THE "IRISHNESS" OF IRISH LAND LAW

Recent publication of the second major treatise[1] on the subject of Irish land law prompts the question of just how "Irish" is the subject. When the writer was a law student at Queen's in the early 1960s it was part of the culture that land law was the one subject above all others in the curriculum which differed substantially from English law.[2] It was the subject in respect of which English texts were to be used with extreme caution[3] and much reliance would have to be put on the guidance of the lecturer.[4] The doyen of the subject then on the Queen's Faculty was Dr Vincent Delany, but, to the writer's great disappointment, Delany left Queen's to take up the Regius Professorship at Trinity College, Dublin just before he was due to study land law.[5] Delany did not produce the major treatise on the subject which he was eminently qualified to write, but he did pen many articles which demonstrated his wide knowledge of Irish land law.[6] The writer's disappointment at Delany's leaving was largely assuaged immediately thereafter by the return to Queen's of Professor Lee Sheridan. He had

1. Lyall's *Land Law in Ireland* (1994). The first "major" treatise in modern times was, of course, the writer's *Irish Land Law* (1st edn, 1975; 2nd edn, 1986). The distinction being made here is between works which seek to provide, so far as is practicable in a single work, an exhaustive treatment of the subject and other works. One must not discount the contributions to understanding of other works, including those of a general nature, such as Pearce's *Land Law* (1985); see also Coughlan's *Property Law* (1995). Nor should one disregard the substantial number of specialist nineteenth-century texts published in Ireland, dealing especially with areas like landlord and tenant law and land registration.
2. One trusts that purists amongst readers will forgive the Head of a Welsh Law School continuing to use the short hand expression "English law" to cover the law of England and Wales!
3. Echoing the strictures of Kennedy CJ given in the Free State's Supreme Court in *R (Moore)* v *O'Hanrahan* [1927] 1 IR 406 at 422: "Only too frequently one observes with regret even in this Court that diligence in the search for Irish precedent and authority is numbed by the facility of reference to English textbooks."
4. Land law remains the subject in respect of which the English professional bodies require Northern Ireland students to sit a special qualifying examination in English law. Interestingly in the Republic students seeking exemption from the English bodies also have to sit a special examination in constitutional law. Arguably they would also have to do so in other subjects like family law if they were categorised as "core" or "foundation" subjects for qualifying law degrees.
5. Tragically Delany died very shortly afterwards and the writer's opportunity to discuss with him the subject to which he has devoted much of his academic life was lost for ever.
6. The following are a few of the more interesting and influential ones (a full listing is contained in O'Higgins, *A Bibliography of Periodical Literature Relating to Irish Law* (1966)): "English and Irish Land Law — Some Contrasts" (1956) 5 *AJCL* 471; "Irish and Scottish Land Resettlement Legislation" (1959) 8 *ICLQ* 299; "Lessees and the Doctrine of Lost Grant" (1958) 74 *LQR* 82; "Equitable Interests and 'Mere Equities' " (1957) 21 *Conv* 195.

previously been a lecturer at Queen's[7] and had already made a substantial contribution to the subject of Irish land law,[8] but later he increasingly concentrated his writing in the area of equity and trusts.[9]

To return to the question posed at the beginning of the previous paragraph, this article seeks to examine the extent to which Irish land law may be said to contain unique or distinct features. It must be emphasised that it is concerned with the "modern" law only, by which is meant the law which has operated in recent centuries. It is not concerned with the ancient Irish "brehon" laws, the nature of which have increasingly been exposed by modern scholars.[10] Though of undoubted historical interest, those laws have long since ceased to have had practical significance[11] except of the most marginal kind.[12] As so defined, it is suggested that modern Irish land law has very few unique features and that the differences from English law of a fundamental or conceptual nature are rare. Given the history of Ireland over the past 800 years it is difficult to see how Irish land law could have developed much differently. However, although there is little which is unique, there is much which is distinctive and which requires careful study. This distinctiveness has evolved over the centuries and has been contributed to by legislators, judges and conveyancers.

It may be appropriate, before examining the previous propositions in more detail, to consider one further preliminary point. It is often said that Irish land law is essentially pre-1925 English law. This is, of course, a reference to the Birkenhead legislation which remains the basis[13] of modern English law.[14] Like many such statements, it is, at best, a generalisation which only approximates to the truth. In a sense it was never very accurate because of the distinct features of Irish law which had developed before 1925.[15] Since 1925 it has, of course, become even less accurate as the Irish

7. He had left in 1956 to set up the Singapore Law School and returned to Queen's in 1963. He then left again in 1971 to establish the new Law School at what was then University College, Cardiff (the writer going with him).
8. Most notably as the author of the *Irish Supplement* (1956) to *Challis's Real Property* (3rd ed 1911), but also through articles such as: "Registration and Priority of Securities" (1951) 53 *JIBI* 259; "Irish Private Law and the English Lawyer" (1952) 1 *ICLQ* 196; "Notice and Registration" (1950-52) 9 *NILQ* 33; "*Walsh* v *Lonsdale* in Northern Ireland" (1950-52) 9 *NILQ* 157; "Land Law and its Teaching" (1952-54) 10 *NILQ*. He and Delany had collaborated in writing the definitive work *The Cy-près Doctrine* (1959).
9. His Queen's PhD, which had been supervised by the founding Dean of the modern Faculty of Law, Professor J L Montrose, was the basis of his early treatise *Fraud in Equity* (1957). He later produced many treatises on equity and trusts, several in collaboration with Professor George Keeton of London University.
10. See the works cited in Wylie, *Irish Land Law* (2nd edn, 1986), para 1.11 *et seq*.
11. Largely due to their systematic displacement by English common law following the Norman Conquest which began in the twelfth century: see Wylie, *op cit*, para 1.16 *et seq*.
12. Note the reference to the evidence of scholars of the ancient law (in connection with claims to fishery rights in the North-West) in *Moore* v *Attorney-General* [1934] IR 44. See also *Foyle and Bann Fisheries Ltd* v *Attorney-General* (1949) 83 ILTR 29.
13. As was to be expected, it has been the subject to various additions and amendments since 1925, a process which has accelerated since the establishment of the Law Commission in 1966.
14. See, *eg*, Underhill, "Property 1885-1935" (1935) 51 *LQR* 221; Hargreaves, "Modern Real Property" (1956) 19 *MLR* 14; Megarry, "Change But Not Decay: A Century of the English Law of Real Property" (1960) 35 *NYULR* 1331; Grove, "Conveyancing and Property Acts of 1925" (1961) 24 *MLR* 123.
15. Many of these are outlined later in this article.

