century to the eighteenth century, but from such records as have survived some picture has been left of the customary law which, in the main, regulated the human relationships of Gaelic Ireland from pre-Christian times until the seventeenth century. The administration of justice by the Druids—whose lawyers, when Christianised, were to be called Brehons—was sacramental, as in other early societies. The Druidical class, com-

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posed of learned men, priests, philosophers and judges, was dedicated to the suppression of violence and the maintenance of the rule of law between individuals, chiefs and kings[1]; their ideal—an attractive one in an age of extreme violence—was a rule of law based on morality, revealed through thought and ritual by the will of an unseen power. Such men became, for the most part, ideal subjects for the so-called conversion to Christianity effected by Patrick in the fifth century, the notion of one God and the apparent magic of the sacraments being most attractive to them. Patrick was too wise to attempt, or probably even to desire, a complete departure from the prior established order of things. As a result, in his time the existing law was revised and, in some degree, Christianised by a committee of nine, made up of three kings — those of Ireland, Munster and Ulster—three bishops, of whom Patrick himself was one, and three lawyers. The commission eliminated much pagan ritual from the proceedings of the courts and evolved 'The Great Code' of Brehon law that was to rule the greater part of Ireland until the seventeenth century.[2] It is to the Great Code, as it worked and was amended as the years passed, that is owed such knowledge of Brehon law as now exists. But Patrick's code did not banish magic from the law, or from Irish life. For instance, there is told the story of a great Brehon whose judgments were always infallible, but it was not until his death that his secret was discovered. He had a magic collar which choked off wrong judgments, so that only truth could come from his mouth. 'Had such haberdashery survived, the rate of insurance on the lives of modern judges would be prohibitive'.[3]

Clearly, however, not all Brehons were so fortunate in their possessions; in fact, the lawyer underwent a long course of training in human affairs as well as in ritual, and judicial office could only be attained after twenty years' practice of the law, though such office, like most Gaelic institutions, was hereditary. This length of training for the judiciary underlines the political and constitutional importance of the judge and the lawyer, the latter being regarded as an officer of the court, though little is known of the actual way in which he went about his work. This work, however, did not go unrewarded since the Brehon was a layman, and was entitled to a quarter of the fund at stake in any action in which he took part.

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[1] Monarchy became a feature of the Gaels' government of Ireland after their conquest of the country in the fourth century B.C., though on the continent of Europe the Celts were republican. At the time of their conquest Ireland was already divided into five 'fifths' or Kingdoms—Ulster, Meath, Munster, Leinster and Connaught—and this division has lasted until the present time, although Meath is no longer a Province. Some loose unity was obtained between the ancient Kingdoms by one of the Provincial kings becoming the Ard Ri, or High King—a sort of President over the many kings of Erin. Under the supremacy of Connaught the royal capital was established at Tara (ca. 275 A.D.). See E. Curtis, A History of Ireland (1936), pp. 2-7.

[2] And see E. Curtis, A History of Ireland (1936), pp. 7-11, for a general account of the work of Patrick. The 'conversion' at first amounted to little more than a new paganism, with a new God and new magic.

[3] Sergeant A. M. Sullivan, Q.C., The Last Sergeant (1952), p. 12.

Strangely enough, conflicts between the lay (Brehon) jurisdictions in Ireland and the ecclesiastical jurisdictions seem to have been rare.[4] The real problem facing the courts of the Brehon law was not so much one of dealing with competing jurisdictions as attempting to enforce their own judgments throughout ages of violence.

It was to a land possessed of this ancient legal tradition with law administered by laymen and based on custom and ritual, presupposing continual tribal conflicts yet providing the legal machinery to end them, that the Norman-Welsh invader came in the twelfth century. Even in the midst of the fighting, intrigue and confusion which led to the request for help sent by MacMurrough, King of Leinster, to the Norman, Richard Fitzgilbert,[5] the parties to the dispute, MacMurrough and O'Rourke, seem to have gone to court, where the matter was concluded in O'Rourke's favour with an award of one hundred ounces of gold as damages.

2. THE NORMAN EXPEDITIONS: THE INTRODUCTION OF THE COMMON LAW

The Norman invasions of Ireland, which began in 1166, did not follow the same pattern as in England, and it is certainly not true to speak of a Norman Conquest of Ireland. Strongbow and his men came to Ireland originally as mercenaries and did not intend to bring Norman law with them. The price of Strongbow's aid was to be his marriage to MacMurrough's daughter and succession, on MacMurrough's death, to the latter's throne of Leinster. The Welsh Earl never intended any closer tie with the English Crown than the tenuous link existing between a Welsh Marcher Lord and the English King. It cost Henry II two expeditions to convince Strongbow that he was Henry's vassal and Henry his feudal overlord.

Following this intervention by the English Crown, English law was extended within the Norman settlements in 'the Pale,' a relatively small area with Dublin as its capital, varying in size according to its inner strength, and the outside pressure of the Gaelic tribes living beyond the Pale. Only one expedition outside the Pale could be described as a conquest with lasting results, and that is De Courey's expedition to Ulster in the 1170's which resulted in the appointment of a Norman seneschal in that province.[6]

Elsewhere, the Norman knights who penetrated westwards, or who were awarded lands outside the Pale, generally married into the native community to ensure their titles, and were assimilated by it, adopting the customs and laws of their neighbours. Hence, outside the Pale, Brehon law and its ancient legal system in large measure continued to govern

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[4] Id. at p. 13. Sullivan cites a case in which St. Finian sued St. Columba for infringement of copyright, in which neither of the reverend litigants demurred to the jurisdiction of the lay court.

[5] Richard Fitzgilbert was the Norman Earl of Pembroke, known to the Irish as 'Strongbow.'

[6] Curtis has described the results of even this expedition as 'rather a veneer than a true English plantation.' Curtis, History of Ireland, p. 62.

the relationships of the Gael and of the invader, although in the thirteenth century royal judges decided cases in the counties of Cork, Kerry, Limerick, Waterford and Louth.

Within the Pale, Norman law and order extended, despite a not infrequent state of siege and the largely successful invasion of the Pale by the Scots armies under the Bruces in 1317. This Anglo-Irish territory was treated, for purposes of administration, much as a group of distant counties. The English register of writs was sent to Ireland in 1227,[7] and it is from this that much of our knowledge of the early common law derives or can be confirmed. The King's writ ran within the Pale, the justices of assize came to ride the circuits, and as the jury system developed it was introduced.

The early history of the common law courts in Ireland is of considerable interest. On MacMurrough's death in 1171 Henry II visited Ireland and induced Strongbow to declare him 'Lord of Ireland,' which for the purposes of the settlement comprised Dublin, most of Wexford and certain royal demesnes, while Strongbow became Earl of Leinster. In the rest of Ireland, theoretically, the Irish Kings were to hold their estates as vassals of Henry II. It must be stressed that this latter arrangement was almost purely theoretical.

The parcelling out of Leinster among the Norman and Welsh invaders led to the growth of seignorial jurisdictions in Ireland, just as the Norman Conquest of England had done in that country. At first it seems that royal justice could only be had in the King's courts at Westminster, since the King's Justiciar in Ireland was not originally invested with judicial functions. Clearly this was a most inconvenient arrangement for any litigant who wished to invoke royal justice—the issue from, and return of writs to, Westminster must have been most haphazard. Hence in 1204, by royal ordinance, certain named writs[8] were to be purchasable from the Justiciar and triable in Ireland, and this arrangement was confirmed despite the objection of the Norman barons in 1207 that it was a usurpation of their private jurisdictions.