legislators have enacted provisions similar to or the equivalent of some of the 1925 Acts. In Northern Ireland the obvious examples are the Administration of Estates Act (NI) 1955,[16] the Trustee Act (NI) 1958[17] and the Land Registration Act (NI) 1970.[18] In the Republic examples are the Registration of Title Act 1964[19] and the Succession Act 1965.[20] There is also a danger in overestimating the changes made by the 1925 legislation. It must be remembered that it was the culmination of some 40 years of law reform work, which began with the legislation of the 1880s.[21] To a large extent the 1925 Acts consolidated provisions to be found in the earlier legislation which applied also to Ireland. This is particularly so of what may be regarded as the core provisions of the 1925 scheme:[22] the Law of Property Act and the Settled Land Act. Those Acts do, of course, contain several important changes to the earlier legislation, but very few of them may be said to be fundamental or to be such as to alter the conceptual basis of the earlier provisions.[23]

The Conceptual Basis of Irish Land Law

The proposition, stated earlier, that modern Irish land law has few unique features is surely established by what occurred over 300 years ago. By the early seventeenth century English common law, which in the context of land law meant essentially the feudal system of landholding as it was developed in the centuries following the Norman Conquest, had supplanted the ancient Irish law throughout Ireland.[24] The process of introducing the English feudal system had, of course, commenced during the twelfth century[25] but the process of supplanting the native Irish law was a gradual and, at times, difficult one, but the fact is that it was eventually achieved.

16. See Leitch, *A Handbook on the Administration of Estates Act (NI) 1955* (1956 with annotations to 1967).
17. See Carswell, *Trustee Acts (Northern Ireland)* (1964).
18. See Wallace, *Land Registry Practice in Northern Ireland* (2nd edn, 1987).
19. See McAllister, *Registration of Title in Ireland* (1973); Fitzgerald, *Land Registry Practice* (2nd edn, 1995).
20. See McGuire, *The Succession Act 1965: A Commentary* (2nd edn by Pearce, 1986).
21. The Conveyancing Acts, 1881-1911 and Settled Land Acts, 1882-90. See Wylie, *Irish Conveyancing Statutes* (1994).
22. Note the views expressed by the House of Lords in *City of London Building Society* v *Flegg* [1988] AC 54.
23. An example of fundamental change introduced in 1925, and still not applicable in either part of Ireland, is that concerning co-ownership which prevents the fragmentation of title through proliferating legal tenancies in common: see Law of Property Act, 1925, ss 34-36. While such a provision would be desirable in Ireland (see Lyall, *Land Law in Ireland* (1994), p 408) other provisions introduced in 1925, such as the imposition of statutory trusts for sale, are not to be recommended: see *The Final Report of the Land Law Working Group* (1990), Vol 1, chs 2.2 and 2.3.
24. A process heralded at the beginning of the seventeenth century by the Judges of the King's Bench in Dublin resolving that the old Irish customary modes of succession would no longer be recognised: see *Case of Tanistry* (1607) Dav 28; *Case of Gavelkind* (1605) Dav 49.
25. The Norman Conquest of Ireland really began with the appointment by Henry II of Hugh de Lacy ("Strongbow") as justiciar of Ireland: see Otway-Ruthven, *History of Medieval Ireland* (1968), chaps 2 and 3.

Thereafter it was almost inevitable that the underlying conceptual framework of Irish law would be, as in so many other parts of the world, English common law. Thus the basic concepts of tenure and estates applied equally in Ireland and most of the other features of modern land law developed essentially as in England, *viz*, the law of future interests, incorporeal hereditaments, settlements and co-ownership, trusts and succession, landlord and tenant, mortgages, covenants and licences. Notwithstanding numerous detailed points of distinction, an English lawyer reading the standard Irish texts[26] will find himself in largely familiar territory.

It was, of course, always possible that Irish legislators might introduce fundamental changes to the basic concepts, but so entrenched had become the English system that this was unlikely to happen. Much of the activity of the Irish Parliament during the seventeenth and eighteenth centuries was directed to providing an equivalent of English legislation, such as the Statute of Uses (Ireland) 1634, the Statute of Frauds (Ireland) 1695 and the Registration of Deeds Act (Ireland) 1707.[27]

The Act of Union 1800 and the transference of legislative power to Westminster meant that this approach of "equivalence" was likely to be reinforced and eventually result in the enactment of common provisions. As mentioned earlier, the culmination of this process was the enactment of the Conveyancing Acts 1881-1911 and Settled Land Acts 1882-90, all of which applied to both England and Ireland.

Notwithstanding the pervasiveness of the English system, an Irish dimension did develop. Although it is debatable whether it could be said to introduce conceptual or fundamental changes to the land law system, some quite distinctive legislation has been enacted during the past two hundred years. Some of this will be discussed later, but attention might be drawn in particular to legislation dealing with landlord and tenant relations. This ranges from legislation enacted at Westminster especially for Ireland, such as Deasy's Act[28] and the Land Law and Land Purchase Acts,[29] to legislation enacted in both parts of Ireland after 1920.[30] In the Republic some quite distinctive legislation has been enacted relating to family property, notably