By 1400 the royal courts available to Irish litigants were: (i) the English King's Bench, though this Court was rarely chosen because of

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[7] There seems to be some doubt as to the exact time at which the Common Law was introduced into Ireland. According to Matthew Paris, Henry II in 1171 'held a council (at Lismore) where the laws of England were received and confirmed.' But there is doubt as to whether this step was taken at the meeting, and, if so, it is dubious whether the laws so received were to apply to the English only, or to the Irish as well. Be that as it may, certainly no real attempt was made to bring the Irish under one law with the English. When King John visited Ireland in 1210, accompanied by the famous Simon de Pateshull, he held a grand council at which 'the laws and customs of England' were received. By 1226, however, Henry III found it necessary to remind the freemen of Leinster that English law was to apply in Ireland. To give meaning to this reminder the register of writs was sent to Ireland in 1227. See Curtis, pp. 53, 71, and F. Elrington Ball, The Judges in Ireland 1221-1921 (1926), Vol. I p. 3. As to the legal position of the native Irish race see Curtis, History of Ireland, pp. 76-78.

[8] Including the Great Writ of Right and the action of Novel Disseisin.

the extreme inconvenience of employing it, (ii) the Irish Justiciar's Courts founded in 1204, having a similar jurisdiction to the English King's Bench and which became the Irish King's Bench in 1394 when Richard II held Court in it in person,[9] (iii) the Irish Common Pleas composed of the Irish justices, five in number by 1250, who, when not on circuit, sat in Dublin to hear cases falling outside the jurisdiction of the Justiciar's Court,[10] and (iv) the Irish Exchequer consisting of the Treasurer, the Chancellor, two Exchequer barons and the King's Remembrancer.[11]

There was, of course, the inevitable battle for jurisdiction between the Courts. For instance, the Common Pleas complained that the Exchequer should not do judicial work. Royal sanction, however, was given to the Exchequer jurisdiction in 1288 provided the legal work done did not interfere with the rest of the business of the Exchequer.

There was not in the early days of the settlement a distinct Irish Chancery, and it is not until 1232 that the existence of a Chancery in Ireland is recognised in the English Close Rolls. By that time it seems that the Chancellorship in Ireland was an office executed, through a deputy, by the Lord High Chancellor of England. In 1244, however, the deputy in Ireland, Robert Luttrell, was described as the Chancellor of Ireland, and from that time forward the Irish Chancery became an autonomous department.[12] From this department there evolved during the thirteenth and fourteenth centuries an Irish Chancery Court, and until the Judicature Acts of the nineteenth century 'the Four Courts,' the Irish King's Bench, Common Pleas, Exchequer and Chancery, dispensed royal justice within the realm of Ireland.[12a]

As far as their judicial staffs were concerned:

> on the bench in the thirteenth century men of Irish birth found but rarely a place; in the fourteenth century they enjoyed in an increasing degree a share of the seats; in the fifteenth century they gained the predominance; at the close of the sixteenth century they lost it; as the seventeenth century advanced fortune leant once more to their side; and in the eighteenth century they regained the predominance and continued to hold it.[13]

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9 Until the Court became known as the King's Bench it had borne the lengthy title of placita nostrum justiciarum Hiberniae sequentia. The Justiciar left the Court in 1395 and it was in that year that the separate King's Bench Rolls began.

10 The first writ known to be addressed to the judges of the Irish Common Pleas is dated 1251. Robert Baggot, who had earlier been sheriff of County Limerick, became the first Chief Justice of the Common Pleas in 1274, and the court had separate Rolls from the year 1277. See Ball, The Judges in Ireland, Vol. I, Chapter I.

11 This was the constitution of the Court in 1284.

12 And see Ball, The Judges in Ireland, Vol. I, p. 9. The Chancery in Ireland was first recognised in Close Rolls, Hen. III, 1231-4, p. 112.

12a It should be noticed that Irish conciliar jurisdictions came into existence in the time of the Tudors; notably the Court of Castle Chamber (the equivalent of the English Star Chamber) and an Irish Court of High Commission (1593).

13 Ball, The Judges in Ireland, Vol. I, p. viii.

In Edward I's time an Anglo-Irish Bar began to come into existence,[14] independent of the rapidly growing Inns of Court in London, and after the Bruce invasion Edward II sent Fitzrichard to Dublin as King's Sergeant to reorganise legal administration.[15] The first Irish Inn of Court was Collett's Inn, but this had been destroyed prior to, or during, the Bruce invasion. Preston's Inn, its successor, was established in the reign of Edward III as a result of the reorganisation in the previous reign, and this remained the Irish Inn of Court until 1543, when Henry VIII founded his King's Inns in Dublin and did away with Preston's Inn.[16] This official recognition and patronage of the Bar in Ireland was a far-sighted and intelligent step, but unfortunately it was robbed of much of its value due to the condition imposed on Henry by the profession in England, to the effect that no barrister should practice before the Superior Courts in Ireland who had not been 'called' by one of the English Inns. This regulation lasted until 1886, Irish barristers keeping four dining terms in London[17] and then being called by an English Inn, on condition that they should practice only in Ireland.

3. THE ENGLISH PLANTATIONS: THE EXTENSION OF THE COMMON LAW

Ireland faced the Tudors with a number of difficult problems. The Norman invasions had not amounted to a conquest; speculative grants outside the Pale to buccaneering barons, who, after success in battle had married into the local community, had been common; central authority, save in the Pale, had been the shadow of a name rather than the substance of reality; Ireland had become 'a second field in which to fight out the battle of Crown versus Baronage'.[18]

Fourteenth century Ireland had been composed essentially of three main areas, the largely untouched Gaelic territories in the North, North-West and West, the feudal liberties of the nobles, and 'the English land' administered on a county basis under sheriffs and the common law. John, Edward II and Richard II had attempted, with some success, to enforce English lordship over the whole land against Gael and Norman baron alike, but their attempts broke down, to be followed by a Gaelic recovery, an increase in the power of the feudal lords and what may be described as 'aristocratic home rule' under the Anglo-Irish families of

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14 See Sullivan, The Last Sergeant, p. 14. Collet's Inn, the first Irish Inn of Court, seems to have been calling 'barristers' in the reign of Edward I. 'But it had probably been raided by the O'Byrnes prior to the Bruce invasion, when a viceroy might have surveyed three fourths of his dominions from the tower of his fortress by the Liffey.'

15 As King's Sergeant Fitzrichard sat as, in effect, Minister for Justice, Lord Justice of the Council and of Assize and law adviser, all in one. For this service he was paid a 'fee' of five marks per annum.

16 Up to the time of Henry VIII's reforms, the exact status of a barrister called by an Irish Inn is not known.

17 Originally Irish students had to reside for five years at one of the English Inns of Court.

18 Curtis, History of Ireland, p. 80.

Ormond, Desmond and Kildare.[19] When Henry VII achieved the English throne and turned his attention to breaking the power of the overmighty subject in England, he was also faced with the Irish and Anglo-Irish nobles in Ireland, whose sympathies were essentially Yorkist, who were opposed to royal power in itself, and to his especially, since it represented the victory of the Lancastrian cause.