26. See n 1 *supra*.
27. In this last instance the essential difference in Ireland was, of course, that the registration system applied, and still does, throughout Ireland (except, of course, in respect of land now registered under the registration of title system): see Madden, *Registration of Deeds, Conveyances and Judgment Mortgages* (2nd ed, 1901). But the concept of registration of deeds had already been introduced in England by the Yorkshire Registry Acts 1703-1734; see also the Middlesex Registry Act 1708. *Cf* the Scottish Registry of Sasines: see *Report on Registration of Title to Land in Scotland* (Cmnd 2032, 1963), chaps 2 and 3.
28. The Landlord and Tenant Law Amendment Act, Ireland, 1860. See further p 348 *infra*.
29. See Cherry, *The Irish Land Law and Land Purchase Acts 1860 to 1901* (3rd edn, 1903), with supplement by Maxwell (ed), *The Irish Land Acts, 1903 to 1909* (2nd edn, 1910). See further p 000 *infra*.
30. *Eg* in the Republic the Landlord and Tenant Acts 1931-1994 and the Landlord and Tenant (Ground Rents) Acts 1967-1978. See Wylie, *Irish Landlord and Tenant Law*, pt VI. In NI see, *eg*, the Business Tenancies Act (NI) 1964 (and Dawson, *Business Tenancies in Northern Ireland* (1993)) and the Leasehold (Enlargement and Extension) Act (NI) 1971 (Wylie, (1971) 22 *NILQ* 389). See further p 349 *infra*.

the Family Home Protection Act 1976.[31] Furthermore, as will be discussed later,[32] one of the most interesting developments in the Republic in recent times has been the constitutional dimension introduced to so many areas of the law by its written Constitution. This includes the area of land law, where, for example, the core of the rent restriction legislation was declared unconstitutional.[33]

Apart from developments derived from special legislation, it must also be recognised that over the centuries a number of concepts emerged which, if not unique, have a particularly Irish distinctiveness. Most of these were devised by landowners and their legal advisers and given recognition by the courts. In some cases legislators made a contribution. There were also a few instances when the Irish courts on particular points of law took a different view of the principles to be applied. It is these distinctive features which will be discussed before returning to the impact of special legislation.

Distinctive Irish Concepts

The impact and significance of the features outlined below have varied over the centuries. This is inevitable, because most of them are the product of historical and economic forces which change over time. Many of them have lost practical significance and where others still have significance, it may be argued that it is no longer a beneficial one.[34]

(i) Fee Farm Grants

The concept of a fee farm grant, in essence a grant of a fee simple subject to a perpetual rent, is not unique to Ireland. Such grants were once common in parts of England where the rent took the form of a rentcharge.[35] What is distinctive about Irish law is, first, the variety of the grants that came to be made and, secondly, the fact that most of them create the relationship of landlord and tenant between the grantor and grantee.[36] The first major

31. See Duncan and Scully, *Marriage Breakdown in Ireland* (1990), ch 11; Farrell, *Irish Law of Specific Performance* (1994), ch 7; Lyall, *Land Law in Ireland* (1994), ch 17; Wylie, *Irish Conveyancing Law* (1978), ch 6. See further p 349 *infra*.
32. See p 351 *infra*.
33. See the Supreme Court decision in two appeals heard together, *Blake and Others* v *Attorney-General* and *Madigan* v *Attorney-General* [1982] IR 117. The initial legislative attempt to resolve the matter also fell foul of the Constitution: *Re Reference under Article 26 of the Constitution of the Housing (Private Rented Dwellings) Bill 1981* [1983] ILRM 246. See de Blacam, *The Control of Private Rented Dwellings* (1984).
34. Implementation in NI of the *Final Report of the Land Law Working Group* (1990) would remove many of these. See p 339 *infra*.
35. See Law Com 68 (1975), which resulted in enactment of the Rentcharges Act 1977. In earlier times a fee farm rent was the name used originally for chief rents reserved on subinfeudation of freehold land before this was prohibited by *Quia Emptores* 1290. See Megarry and Wade, *The Law of Real Property* (5th edn, 1984), p 828. Note, however, the Crown sanction of grants in Ireland *non obstante Quia Emptores:* see p 337 *infra*.
36. Note, however, that rentcharge grants were also not uncommon in Ireland: see *Brady* v *Fitzgerald* (1848) 12 Ir Eq R 273; *Re Lunham's Estate* (1871) IR 5 Eq 170; *Re Maunsell's Estate* [1911] 1 IR 271.

attempt to categorise and analyse the grants recognised in Ireland was made by the former Dean of the Queen's Faculty, Professor J. L. Montrose, in a series of articles published in this Journal.[37] The series was never completed by Montrose,[38] but was many years later by the current writer.[39]

As with so much of what is distinctive about Irish land law, the explanation for it lies in the turbulent history of the island. One source of fee farm grants was the seventeenth century Crown confiscation of Irish land and regrant by letters patent to loyalists such as occurred in the Ulster Plantation. These regrants frequently conferred on the grantees a special dispensation from the old feudal statute *Quia Emptores* 1290, so as to enable them to "subinfeudate" by way of fee farm grants.[40] Such grants created feudal tenure — the old lord and tenant relationship between the grantor and grantee — and some probably survive to this day.[41]

More common in both parts of Ireland in modern times are "leasehold" grants, which derive from two principal sources, both statutory. One is the so-called "conversion" grants. These are all converted leases and arise from various statutory provisions enacted for the most part during the nineteenth century.[42] Of most significance was the Renewable Leasehold Conversion Act 1849, which conferred on lessees holding under existing leases for lives renewable for ever[43] the power to convert them into fee farm grants.[44] Any such lease granted after 1849 was converted automatically into a fee farm grant. The other principal source of leasehold grants was section 3 of Deasy's Act[45] which, by providing that a reversion was no longer necessary in Ireland[46] to the creation of the relation of landlord and tenant, enabled