Henry VII intended to break the power of the Kildares, and with it that of the Anglo-Irish aristocracy of the day. His first step was the sending to Ireland in 1494 of Sir Edward Poynings as viceroy. Under this resolute fifteenth century civil servant a Parliament met which, in 1495, attainted Kildare, passed a series of Acts resuming for the Crown the appointment of Irish officials of state and restoring Crown revenues, statutes limiting the power of the nobles, and the famous Poyning's law, under which no Irish Parliament was to meet until notice of such Acts as were likely to be passed by it had been given to the English King and Council, and royal licence given for the meeting of the Parliament.[20]

Though these measures imposed theoretical restrictions on the Anglo-Irish nobles, and ensured that the Irish Parliament should not be used to pass measures contrary to the interests of the English Crown, it was not until 1532 that the power of the Kildares was finally broken. Ireland then lay open to Henry VIII, who decided to create a Kingdom of Ireland in a real sense, a state that was no vague lordship. There followed an attempt to Anglicise the country and to enforce the English Reformation settlement, but without translating the new Book of Common Prayer into the Irish tongue.

Old ways die hard; and though the schemes of Henry and Elizabeth were not altogether unattractive, particularly in that they entailed the establishment of law and order in a disordered land, they miscarried. The bitter wars of the sixteenth and seventeenth centuries resulted, the Plantations followed.[21] The sympathy of the English and Irish peoples for each other was largely destroyed, and so was the ancient order of things in Gaelic Ireland. Following the defeat and flight of the earls in 1603 the structure of Gaelic society, and with it Brehon law, collapsed. In 1607 the King's Sergeant recorded the first assize of the whole Kingdom.[22] The common law ran throughout the Kingdom for the first time

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19 See generally Curtis, History of Ireland, Ch. X and XI for an account of aristocratic home rule and the Kildare supremacy.

20 See Curtis, History of Ireland 151. Poynings Law stated that no parliament shall be held in Ireland '. . . till the Lieutenant and Council of Ireland shall first certify the King under the Great Seal of such causes and acts as to them seemeth should pass; then the King and his Council, after affirming such causes and acts to be good and expedient for the said land, shall send his license thereupon, as well as in affirmation of the said causes and acts as to summon the said parliament under his Great Seal of England; that done a parliament shall be holden . . .'

21 The chief Plantations that occurred within the period were those in Leix and Offaly in the 1550's, Munster in 1586 (a Plantation which largely failed), Ulster in the reign of James I, and widespread settlement of English families during the Commonwealth period and the time of William III. A great many of the Ulster settlers had been Scots.

22 See Sullivan, The Last Sergeant, p. 16.

in a real sense, and was enforced wherever force of arms could maintain it.

During the sixteenth century English administration in Ireland was at a low ebb, and the judges in Ireland were, for the most part, more distinguished for their political or military careers than for their work as lawyers. Adam Loftus, who became Lord Keeper in 1573 and Chancellor in 1581, was such a man. 'Judged only as head of the law, head of the Church, as a statesman, or as a scholar, his stature may not seem great, but if his capacity in all these spheres is considered, he towered above all his contemporaries in Ireland'.[23] Even in judicial office, and he never had a training in law, he proved himself most competent. But the same does not seem to be true of some of the other judges of the time, unlike their predecessors in the thirteenth, fourteenth and fifteenth centuries who had for the most part been men of real legal distinction.

The seventeenth century, however, despite its violent civil and religious wars, was a period of expansion for the common law and Bench and Bar in Ireland, an expansion directed at first by the intellect of Sir John Davies,[24] the poet-lawyer who, as Attorney-General, was responsible for the organisation of the circuit system,[25] and for the increase in the establishment of the judiciary.[26] Most of the new appointees were English, since recusancy permeated the legal profession in Ireland. Despite a high degree of nepotism—common enough in the seventeenth century—the standard of scholarship and ability in the Irish legal profession steadily increased, and together with English appointees, Anglo-Irishmen began to take their place in the ranks of Bench and Bar.[27]

4. THE EIGHTEENTH CENTURY

The staffs of the Irish courts of law in the seventeenth and eighteenth centuries, judges and barristers, were drawn from English judges and barristers and from the members of the Irish 'political' nation, the Pro-

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[23] Ball, The Judges in Ireland, Vol. I, p. 130. For a general summary of his career and achievements see pp. 130-136 and 214-217.

[24] See Ball, The Judges in Ireland, Vol. I, pp 231-234. In Davies' opinion the English legal system was the cure for Ireland's troubles. 'If justice be well and roundly executed here but for two or three years,' he wrote, 'the kingdom (of Ireland) will grow rich and happy, and in good faith, I think, loyal, and will be no more like the lean cow in Pharoah's dream and devour the fat of (your Majesty's) happy realm of England.' Works of Davies, ii, lvi.

[25] The circuit system had been evolving for a matter of about twenty years, since the Chancellorship of Gerard (1576-81). In 1614, under Davies there appear mapped out five circuits—the Connaught, the Leinster, the Munster, the North-west and the North-east.

[26] Between 1604 and 1612 the judges in Ireland increased in number from nine to twelve.

[27] The predominance of men of Irish birth on the Irish judicial bench from the eighteenth century onwards was a direct result of Queen Elizabeth's foundation of the University of Dublin (Trinity College). The effect of this foundation on the appointments to the bench was slow, but most important. Between the accession of Charles I (1625) and George III (1760) 115 men were raised to the bench, of which Dublin University could claim 34. But between 1760 and 1921, 145 men were raised to the bench, and of these Trinity could claim 111. (See Ball, The Judges in Ireland, Vol. I, xvii.

testant ascendancy, who had chosen the law as their career. It was not until 1791 that the penal laws prohibiting Roman Catholics from the practice of the law were withdrawn.

It is from the writings of eighteenth century Irishmen like Charles Laver and Sir Jonah Barrington, himself a lawyer, that we first begin to meet the members of the Irish Bench and Bar as real people.[28] Eighteenth century Ireland with its gay irresponsibility, heavy drinking, good sport, Protestant Irish nationalism and intellectual achievement, too —for after all it gave birth to Burke, Swift, Goldsmith, Sheridan, Berkley and Lucas, among others—is an Ireland which modern Irish patriots of the sterner stuff tend to 'scorn without pity'. But to many, including G. A. Birmingham, the Ireland of Charles Laver is real, and something of its feeling remains, if nowhere else at least in the famous drinking song of that age in Ireland whose author, as it happens, was promoted to high legal dignity:

> Ye lawyers so just
> Be the cause what it will, who so learnedly plead,
> How worthy of trust!
> Ye know black from white
> Yet prefer wrong to right
> As you chance to be fee'd.
> Leave musty reports
> And forsake the King's courts,
> Where dullness and discord have set up their thrones
> Burn Salkeld and Ventris
> With all your damned Entries
> Away with the claret — a bumper, Squire Jones.

The eighteenth century in Ireland is scarcely one to appeal to the cultured sentimentalist, and this is hardly surprising since the members of the ascendancy, many of them the offspring of buccaneering English and Scots settlers, were sometimes cultured, but rarely sentimental, while the peasant of the day more often than not lived in conditions appalling by twentieth century standards. Only in Ulster did the Irish tenant normally have fixity of tenure, and any real stake in the land.

Sir Jonah Barrington's *Personal Sketches and Recollections* is hardly to be regarded as a reliable historical work, any more than his famous—and tremendously unreliable—*Rise and Fall of the Irish Nation*, but Barrington did know his eighteenth century Ireland, and well he ought, for he experienced a great deal of it—a colourful career at the Bar, elevation to the Bench of the Irish Admiralty Court in 1789, and removal from the Bench in 1830 for malversation and misconduct in office. He leaves us at least a picture, if not a photograph, of the Irish Bar of his time, and his comments upon the members of the Bench are quite as uninhibited as his own conduct upon the Bench itself.

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[28] It should be noted that this is only true in a qualified sense. In his Judges of Ireland (see especially Vol. I, Book 3) Ball has shown that it is possible to make an appreciation of the legal careers of individual lawyers and there are many stories still extant of the Bench and Bar in the seventeenth century. J. Roderick O'Flanagan has collected many of these in his book, The Munster Circuit (1880).

Although the Chief Justices and Chancellors of Ireland were generally men of real legal ability, the puisne judges, according to Barrington, rarely were.[29] As Barrington points out, it was not until 1784 that the Irish judges were made independent of the Crown and, as in any case their salaries were small, many of the best English barristers were generally not willing to accept the office—though most appointees came from England. Nor were their Irish colleagues conspicuous for their ability. Hence it often happened that the Irish Bar viewed the Bench with some disdain. Barrington retails the reasons for this as against individual judges, with great glee. Baron Monckton of the Irish Exchequer, he says, 'understood *black* letter and *red* wine better than any who preceded him in that situation'.[30] Judge Boyd,[31] another with an understanding of the grape, was said to be so tender hearted that he never sentenced an unfortunate to death without having 'a drop in his eye',[32] a drop quite apparent to all those in his court. Another Irish King's Bench judge of the day (could it have been Counsellor Necessity, promoted to the Bench because *necessitas non legem habet*?) in deciding a will case, said he 'thought it clear the testator intended to keep a *life interest* for *himself*.' The Bar did not laugh outright until counsel, in this instance Curran,[33] ensured it by replying, 'Very true, my lord, testators often do secure life interests to themselves. But in this case I think your lordship takes the *will* for the deed'.[34]

The activities of the profession out of court were at least as dramatic as their conduct within it. Two rather remarkable suicides occurred during the eighteenth century, and the manner of each was identical.[35] First, Baron Power,[36] driven mad seemingly by personal attacks upon him by

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29 Barrington's disparaging comments must be accepted with reservations. He gives the impression that because the judges were not independent, dismissal at the royal pleasure was frequent, or at least a real deterrent to the acceptance of judicial office by men of ability. On the whole this would seem to be untrue, even in Barrington's own time. Elrington Ball disagrees with Barrington's contention. His opinion is that 'viewed as a whole the history of the judges in Ireland is remarkable for a continuity quite exceptional in that land of change.' For the most part the continuity of individual judges in office in the eighteenth century is also remarkable, and Barrington's own tenure of office more remarkable than most! He was himself eventually removed by a motion of both Houses of Parliament.

30 Sir Jonah Barrington, Recollections, p. 262.

31 Robert Boyd, educated at Dublin University, joined the Middle Temple, was called to the Irish Bar in 1767, and was appointed a justice of the King's Bench in 1791. He resigned in 1798.

32 Barrington, Recollections, p. 262.

33 John Curran, educated at Dublin University; he entered the Middle Temple in 1773, gained a tremendous reputation at the Bar as an orator, and was appointed Master of the Rolls in 1806, but retired in 1812.

34 Barrington, Recollections, p. 263.

35 Id. at pp. 264, 265.

36 Richard Power, entered the Middle Temple in 1752, was called to the Irish Bar in 1757, became a King's Counsel in 1768. He was summoned to render an account as usher of the Court of Chancery in 1794. Shortly afterwards he was found drowned.

Fitzgibbon,[37] the Irish Lord Chancellor, deliberately walked into the sea, having first filled his pockets with pebbles. The baron was quite conclusively drowned. His success prompted a Dublin attorney, Morgal by name, to end his life, also by pebble and sea, in the very same spot. Barrington comments that it is a pity that more attorneys did not follow Morgal's example; if they had, fewer of their clients might have had to. The mortality rate among the Bench and Bar, however, was heavy enough. Lord Kilwarden, the Chief Justice, was murdered in 1803 by the rebels who rose under the ill-fated Robert Emmet,[38] and as if the troubled state of the country and the strength of eighteenth century drink were not sufficient hazards, duelling was a favourite pursuit of the legal profession.

During his time, Barrington asserts, two hundred and thirty-seven 'memorable and official'[39] duels were fought. He gives an abbreviated list which includes the following:

> The Lord Chancellor of Ireland, Earl Clare, fought the Master of the Rolls, Curran. The Chief Justice of the King's Bench, Lord Clonmell, fought Lord Tyrawley, a privy counsellor, Lord Llandaff and two others. . . . The Chief Justice of the Common Pleas, Lord Norbury, fought Fire Eater Fitzgerald, and two other gentlemen, and frightened Napper Tandy, and several others beside; one hit only . . .[40]

The list seems endless. Barrington's final comment is, 'in my time the number of killed and wounded amongst the Bar was very considerable. The other learned professions suffered much less'.[41] Duelling, of course, was by no means restricted to Ireland, though very popular there, nor was fighting—for honour or for its own sake—restricted to the Protestant ascendancy. Mob fighting was common throughout the country, and this general background of violence makes the often quoted *Purcell's Case*[42] a little less remarkable than it otherwise would be. In that case, it will be recalled, Purcell, a septuagenarian of the County Cork, killed four burglars with a carving knife, and in 1811 received a knighthood for this work.

Despite the personal habits of the eighteenth century Bench and Bar, and despite agrarian unrest, the growth of Protestant Irish Nationalism, the United Ireland movement, and the ill-fated rebellion of 1798, or perhaps because of these things, the profession in Ireland gained in

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37 John Fitzgibbon, Earl of Clare, was educated at Dublin and Oxford Universities. He was called to the Irish Bar in 1772 and was appointed Lord Chancellor of Ireland in 1789. He died in 1802.

38 As it happens, Kilwarden (Arthur Wolfe) was a popular man, and the mob murdered him in mistake for Lord Carleton, who had made himself hated as Chief Justice of the Common Pleas.

39 Barrington, Recollections, p. 280.

40 Id. at p. 279.

41 Id. at p. 280.

42 (1811) K.S.C. 139, and see Kenny, Outlines of Criminal Law, 15 ed. (1947) at p. 117.

stature, Barrington's criticisms and witticisms notwithstanding. Irish judgments came to be studied and respected in England. An Irish lawyer, Edmund Burke, though he was called to the English Bar and lived most of his adult life in England, laid the foundations of modern conservative thought.