37. "Fee Farm Grants" (1938) 2 *NILQ* 194; (1939) 3 *NILQ* 40 at 81 and 143; (1940) 4 *NILQ* 40 and 86.
38. One reason, perhaps, why it was not included in the posthumous book of his writings edited by Professor H G Hanbury, *Precedent in English Law and Other Essays* (1968). A more likely reason is that the book concentrates on Montrose's more lasting contribution, his jurisprudential writings.
39. "Fee Farm Grants — Montrose Continued" (1972) 23 *NILQ* 285. See also *Irish Land Law* (2nd edn 1986), para 4.057 *et seq;* cf Lyall, *Land Law in Ireland* (1994), ch 7.
40. See the discussion of the grant by Charles I to Viscount Montgomery of the Manor of Donaghadee in *Delacherois* v *Delacherois* (1864) 11 HLC 62.
41. See *Irish Land Law* (2nd edn, 1986), para 4.060.
42. Re bishop's leases and college leases see *ibid*, paras 4.079 and 4.080.
43. See p. 339 *infra*.
44. In the Republic any such lease remaining unconverted was apparently converted to a fee farm grant by s 74 of the Landlord and Tenant (Amendment) Act 1980. That section is not as clearly drafted as it might be, and it is arguable that the holder obtains the fee simple unencumbered by the rent, but that interpretation would give rise to constitutional difficulties in view of the absence of any provision for compensation to be paid to the superior owner. See Wylie, *Irish Landlord and Tenant Law*, p 1181; Lyall, *op cit*, p 202. It has been suggested that few lessees in NI took advantage of the power to convert: see *Report of the Committee on Registration of Title to Land in Northern Ireland* (Cmnd 512, 1967), para 123.
45. The Landlord and Tenant Law Amendment Act (Ireland) 1860.
46. This did not remain a provision unique to Ireland. For example a similar provision was contained in the Ontario Landlord and Tenant Act 1895. See Williams, *The Canadian Law of Landlord and Tenant* (5th edn by Rhodes, 1983), pp 3-4; Ontario Law Reform Commission, *Report on Landlord and Tenant Law Applicable to Residential Tenancies* (1976), p 5. See also *Kennedy* v *Agricultural Developments Board* [1926] 4 DLR 717, 59 OR 374; *Royal Bank* v *Lambton Loan and Investment Co* [1941] 2 DLR 643, [1941] OR 56.

Irish landowners to grant a fee simple subject to a rent which was a *leasehold* rent. Indeed, it came to be recognised that the full relationship of landlord and tenant existed between the grantor and grantee, a matter of particular significance in respect of remedies for enforcement of covenants and the passing of their benefit and burden to successors in title.[47]

There is no doubt that fee farm grants, especially those creating leasehold tenure, have played a significant role in the development of Irish land law and have served to give it a distinctive, if not unique, character. Much land has been held under such grants, but many will have disappeared in relation to agricultural land as a result of the Land Purchase Acts.[48] So far as urban land is concerned, along with the long leases so prevalent in Ireland,[49] they have been a key element in the creation of the "pyramid" titles which are a feature of Irish cities and major towns.[50] In that respect, however, they have been the source of undesirable complexity of titles. This has been a particular problem because most urban land in both parts of Ireland remains unregistered land.[51] Apart from such conveyancing considerations, it is arguable that the holding of so much land subject to what are usually relatively small "ground" rents is out of tune with modern attitudes of land ownership.[52] This is especially so with respect to residential property, and so it is not surprising that legislators have sought to change things.

In the Republic major steps have already been taken in a two-pronged attack on ground rents of dwellings. First, the creation of new rents, and therefore the use probably of fee farm grants[53] as well as long leases, was prohibited by the Landlord and Tenant (Ground Rents) Act, 1978.[54] Second, a scheme entitling landowners holding subject to ground rents, which again probably includes a fee farm grantee,[55] to buy out the rents and thereby become freeholders no longer subject to such encumbrances has become increasingly effective.[56] As a consequence fee farm grants relating to residential property have rapidly disappeared and the only use of them, which is comparatively rare, is in connection with commercial property.

In Northern Ireland no effective steps have yet been taken to deal with the ground rents problem. The Leasehold (Enlargement and Extension) Act (NI) 1971, which purports to give grantees of "certain" fee farm grants the

47. It was argued by the writer that some account should be taken of the fact that such a grant does convey a fee simple, so that appropriate words of limitation should be used: See *Irish Land Law* (2nd edn, 1986), para 4.095 and note acceptance of the argument in *Re Courtney* [1981] NI 589 at 65-66 (*per* Murray J).
48. See p 348 *infra*.
49. See Wylie, *Irish Landlord and Tenant Law*, para 1.13.
50. See *Irish Land Law* (2nd edn, 1986), para 4.179 et seq.
51. It is one of the most depressing distinctive features of Irish law, as compared with developments in England, that so little progress has been made in extending compulsory registration of title. This is despite the fact that the legislative provision for this has been in place for decades: see the Republic's Registration of Title Act 1964, ss 23-26; Land Registration Act (NI) 1970, s 24 and Sched 2, Pt 1.
52. See the *Final Report of the Land Law Working Group*, Vol 1, Pt 1.
53. The drafting of the legislation and, in particular, its application to fee farm grants is not as clear as it might be; see Wylie, *Irish Landlord and Tenant Law*, paras 2.22 and 4.44.
54. See *ibid*, p 973 *et seq*.
55. See n 53 *supra*.
56. See the Landlord and Tenant (Ground Rents) Acts, 1967-78; Wylie, *ibid*, p 871 *et seq*.

right to redeem their rents,[57] has become a dead letter, partly because of the difficulties of operating it in respect of a "pyramid" title and partly because of the costs involved.[58] The Land Law Working Group has recommended a much more radical scheme which, like the Republic's scheme, involves two lines of attack. It would prohibit the future creation of new ground rents and introduce a scheme for compulsory redemption on a pre-sale basis, *ie* a conveyance of the legal title would not be effective unless the rent was redeemed first.[59] The draft legislation makes it clear that the scheme would apply to fee farm grants,[60] but, again as in the Republic, it would not prohibit the continuing use of fee farm grants in respect of commercial property.[61] Until this or some similar scheme is put into operation fee farm grants, and associated problems such as complex pyramid titles, will remain a feature of Northern Ireland land law.