Burke was born in Dublin in 1730, the younger son of a reputable Protestant attorney.[43] A sickly boy, he spent much of his youth as an invalid, and reading became his pastime. He was educated at a Quaker school at Ballitore and Trinity College, Dublin, where he became a Bachelor of Arts in 1748 and a Master of Arts in 1753. He joined the Middle Temple in 1750 and kept terms there, though his mind was drawn away from the minutiae of law to the wider field of politics, theoretical and practical. By 1753, when he applied (unsuccessfully) for the Chair in Logic at Glasgow, he seems to have given up the idea of legal practice as a career. His early years in Ireland, a country for which he never lost his affection, and the impact upon him of the intellectual life of London in the latter half of the eighteentht century bred in Burke an independence of mind and action founded upon a deep belief in established order and a sincere tolerance. As a Whig member of the House of Commons he bitterly condemned, though in vain, British policy towards the American colonies. This was to him a denial of all that the English Parliament had fought for, and won, in the seventeenth century. Equally bitterly did he attack the revolution in France, which, though still a Whig, he saw as a destruction of civilization—a compact between all men and all ages 'trampled beneath the feet of a swinish multitude'—a view which was soon to be borne out by the appalling atrocities of the 1790's in France.

Although Burke was well aware of his countrymen's grievances, in Irish affairs, too, he stood for the Establishment—the English connection and the Church of Ireland.[44] In sharp contrast to his views were those of Wolfe Tone,[45] another Protestant Irish Trinity man, who joined the Irish Bar. He was no success at the Bar, but, together with others of his age, he had a different view of the Irish nation than that of the eighteenth century 'political' ascendancy. He played a leading role in the organization, if organization it can be called, of the Society of United Irishmen.

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[43] Reputable attorneys were not so common in Ireland in the eighteenth century. Barrington retails one story (p. 266 of his Recollections) illustrating this point. A suitor in the Court of Exchequer complained in person to the Chief Baron that he was quite ruinated (sic) and could go no further. 'Then,' said Lord Yelverton, 'you had better leave the matter to be decided by reference.' 'To be sure I will, my lord,' said the plaintiff; 'I've been at law thirteen years and can't get on at all. I'm willing . . . to leave it all either to one honest man or two attorneys.' . . . 'You'd better toss up for that,' said Lord Yelverton. . . . Two attorneys . . . were appointed . . . and in less than a year reported that they could not agree. The parties then left the matter to an . . . honest neighbour . . . (and) in about a week . . . told his lordship that their neighbour had settled the whole affair. . . .'

[44] But Burke, like all reasonable, humane men of the period, regarded the penal laws as indefensible. See Curtis, History of Ireland, p. 300.

[45] See Curtis, History of Ireland, pp. 330-331, and for a most sympathetic sketch of Wolfe Tone see Barrington, Recollections, Chap. 22.

This was a society formed in 1792, which, influenced largely by the French Revolution, was anti-English and republican in aim. Its leaders, Tone, Lord Edward Fitzgerald and Henry Joy McCracken, sought to unite the Roman Catholics of the South with the Presbyterians of the North, but the movement split upon the rock of Protestant and Catholic distrust. It was savagely put down by the Protestant yeomanry in face of a French invasion, and this, in turn, provoked the rebellion of 1798 which ended so tragically for the United Irishmen of Wexford and Antrim.

The threat of French invasion, and the Irish rising, turned Pitt's attention to Irish affairs. The cure for the situation in his view was union of the two Parliaments, as had already taken place between England and Scotland. Two methods were used by Castlereagh, the Chief Secretary, to induce the Irish Parliament to vote for its own abolition—the usual eighteenth century method, bribery, and the promise of complete Catholic emancipation. Despite vigorous opposition the Act was carried, and might have been made to work had not George III believed that to grant Irish Catholics their political freedom would be to violate his coronation oath. The promise of emancipation was not fulfilled.

5. THE NINETEENTH CENTURY

As has been seen, Catholics had been permitted to enter the legal profession when the penal laws were relaxed in 1791, and it was early in the nineteenth century that a great Roman Catholic barrister, Daniel O'Connell, began the constitutional movement for Catholic Emancipation. The movement succeeded when, in 1829, O'Connell himself was elected as representative for Country Clare and in order to allow him to take his seat Wellington and Peel were forced to pass the Roman Catholic Emancipation Act. O'Connell's political gifts and talents as an orator are well known, though less, understandable enough, has been written of his gifts as a lawyer. Primarily, I think, he had a reputation as a cross-examiner, and as a rough-handler of the difficult witness, but most of his recorded efforts now seem merely abusive, though effective. One, however, while being most effective also suggests humour. The charge against O'Connell's client depended almost entirely on the evidence of a witness who happened to be a Dane. Rising to cross-examine him, O'Connell said, 'You say you are a Swede?' 'No,' replied the witness. 'What are you then?' demanded O'Connell. 'A Dane,' replied the unfortunate witness. O'Connell turned a shocked face to the jury and said, 'Gentlemen, you hear the prevaricating scoundrel!' and then sat down. No more questions were necessary. The jury acquitted![46]

'The Union had put an end to the claims to independence of the Irish courts under the Irish Parliament, and since that time the Irish administration of justice [has been] distinguished from the English mainly by being less than a fifth of the cost while identical in practice'.[47] Yet,

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[46] See J. A. Strahan, The Bench and Bar of England (1919), p. 75.

[47] Sullivan, The Last Sergeant, p. 16.

strangely enough, it was in the nineteenth century and in the early days of this century while the Irish courts could claim no independence under their own Parliament, that the Irish Bench and Bar made a tremendous contribution to the common law. Further, it is a period of which Irish lawyers have written with deep sentiment and to which many of those now in practice look back as to a golden age. Nor is pride in its achievements, or its traditions and temper misplaced.

One factor which contributed to the high standard of the nineteenth century Irish Bench and Bar was the almost unique comradeship that existed among its members. Sergeant Sullivan has suggested that this comradeship depended largely on two factors; the first that in nineteenth century Ireland, especially in the latter half of the period, no great fortunes were, or could be, made at the Irish Bar[48]; the second the absence of a system of chambers and clerks, which made the library of the Four Courts building in Dublin the centre of Irish legal life in a very real sense.

The members of the Bar met each day in the Law Library of the Four Courts, as in large measure they still do,[49] and a man who had been in the profession long enough virtually acquired a prescriptive title to a desk in the library, where he sat while not actually engaged in court. At the door sat a man in a pulpit who shouted out the name of any barrister who was summoned to the door by a solicitor to receive a brief. Barristers dealt directly with solicitors without the intervention of a clerk. The more junior barristers, even when briefless, spent most of their days in or around the courts or the library. Sullivan gives a picture of life in the library as he knew it, and his description, for the most part, still holds good.

> Life in the library was in theory absolutely demoralizing. How a man could work with the incessant buzz and noise of conversation — sometimes directed to himself — might appear to be a puzzle, but somehow or another you get used to anything and your ear gets trained to shut out all sounds but the one it wants to hear, and you can carry on a conversaton and write an opinion at the same time when you have practised doing this for a sufficiently long period of years. Generally you could go and work there with people reciting the latest gossip, and even speaking to yourself, without hearing a sound, but there was one sound you never missed: what John Stuart Mill might have called your enlightened self-interest always detected the sound of your own name, with the hope of a brief behind it. . . .[50]

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[48] The early inauguration of a county court system in Ireland contributed towards a relatively low scale of costs. See Sullivan, The Last Sergeant, pp. 28, 29; (1929) 3 Cam. L.J., pp. 365-6; Maurice Healy, The Old Munster Circuit (1939), p. 286. Healy does not think that any leader, other than a Law Officer, ever made £5,000 a year at the Irish Bar pre 1922. He 'is certain that there would not have been ten earning £3,000'.