(ii) Leases for Lives Renewable for Ever

This sort of hybrid estate, whereby the grantee gained a freehold estate but was subject to leasehold tenure, was once one of the most common forms of landholding in Ireland. Indeed, it has been estimated that early in the last century as much as one-seventh of the entire landmass of the island was held under such leases.[62] Despite their popularity the origin of such leases has been the subject of considerable controversy,[63] but it is clear that in earlier times they secured benefits for both the grantor and grantee.[64] They were clearly one of the most distinctive features of Irish land law, though not unique,[65] except, perhaps, in the particular use of renewal of lives upon payment of fines (sums of money) as a method of securing additional income for the landlord. However, as mentioned earlier,[66] they have long since ceased to have much practical significance because, under section 37 of the Renewable Leasehold Conversion Act 1849, any such lease granted after 1 August 1849 has operated automatically as a fee farm grant. It is true that many pre-1849 leases remained unconverted because tenants did not take

57. Like the Republic's legislation this Act's application to fee farm grants is not free from ambiguity; see Wylie, "Leasehold (Enlargement and Extension) Act (NI) 1971 — A Critique" (1971) 22 *NILQ* 389.
58. See the Land Law Working Group's Interim Report, *Ground Rents and Other Periodic Payments* (1983), Chap 4.
59. *Final Report of the Land Law Working Group* (1990), Vol 1, Pt 1.
60. *Ibid*, Vol 3, Ground Rents Order, art 3 (definition of "ground rent").
61. *Ibid*, Vol 1, para 1.3.10 (which makes it clear that the owner of business premises will be able to take advantage of the scheme on a voluntary basis).
62. Lyne, *Leases for Lives Renewable for Ever* (1837), p 1.
63. *Ibid*, pp 1-7. See also Wylie *Irish Land Law* (2nd edn, 1986), para 4.168; Lyall, *Land Law in Ireland*, p 241 *et seq*.
64. See the authorities cited in the previous note.
65. In England perpetually renewable leases tended to be for terms of years (rather than lives) renewable; see *Caerphilly Concrete Products Ltd* v *Owen* [1972] 1 WLR 372 (dealing with the conversion provisions of the Law of Property Act, 1922, 15th Sched). Note that the Irish Renewable Leasehold Conversion Act, 1849, also applied to renewable leases for *years*.
66. P 337 *supra*.

advantage of the right conferred by the 1849 Act[67] to obtain a fee farm grant in place of the lease and many such leases survived in urban areas unaffected by the Land Purchase Acts.[68] They still do in Northern Ireland but in the Republic they were converted by section 74 of the Landlord and Tenant (Amendment) Act 1980.[69]

(iii) Leases for Lives and for Years

This is another hybrid estate which was relatively common in Ireland, whereby a freehold estate (*pur autre vie*) was combined in the same grant with a term of years. Such a grant made more sense where the term of years ran concurrently with the lives because then, if the lives were chosen carefully, it would usually be the case that they would expire before the end of the term, which would ensure determination by a definite date.[70] However, the case-law demonstrates that care was needed in drafting the lease, for otherwise there was the danger that the term of years would be construed as reversionary rather than concurrent, *ie* running from the death of the last surviving of the named lives.[71] Such leases seem to have been a unique Irish conveyancing device, but one which has surely ceased to have much practical significance. Although old leases crop up from time to time in the investigation of title, it is difficult to see why a new one should have been created in modern times.

(iv) Rights of Residence

This is a right commonly created by will in the rural communities of Ireland. A farm is usually left to the younger members of the family (such as the farmer's son or sons), but provision is made for his surviving widow by giving her a right of residence on the farm or some part of it, such as the farmhouse, or even rooms within it.[72] One of the difficulties which has faced the courts over the years is that often the will has been ill-drafted and difficult questions can arise as to the precise nature of the right created.[73] Far and away the best analysis of this troublesome area of the law was provided by a

67. See ss 1 and 2.
68. Which related to agricultural and pastoral land only: see p. 348 *infra*.
69. See n 44 *supra*.
70. See the discussion by Fitzgibbon LJ in *Duckett* v *Keane* [1903] 1 IR 409 at 413-14. See also Lyall, *Land Law in Ireland* (1994), p. 256.
71. *Ibid*, p 413. See also *Adams* v *McGoldrick* [1927] NI 127 at 130 (*per* Wilson J).
72. Sometimes the right of residence will be supplemented by provision for maintenance or support of some kind, *eg* a bed and bedclothes (*Ryan* v *Ryan* (1848) 12 Ir Eq R 226), or clothing (*Leonard* v *Leonard* (1910) 44 ILTR 155; *Re Shanahan* [1919] 1 IR 131) or fuel (*National Bank* v *Keegan* [1931] IR 344). There is, of course, no reason in principle why such rights should be confined to farm land, but this is the most usual case. *Cf Johnston* v *Horace* [1993] ILRM 594.
73. See the discussion in *Kelaghan* v *Daly* [1913] 2 IR 328 and *National Bank* v *Keegan* [1931] IR 344.

then member of the Queen's Law Faculty, Professor Brian Harvey, in the pages of this Journal.[74]

As Harvey pointed out, in many cases there is nothing unique, or indeed, particularly distinctive about such rights. Frequently the grantee is given sufficient exclusive rights of possession over the farm, or a part of it, as to amount to a life interest coming within the Settled Land Acts.[75] In this respect the right accords with one which has been recognised by the English courts in analogous cases.[76] However, often the conferment on the grantee of a tenant for life's statutory powers of dealing with the land (including the powers of sale and leasing) would defeat the limited objectives of the grantor, *viz* to provide a roof over the grantee's head.[77] Not surprisingly, then, the Irish courts have frequently found that the right of residence falls short of conferring a life interest and, instead, creates an interest more in the nature of a lien for money's worth[78] or an annuity or money charge.[79] What is not so clear from the case-law is how effect can be given to such an interest in the event of a dispute between the grantee and others interested in the property. This point was recently emphasised by Lavan J in *Johnston* v *Horace*[80] in dealing with a claim to a general right of residence in a cottage to be shared with another beneficiary. He held that the primary purpose of the testator had been to supply a roof over the head of the grantee and it was not appropriate to reduce this to a monetary award.[81]

The holding in the *Johnston* case may signal that the Irish courts will eventually come to regard such rights as akin to the licences to occupy land which have increasingly been recognised by the courts, particularly in England, in recent decades. The courts have been prepared to invoke equitable principles such as proprietary estoppel[82] and constructive trusts[83] in order to achieve justice between the parties. In the meantime the juridical nature of many Irish rights of residence remains in a high degree of uncertainty.