[49] This is true also of the present Bar in Belfast, where the Law Courts Library is the focal point of the profession.

[50] Sullivan in (1929) 3 Camb. L.J. 365.

'The Library System', wrote Maurice Healy, 'not only enabled us to practice cheaply, but gave every neophyte three hundred tutors to teach him'.[51] In the County Courts, too, life was extremely intimate among the members of the Bar who followed the court from place to place.[52] It is not surprising that from the intimacy of the corporate life of the nineteenth century Irish Bar, which in many ways seems strikingly similar to the life of the English Bar in the sixteenth and seventeenth centuries, a number of tremendously capable lawyers emerged, and that the overall standard of scholarship and professional ethic was high.

Perhaps the ablest of the judges to sit upon the Irish Bench was Christopher Palles,[53] the Chief Baron of the Exchequer. Palles was a tremendous black letter lawyer and many of his decisions are well known throughout the common law world. It was by no means every barrister who would wish to appear in his court. Still, in the late nineteenth and early twentieth centuries Irish counsel still had a choice of three common law courts in which to bring an action.

> If you had some merit on your side but thought that the law was against you, you issued your writ in the Queen's Bench, which was presided over by Micky Morris, as he was invariably called although he was a lord, because Mickey had a good deal of common sense, a great deal of humanity, but his ideas of jurisprudence were peculiarly his own. On the other hand, if you were strongly of opinion that however iniquitous your client was, he had the law on his side, you issued your writ in the Court of Exchequer, presided over by Christopher Palles, the greatest judge before whom I have ever appeared. Christopher Palles decided according to what he believed to be the law, and would pay no attention to any other consideration that might be advanced before him. On the other hand there was a third course: if you had neither law nor merits you went to the Court of Common Pleas, which in that day was presided over by Chief Justice May, before whom no case was certain and no case was hopeless. Accordingly there you took your chance, and you had a very good one, whatever was the state of affairs.[54]

Although we are told that Mickey Morris's ideas of jurisprudence were peculiarly his own, he became one of the Law Lords in 1889. Shortly after his appointment he was asked what he thought of the supreme tribunal. His answer was, 'I think the English are a long suffering people. There is the highest court in their Empire, and what does it consist of? Why three Irishmen, two Scotsmen and an ould Jew'.[55] The disrespectful description was intended to apply to the late learned Lord Herschell.

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[51] Healy, The Old Munster Circuit, p. 287.

[52] For an account of life on circuit generally see Healy, The Old Munster Circuit, and see Sullivan, The Last Sergeant, Chap. 22.

[53] Christopher Palles was educated at Clongowes Wood College and Trinity College, Dublin, called to the Irish Bar in 1853, and became successively Solicitor-General and Attorney-General in 1872. Two years later he was appointed Chief Baron of the Exchequer.

[54] (1929) 3 Camb. L.J. at p. 365; R. E. Megarry, Miscellany at Law (1955), p. 238.

[55] Strahan, The Bench and Bar of England, p. 16.

The generous disregard of prejudice, national or religious, which Morris so lightly associated with the English Bench and Bar, is in contrast to the rather narrower provincial feeling to be found in Ireland. London, like Rome, has always welcomed lawyers of ability wherever they may have originated.[56] Scaevola, Papinian and Ulpian were none of them Romans. In nineteenth century London three of the most renowned jurists were Jessell, Willes and Cairns; of these Sir George Jessell was a Jew, Cairns and Willes both Irishmen, nor were they the only successful Irishmen in the profession in England then, or now.

Willes was born in Cork, the home of so many fine lawyers, but like Burke, as a young man he travelled to London. He read in the chambers of Chitty, the well-known pleader, and, though he had neither position nor connections, soon made his way by unassisted merit, his particular skill being the arguing of demurrers and special cases. He was, it is said, a match for the great Baron Parke himself. He became Tubman of the Exchequer, a post described as 'odd but honourable',[57] and was employed with Bramwell in preparing the Common Law Procedure Acts. In 1855 he was raised to the Bench of the King's Bench, and on the day of his elevation delighted Campbell, the Lord Chancellor, by attempting to evade saying the clause in the judicial oath whereby he was to abjure James II 'and the descendants of the said James.' After seventeen successful years on the Bench, Willes, suffering from overwork, took his own life.[58]

Unlike Willes, Cairns was an Ulsterman born at Cultra in County Down; to abjure the Jacobites was no hardship to him! He had been intended for the Church, but while at Trinity College, Dublin, his tutor, who had trained Willes, Palles and Fitzgibbon, urged that he should take up law. Like Willes, he studied in Chitty's chambers, and like him was called not to the Irish, but to the English Bar. In 1866 he became Attorney-General, and on Knight Bruce's retirement took his place and a peerage. In 1868, however, Disraeli chose him as Lord Chancellor, for his political as well as his legal ability. Though a cold and austere man, he was capable of real depth of feeling and fire. He made the cause of the established Church in Ireland deeply his own, and fought hard, though unsuccessfully, against the Disestablishment Act of 1869. His early death was a real loss to English law and a tragedy for the Conservative Party of his day.[59]

Another Ulsterman, Charles Russell, joined the Bar in England and rose to the top of the profession as a forensic advocate while Willes was on the Bench and Cairns on the Woolsack. His career is interesting in that he began it as a solicitor in Belfast, and had not Judge Jones of the

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[56] See generally Strahan, The Bench and Bar of England, pp. 14-17.

[57] E. Manson, The Builders of Our Law, 2 ed. (1904), p. 186.

[58] See further Manson, The Builders of Our Law, pp. 186-192.

[59] See generally id. at pp. 203-214.

Newry Quarter Sessions persuaded him that he should take his chance at the English Bar, he would never have become a barrister. After his arrival in London success came fairly swiftly. He earned £117 in his first year, £261 in his second, £1,096 in his third. His ability in legal argument was considerable, as he showed in *re Grazebrook*,[60] but it was his power of swaying juries which took him to the top ranks of the Bar, and he appeared in most of the *causes celebres* of the last quarter of the nineteenth century. His style was lucid and incisive and he had no belief in oratorical flourishes, nor was he usually a forensic or judicial humourist, though not lacking in wit. One of his best efforts was his reply to a brother barrister who one day in court asked him 'What's the extreme penalty for bigamy, Russell?' 'Two mothers-in-law,' was the reply.

He became a Lord of Appeal in 1894 and Lord Chief Justice a few months later, on the death of Lord Coleridge, having taken the title of Russell of Killowen. Russell's views on the best mode of approach to English juries are of special interest since it was before them that he made his reputation. He considered that with an Irish jury to use finesse might often succeed, but 'with an English jury,' he advised an Irish friend, 'it is better to go straight to the point. They are busy men and they want to get away quickly. The great thing in dealing with an English jury is not to lose time. . . . Go straight at the witness and at the point. . . .'[61]

Irish juries and witnesses, however, needed, and still need, a rather different approach. Rarely is it necessary for an English judge to appeal to an English jury for a conviction, sometimes he may have to appeal for an acquittal. In Ireland, however, the judges not infrequently had to urge a conviction when public justice and safety demanded it. 'This was not merely true in political or agrarian offences, when fellow feeling might affect the jurors' minds, but in ordinary crimes where their own well-being and protection were at stake'.[62] The famous case of highway robbery in Tralee is a well-known example. The evidence for the prosecution was overwhelming and yet the jury acquitted. The presiding judge showed his view of the case by requesting the High Sheriff to detain the innocent prisoners in custody until he had got a good start on his way back to Dublin! A certain irreverence for the law is to be found, too, in the Bench and Bar. Professor Dicey recounted how on a visit to Dublin he was invited to sit on the Bench in a criminal court. There was no doubt that the prisoner was morally justified in his conduct; equally there was no doubt that he was criminally responsible. The Irish judge, a Tory and a Protestant, told the jury that the prisoner had broken the Statute, but, he added, they would be a queer set of Irishmen if they could not find a way of getting round an Act of Parliament. Of course, the jury acquitted.[63]

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60 Re Grazebrook (1865) 4 De G. J. & Sm. 655.

61 Manson, The Builders of Our Law, p. 436.

62 Strahan, The Bench and Bar of England, p. 174.

63 Id. at p. 177.

Maurice Healy, who himself had extensive experience of practice at both the English and the Irish Bar, sees the essential difference in technique between them as depending upon

> the *personnel* of litigation in the two countries. To him the English (witness) approaches a court of law unwillingly . . . especially apprehensive of cross examination. No doubt there are occasional witnesses of that kind in Ireland, too; but the vast majority go to give their evidence as a cricketer who walks to the wicket. Each is confident he will not be bowled until he has knocked up a good score. . . .[64]

This jaunty attitude is reflected by the Irish witness' reply to Lord Justice Darling when the judge turned sternly to him and said: 'Tell me, in your country, what happens to a witness who does not tell the truth?' 'Begor, me Lord,' replied the Irishman, with a candour that disarmed all criticism, I think his side usually wins!'[65]

This Irish irreverence for law, however, does not stem from sympathy with crime, or wrongdoing in general, but rather from the fact that the Irish, who have a longish memory, are aware even now that the law in Ireland is not Irish law. However just it may be—and it was once most unjust—it does not command reverence as a native institution, but simply respect nowadays as an essential part of the machinery of government. Oddly enough, even during the Irish land war in the nineteenth century when hatred, both spontaneous and organised, of the administration was rampant, the judges in Ireland who symbolised the law were never subjected to suggestions of bribery. Such suggestions would have been regarded as ludicrous.[66]

The marked differences between the gifts which could lead to success at the Irish or English Bar in the nineteenth century caused, as has been seen, a good many Irishmen to practice in England. One of the most amazing legal careers must surely be that of Sir James O'Connor. As Megarry puts it, 'his legal wheel turned full circle'.[67] He was admitted as a solicitor in Ireland in 1894, and in 1900, having first ceased to be a solicitor, he was called to the Bar. He took silk in 1908, became Solicitor-General (Ireland) in 1917. In 1918 he was elevated to the Irish Chancery Bench and later that year made a Lord Justice of Appeal. In 1924, on the establishment of the Irish Free State, the Irish Court was abolished and Sir James was 'deemed to have retired.' He practised at the Bar in England, adding English silk to his Irish silk, but in 1929 he had himself disbarred and dispatented,[68] both in England and Ireland, was readmitted as a solicitor in Ireland, where he practiced until his death in 1931.

Edward Carson was another Irish barrister who practiced at the Bar of both countries. His phenomenal success in England, and phenomenal

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[64] Healy, The Old Munster Circuit, p. 95.

[65] Id. at p. 96.

[66] See Strahan, The Bench and Bar of England, pp. 179-181.

[67] R. E. Megarry, Miscellany at Law (1955) at p. 14.

[68] As Megarry points out, 'the term "desilked" has mercifully yet to be used; and "stuffed" would be confusing.' (Miscellany at Law, p. 14, n. 7a).

it was, 'was something of a puzzle to his best friends in Ireland'.[69] He had been an effective counsel in Ireland, but was considered by some to be inferior to James Campbell. But, 'in the long run it came down to a question of character. Carson was a strong and sincere man; Campbell was a lath painted to look like iron. It was the difference between Rupert of the Rhine and Cromwell's Ironsides'.[70] Lord Carson's political career is too well known to need repetition, but his personal character and motives have often been misunderstood, sometimes not unintentionally. He has often been described as hard and ruthless, and as a 'rebel' for his organisation of Ulster to resist the Home Rule Bill by force if necessary. As far as Irish politics were concerned he was moved by a conviction 'that all the elements that had the real power in Irish nationalism were not only anti-English but were really far from civilised . . . in the long run . . . the parties of disorder . . . would come out on top'.[71] He was himself southern Irish, but he allied himself with Protestant Ulster, at first as a matter of strategy, since that was where Unionist strength lay, and he was willing to go to extremes to preserve the union, believing that the happiness of all classes, not least the peasantry of Ireland, depended on its maintenance.

The record of the administration in nineteenth century Ireland had hardly been a happy one; conditions had been incredibly bad, reaching a peak in the famine years of the 1840's, agitation, revolt and repression frequent; but by 1912 Roman Catholic emancipation had been in existence for more than eighty years, it was over forty years since the disestablishment of the Church and no tithes had been paid since then. Ireland had already become essentially a land of peasant proprietors under the Land Purchase Acts.[72] Carson believed that Ireland's economic and cultural advantage lay with England. He regarded the changes of the nineteenth century in Ireland, especially land purchase and settlement, as positive steps towards Irish prosperity and happiness, regardless of the violent agitation and strife that had been necessary to bring the changes into being. However, it seemed when the Home Rule Bill was passed in 1914 that the English connection would be lost constitutionally, but the Great War supervened, the operation of the Act was suspended and what might have happened had this not occurred is one of the great 'ifs' of Irish history.

To the German Government, Britain in the years 1912 to 1914 appeared likely to be burst asunder by class feeling, industrial unrest, militant suffragettism, while in Ireland two armed camps faced each other, the

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[69] Healy, The Old Munster Circuit, p. 95. In effect, Healy solves the puzzle himself by pointing out that Carson's gifts—quietness, sarcasm and imperturbability—were well suited to use before English judges and juries.

[70] Ibid.

[71] In a letter to J. A. R. Marriott, the historian, in November, 1933.

[72] The chief of these, prior to 1921, were the Acts of 1885 (the Asbourne Act), 1891 and 96 (the Balfour Acts) and 1903 (the Wyndham Act). It is interesting to notice that the Torrens system was introduced into Ireland in 1891 by the Local Registration of Title (Ireland) Act. Torrens was himself an Irishman.

North under Carson, the South under Dillon, the Nationalist leader. Carson's opposition to Home Rule and Dillon's stupidity[73] in preventing the prosecution of Sir Edward for conspiracy and treason-felony and causing the arming of his own Southern Nationalists had created the fantastic situation in which a loyalist army was willing to overthrow British law, while rebel organisations seized arms, ostensibly to enforce it.