74. "Irish Rights of Residence — The Anatomy of a Hermaphrodite" (1970) 21 *NILQ* 389. See also Wylie, *Irish Land Law* (2nd edn, 1986), para 20.13 *et seq*; Lyall, *Land Law in Ireland* (1994), p 501 *et seq*.
75. See *National Bank* v *Keegan*, *supra*.
76. See *Bannister* v *Bannister* [1048] 2 All ER 133; *Binions* v *Evans* [1972] Ch 359.
77. To some extent the Irish legislators recognised this by providing, in respect of *registered* land, that such rights create a personal right only and not an estate or other right of ownership: compare the wording of s 81 of the Republic's Registration of Title Act 1964 with s 47 of the Land Registration Act (NI) 1970. Compare also s 40 of the Republic's Statute of Limitations 1957 and s 42 of the Statute of Limitations (NI) 1958. These statutory provisions do recognise that a life interest may, however, be created in some circumstances, *viz* where the grantee is given an exclusive right to the whole of the land in question.
78. See *Kelaghan* v *Daly* [1913] 2 IR 328.
79. See *National Bank* v *Keegan* [1931] IR 344. See also *Re Shanahan* [1919] 1 IR 131.
80. [1993] ILRM 594.
81. The grantee had been forced out by duress by the other beneficiary. Lavan J granted an injunction restraining that beneficiary from preventing exercise of the right of residence and awarded damages for past interference with it.
82. See Brady, "An English and Irish View of Proprietary Estoppel" (1970) *Ir Jur (ns)* 239.
83. See *Lloyds Bank plc* v *Rosset* [1991] 1 AC 107. See also *Binions* v *Evans* [1972] Ch 359; *Lyus* v *Prowsa Developments Ltd* [1982] 1 WLR 1044.

(v) Conacre and Agistment

These are systems of farming land which were developed in Ireland and, arguably, often have unique features. Conacre relates to growing crops and agistment concerns grazing livestock. The origin of the Irish systems is obscure,[84] but no doubt derived from the desire of landowners to avoid restrictions on the leasing of land — whether contractual (*eg* covenants against subletting) or statutory (*eg* the prohibition on subdivision of land bought out under the Land Purchase Acts).[85] According to the traditional view the holder of a conacre or agistment "letting" does not have a lease of the land; he usually has no estate or interest nor, even, is he entitled to "possession" but rather has a right of use for limited purposes only.[86] However, as with rights of residence, the Irish courts have had some difficulty in determining the precise juridicial nature of these arrangements.[87] Indeed, it is arguable that in many cases there is nothing particularly unique about the arrangement, in that it is in essence a form of licence to use or occupy the land.[88] It has also been emphasised recently in Northern Ireland that many such arrangements in modern times no longer involve the traditional form of informal marginal farming of small plots of land, but are part of large business operations in respect of which the traditional incidents may no longer be appropriate.[89]

There is no doubt that conacre and agistment arrangements have been extremely popular in the rural communities of Ireland. Often they are an effective means for a farmer to extend his farming operations with the minimum of capital outlay. However, therein lies a problem. All too often the minimal commitment to the land which so many of these arrangements involve results ultimately in the adoption of very low-quality farming practices.[90] What is needed is a review of agricultural practices and the creating of conditions to encourage more appropriate farming arrangements.[91] An attempt on this was made recently in the Republic with the launching in 1983 of a "Master Lease" for agricultural leasing by Allied Irish Banks and the Irish Farmers' Association, in co-operation with the Incorporated Law Society and Royal Institution of Chartered Surveyors, This was facilitated by the legislative exclusion of old nineteenth-century

84. See Ferguson and Vance, *The Tenure and Improvement of Land in Ireland* (1851), Chap 18; De Moleyns, *Landowner's and Agent's Practical Guide* (8th edn by Quill and Hamilton, 1899), p 238.
85. See Wylie, *Irish Land Law* (2nd edn, 1986), para 20.27.
86. See *Booth* v *McManus* (1861) 12 ICLR 418; *cf Dease* v *O'Reilly* (1945) 8 Ir LR 52.
87. See Wylie, *Irish Landlord and Tenant Law*, para 3.20 *et seq*.
88. *Ibid*, paras 3.22 and 3.30.
89. *Maurice E Taylor (Merchants) Ltd* v *Commissioner of Valuation* [1981] NI 236 at 244-45 (*per* Gibson LJ). Note, however, that the Court of Appeal held that the notion that a conacre agreement does not create a tenancy "is so well established and embedded in our statute law that is cannot now be questioned": *ibid*, p 245. On the other hand, it did hold that the arrangement under consideration in that case did confer on the conacre holder sufficient rights of exclusive occupation to attract rating liability. See also *Northern Ireland Animal Embryo Transplant Ltd* v *Commissioner of Valuation* [1983] NI 1.
90. See Wylie, *Irish Land Law* (2nd edn, 1986), para 20.27.
91. See *Survey of the Land Law of Northern Ireland* (1971), paras 286-88; *Final Report of the Land Law Working Group* (1990), Vol 1, ch 4.9.

legislation which would otherwise have applied to such leases,[92] but it would appear that little interest has been shown in the scheme. Something more radical, more directly supported by Government, would seem to be needed.

Distinctive Judicial Developments

The fact that Ireland had imposed upon it the same conceptual framework of land law as applied in England[93] rendered it unlikely that the Irish courts would apply different principles of law. However, over the years the Irish courts have on occasion shown a degree of independence of view. The following are some of the more notable examples.

(i) Rule Against Perpetuities

The Irish courts have taken a different view from their English counterparts on a number of points. Thus in *Exham* v *Beamish*[94] Gavan Duffy J, while recognising the fundamental principle that the rule should be applied without any "wait and see" approach, refused to push this to the absurd lengths which the concomitant principle of determination of validity of gifts on the basis of the remotest possibilities would suggest. The English courts had thereby disregarded, for example, the tenets of medical science by ignoring the age of women past child-bearing age.[95] Gavan Duffy J stated that this was absurd and indicated that he would disregard the English authorities and receive evidence as to a woman's ability to have children. There is no other authority on the point, but this ruling has never been questioned since.[96]

The Irish courts also took a different approach to the application of the rule against perpetuities to determinable and conditional gifts. In *Attorney-General* v *Cummins*,[97] Palles CB, giving the judgment to the old Exchequer Division, concluded firmly that the rule did not apply to interests such as a possibility of reverter (arising under a determinable fee) or a right of entry for condition broken (arising under a fee simple subject to the condition in question). The English courts took a different view,[98] but Palles CB's reasoning was accepted as correct by the Northern Ireland Court of

92. Land Act 1984. On the problems created by the old legislation see Leitch, "Present-day Agricultural Tenancies in Northern Ireland" (1965) 16 *NILQ* 491.
93. See p 334 *supra*.
94. [1939] IR 336.
95. See, *eg*, *Ward* v *Van der Leoff* [1924] AC 653.
96. In NI the point is now academic because the Perpetuities Act (NI) 1966 (based on the English Perpetuities and Accumulations Act 1964) introduced a "wait and see" principle and presumptions as to "future parenthood": See Wylie, *Irish Land Law* (2nd edn, 1986), para 5.062 *et seq*. No equivalent legislation has been enacted as yet in the Republic.
97. [1906] 1 IR 406.
98. See, *eg*, *Re Hollis' Hospital and Hague's Contract* [1899] 2 Ch 540; *Hopper* v *Liverpool Corporation* (1944) 88 *Sol Jo* 213. *Cf Re Cooper's Conveyance Trusts* [1956] 1 WLR 1096.

Appeal in *Walsh* v *Wightman*.[99] The irony is that legislation has since imported the view of the English courts into Northern Ireland.[1]

(ii) Prescription

The English courts have always taken a cautious approach in applying the doctrine of prescription to leasehold property, especially in the case of a tenant purporting to prescribe against his own landlord or against another tenant holding under the same landlord. In their view the underlying notion of user "as of right" is inconsistent with such claims,[2] and there is even the suggestion that prescription should be confined to freehold property on the basis that it involves creation of a permanent right at some unspecified date in the past, so that there can be no prescription *against* a limited owner or leaseholder.[3]

The Irish courts have long adopted a much more pragmatic approach to these questions, which may be a reflection of the huge amount of leasehold property which has existed in the past. The point has also been of considerable practical importance because of the prevalence of long leases for periods like 999 years and 10,000 years, and hybrid leases involving freehold interests like leases for lives renewable for ever.[4] If the Irish courts had followed the English courts it would have severely curtailed the operation of the doctrine of prescription in respect of much Irish land. Though it is clear that the Irish courts adopted a different approach to leasehold property, it is not easy to discern from the voluminous case–law the precise state of the law.[5] There is, however, strong authority for the propositions that Irish courts will allow a tenant to claim a prescriptive right, at least under the Prescription Act 1832, against his own landlord,[6] and against another tenant of the same landlord,[7] and will allow another party to claim a prescriptive right against a tenant.[8]

(iii) Adverse Possession

The above inclination to favour leaseholders may also be said to have influenced the Irish courts' approach to the doctrine of adverse possession. Although the Irish courts have not gone so far as to abandon the fundamental

99. [1927] NI 1.
1. Perpetuities Act (NI) 1966, s 13. See Wylie, *op cit*, para 5.108 *et seq*.
2. See the leading cases *Bright* v *Walker* (1834) 1 Cr M & R 211; *Gayford* v *Moffat* (1868) 4 Ch App 133.
3. *Wheaton* v *Maple & Co* [1893] 3 Ch 48 at 63 (*per* Lindley LJ). See Kiralfy, "Position of Leaseholder in Law of Easements" (1948) 13 *Conv (ns)* 104.
4. See p. 339 *supra*.
5. See Delany, "Lessees and Doctrine of Lost Grant" (1958) 74 *LQR* 82; Chna, "Easements: Termors in Prescription in Ireland" (1964) 15 *NILQ* 489.
6. *Fahey* v *Dwyer* (1879) 4 LR Ir 271.
7. *Hanna* v *Pollock* [1900] 2 IR 664; *Flynn* v *Harte* [1913] 2 IR 322; *Tallon* v *Ennis* [1937] IR 549; *Tisdal* v *McArthur & Co. (Steel and Metal) Ltd* [1951] IR 228.
8. *Deeble* v *Linehan* (1860) 12 ICLR 1; *Wilson* v *Stanley* (1861) 12 ICLR 345; *Beggan* v *McDonald* (1878) 2 LR Ir 540.

principle that the statutes of limitation do not effect a "parliamentary conveyance"[9] of the dispossessed owner's title to the squatter, they have been prepared to temper its effect in leasehold cases. In one line of cases they have been prepared to invoke the doctrine of estoppel and have held that the squatter is estopped from denying that an assignment of the lease has taken place.[10] In so holding, the Irish courts have been prepared to find an estoppel in circumstances where an English court would probably require more evidence.[11] On the basis of this the Land Registry adopted the practice of registering the squatter as the new owner of the leasehold title.[12]

Even more controversial on the subject of the operation of the doctrine of adverse possession in relation to leasehold land was the decision of the House of Lords in the case of *Fairweather* v *St Marylebone Property Co Ltd*.[13] There it was held by the majority of the law lords that, since there was no parliamentary conveyance of the dispossessed lessee's title to the squatter, the lessee retained his estate and was in a position to deal with it by, for example, colluding with the landlord to "squeeze out" the squatter.[14] This might be done by surrendering the lease to the landlord or acquiring the landlord's interest and merging the leasehold interest in the superior interest. However, in *Perry* v *Woodfarm Homes Ltd*[15] the Republic's Supreme Court[16] refused to follow the majority decision on this point and held that the dispossessed lessee was not in a position to deal effectively with his lease, *eg* by surrendering it or effecting a merger which might destroy the squatter's title.[17] It is by no means clear that the Northern Ireland courts would follow the *Perry* decision as against the decision of the House of Lords.[18]