The German Government chose to exploit this situation in Ireland. Sir Roger Casement[74] became the German agent in this venture to wreck the British and allied cause. The invasion of Ireland by German arms and a rising within organised by Casement was to be the method used. But the plot miscarried. At the outbreak of war Carson's loyalistst rallied to the British cause, and so did the Nationalists, mindful of Ireland's traditional alliance with France. The Irish people united for the one occasion in their history. When Sir Roger Casement landed in Ireland from a German submarine in 1916, the German High Command refused to risk any military assistance to his rebellion. It seems that Casement tried to stop the rising, but the extremists had their way, and on Easter Monday bloodshed and destruction struck Dublin. With the Easter rebellion hopes of a peaceful solution to the Irish question after the War virtually disappeared.

Casement was captured and taken to England to be tried for treason,[75] but no Queen's Counsel at the English Bar was willing to undertake his defence. Eventually his defence was accepted by an Irish sergeant, A. M. Sullivan, a Catholic from Cork, a product of the King's Inns in Dublin and the Munster Circuit.

The defence, which was to the effect that the War was believed to be practically over and that Casement was recruiting an army to fight Carson, failed, but not before Sullivan had made a deep impression on the courts and upon the profession in England. Twice Sullivan took the judges to task. While he was showing that two cases cited by Coke and various of Coke's *dicta* were not relevant to the instant case, Darling J. enquired, 'Are you saying, Sergeant Sullivan, that Lord Coke was always wrong?' To which Sullivan replied, 'My Lord, it is as impossible for a judge to be always wrong as it is for him to be always right.' 'Yes,' said Darling, 'some

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73 'Dillon . . . had insisted on the repeal of the Arms Act, thus rendering possible the equipment of political organisations with lethal weaons . . . and . . . prevented the prosecution of Sir Edward (Carson) . . . for treason-felony and conspiracy, charges to which he had no answer . . .' Sullivan, The Last Sergeant, p. 266.

74 Though Casement was hardly known in Ireland, he succeeded in convincing the German Government of the day that he could organise an armed revolution in Ireland. See Sullivan, The Last Sergeant, p. 267.

75 If Casement had been charged with his Irish venture he would have had to be tried in Ireland, in accordance with Edward III's Statute of Treason. Hence, since the British Government wished to have him tried in England, he was charged with treason at Ruthleben in Germany, but at the time of this act neither he nor the enemy was within the realm. For Sullivan's argument in relation to the applicability of the statute to such a situation see Sullivan, The Last Sergeant, pp. 270-271. Briefly, he endeavours to show that Casement's act of collaboration with the German Government did not fall within Edward's statute, but amounted to a 'foreign treason' triable by civil law. Casement was found guilty under Edward III's statute.

of us have found that out for ourselves.' Later, when Mr. Justice Scrutton saw fit to criticise Sullivan's junior, Sullivan forgot that he was not a silk in England and informed the judge that so long as his junior did his duty to his (Sullivan's) satisfaction there was no other person in the court entitled to criticise him.[76] Throughout the trial, and the appeals, Sullivan's conduct was a credit to his country and the Bar at which he had practiced.

Sullivan never shared Carson's ultra-loyalist and unionist views, but he was, like many other Irishmen, a real believer in ordered justice and in the Kingdom of Ireland.

The Treaty of 1921, ending the 'Tan War' which had reflected so little credit on either side, was to Sullivan a shameful document. In his view it gave 'Southern Ireland to the Anti-English, Northern Ireland to the Anti-Irish'.[77] For the extreme nationalist or unionist, perhaps, the treaty was no tragedy, but to many members of the old Irish Bar, who were neither, it was, and after it, like many others, Sullivan was forced to leave Ireland and take up practice in England, where he took silk and towards the end of a most successful career became Treasurer of the Middle Temple. Many are the stories told of him. One of his most famous witticisms was the comment that 'legally all ladies are to be presumed young, until the contrary be proved.' Another comment attributed to him was made when in pressing a claim on behalf of some rather dubious plaintiffs from Connemara the judge sternly asked him, 'Are your clients not aware of the maxim *In pari delicto potior est conditio defendentis*?' To which the reply was 'Sure, my Lord, in the bogs of Connemara they talk about nothing else!'[78]

The legal profession in nineteenth and early twentieth century Ireland abounded with characters. To write so little of so few is to fail to do justice to the subject. The O'Brien's, Peter and John, Stephen Ronan, the Healys, Andrews and a host of others receive no mention here, and for the choice of characters of whom I have tried to write I must accept the blame; but it has not been an easy choice to make. Fortunately, others have written of the Bench and Bar much more capably and much more fully than I could hope to do.

6. 1922 AND BEYOND

With the Treaty of 1921 came the partition of Ireland, and with it the end of the old Irish Bar. Since that time the professions in Northern and Southern Ireland have been distinct, the Southern Irish Bar training in the King's Inns in Dublin, the Northern Bar in The Inn of Court of Northern Ireland. Both have produced able counsel and judges, each

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[76] Sullivan later became a close friend of Darling and of Scrutton. See Sullivan, The Last Sergeant, p. 274. It is interesting to notice that one of the English juniors who assisted Sullivan in Sir Roger Casement's trial was the famous Artemus Jones.

[77] Sullivan, The Last Sergeant, p. 264.

[78] Sullivan himself attributes a similar riposte to Henry Harte Barry. See Sullivan, The Last Sergeant, p. 48.

maintaining within its own jurisdiction the best traditions of the common law, which is—in a divided land—a common law in a very real sense.

The method of training has not changed materially and the emphasis as between the two jurisdictions is rather on similarity than difference. The Library system, rather than a system of chambers, still operates. Humour is not lacking in either jurisdiction. Mr. Justice Gavan Duffy's excellent judgment in *McInerney v. Liddy*[79] is a fair example. In summing up the arguments in relation to the interpretation of a will he declared:

> 'I am confronted with this clear alternative: either [the testator] believed that he was endowing his chosen "residuary legatees" with all that he still had to give, including the farms . . . or else, while taking the trouble to make a will in hospital, he was all the time chuckling to himself at his singular crochet, singularly manifested *sub silentio*, when he reflected that a partial intestacy would be a neat device to let all his next-of-kin, including the chosen pair, divide the five farms between them. Now I take his "last will and testament" to be meant as a serious document of title and reject the notion of a humourless jest . . .'[80]

Just as a jest which is not humourless is still the mark of the Irish Bench and Bar in both North and South, so, too, is an adherence to a belief in the true role of counsel as an officer of the court, as no mere mouthpiece of his client.

> To consider him in that light is to degrade him . . . He is a representative, but not a delegate. He gives to his client the benefit of his learning, his talents, and his judgment; but all through he never forgets what he owes to himself and to others. He will not knowingly misstate the law—he will not wilfully misstate the facts, though it be to gain the cause for his client. He will ever bear in mind that if he be the Advocate of an individual and retained and remunerated (often inadequately) for his valuables services, yet he has a prior and perpetual retainer on behalf of truth and justice; and there is no Crown or other licence which in any case, or for any party or purpose, can discharge him from that primary and paramount retainer."[81]

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79 [1945] I.R. 100.

80 Id. at 114 per Gavan Duffy, C.J.

81 R. v. O'Connell (1844) 7 I.R. L.R. 261 at 312, 313; H.L. (1844) 155, and see Megarry, Miscellany at Law, p. 51.