9. That principle was, of course, only established late in the nineteenth century by the English Court of Appeal in *Tichbourne* v *Weir* (1892) 67 LT 735, followed in *Taylor* v *Twinberrow* [1930] 2 KB 16. This reversed the view previously expressed in both Ireland and England: see *Incorporated Society for Protestant Schools* v *Richards* (1841) 1 Dr & War 258; *Doe d Jukes* v *Sumner* (1845) 14 M & W 39; *Rankin* v *McMurtry* (1889) 24 LR Ir 290. The *Tichbourne* principle was recognised by the Republic's Supreme Court in *Perry* v *Woodfarm Homes Ltd* [1975] IR 104. See Wylie, *Irish Land Law* (2nd edn, 1986), para 23.09 *et seq*.
10. See *O'Connor* v *Foley* [1906] 1 IR 20; *Ashe* v *Hogan* [1920] 1 IR 159.
11. Thus in *Tickner* v *Buzzacott* [1965] Ch 426 (following views expressed in the *Tichbourne* case, n 9 *supra*) it was held that mere payment of the rent was not sufficient to raise as estoppel.
12. See Wylie, *op cit*, para 23.14. In *Perry* v *Woodfarm Homes Ltd* [1975] IR 104, Walsh J expressed the view that a transfer of title took place in the case of registered leasehold land, thereby anticipating the English decision in *Spectrum Investment Co* v *Holmes* [1981 1 WLR 211. See, however, the discussion of the *Spectrum* decision in an Irish context by Wallace, "Adverse Possession of Registered Land" (1981) 32 *NILQ* 254.
13. [1963] AC 510 (Lord Morris of Borth-y-Gest dissenting).
14. For trenchant criticism of this aspect of the decision see Wade, "Landlord, Tenant and Squatter" (1962) 78 *LQR* 54. See also Wylie, "Adverse Possession: An Ailing Concept?" (1965) 16 *NILQ* 467; Wallace, "Adverse Possession of Leaseholds — The Case for Reform" (1975) 10 *Ir Jur (ns)* 74; Wallace, *Land Registry Practice in Northern Ireland* (2nd ed, 1987), p 68 *et seq*.
15. [1975] IR 104.
16. Walsh and Griffin JJ; Henchy J dissented and preferred the view of the majority of the House of Lords on the point.
17. Note, however, that the majority accepted that the squatter might be affected by a forfeiture of the lease unless he took steps to ensure that covenants were complied with: see Walsh J, *op cit*, p 120; Griffin J, *op cit*, p 130. This notion is not without its difficulties: see Lyall, *Land Law in Ireland* (1994), pp 856-61.
18. See MacDermott, (1977) 28 *NILQ* 110.

There is one further aspect of the law of adverse possession which is worth mentioning as an area where the Irish courts eventually adapted the law to suit social conditions. It is common in Ireland for one or more member or members of a farmer's family to continue to run the farm after his death without obtaining a grant of probate of his will or, as is often the case, a grant of letters of administration in a case of the farmer dying intestate. In the event of a dispute arising amongst rival claimants, or where a title query has to be dealt with because of some prospective dealing with the farm, often the only way of resolving the matter is through the doctrine of adverse possession. Particular problems arose where a member of the family did take out a grant because of the general rule that a personal representative holds the estate as a trustee. It had been held in England that, because of this, the personal representative could not claim the benefit of the doctrine of adverse possession,[19] and at first the Irish courts followed this.[20] Then the Northern Ireland Court of Appeal held that a personal representative could bar the claims of the beneficiaries or intestate successors[21] and this was followed shortly afterwards by the Republic's Supreme Court.[22] This was clearly a view of considerable practical and social importance and, not surprisingly, was confirmed by legislation.[23]

(iv) Foreclosure

There is one part of the law of mortgages where the Irish courts in modern times have taken a different approach from their English counterparts. This is in relation to the mortgagee's remedy of foreclosure. Notwithstanding that the jurisdiction to order foreclosure remains in existence, it has been the settled practice in Ireland for over a century never to make a foreclosure order and instead to order a sale of the property.[24] It has been a matter of some dispute as to why this practice developed, but it probably had something to do with the fact that many properties in Ireland during recent centuries were heavily mortgaged, and requiring a sale protected more directly the interests of second, third and later mortgagees.[25]

19. See *Toates* v *Toates* [1926] 2 KB 30.
20. See, *eg*, *Nugent* v *Nugent* (1884) 15 LR Ir 321; *Re Loughlin* [1942] IR 15.
21. *McNeill* v *McNeill* [1957] NI 10. See also *Re Hughes* [1974] NI 1.
22. *Vaughan* v *Cottingham* [1961] IR 184. See also *Ruddy* v *Gannon* [1965] IR 283.
23. Which provides that a personal representative in his capacity as such is not a trustee for the purposes of the Statute of Limitations: see the Republic's Statute of Limitations 1957, s 2(2)(*d*) (as substituted by the Succession Act 1965, s 123); Statute of Limitations (NI) 1958, s 47(1). See on this subject generally Brady, *Succession Law in Ireland* (2nd edn, 1995), para 9.79; Brady and Kerr, *The Limitation of Actions* (2nd edn, 1994), pp 155-56.
24. See the remarks of Walker LC in *Bruce* v *Brophy* [1906] 1 IR 611 at 616. See also Lowry J in *Re O'Neill* [1967] NI 129. The statutory confirmation of the power to order a sale in lieu of foreclosure in s 25 of the Conveyancing Act 1881, did not apply to Ireland: see s 25(7). Presumably this was because there was no doubt on the matter in Ireland; *Cf Twentieth Century Banking Corporation* v *Wilkinson* [1977] Ch 99.
25. See Wylie, *Irish Land Law* (2nd edn, 1986) para 13.060.

(v) Family Property

Another area of law where Irish law has developed markedly differently from English law is family law.[26] This relates to the Republic only, where the distinctive provisions of its written constitution come into play.[27] What is relevant in the present context is that there are signs that the Republic's courts may be willing to go further than the English courts in finding that a spouse or other person in a close relationship with the legal owner of the family property has acquired a beneficial interest in it.[28] In particular, the Republic's courts seem to be more willing to base such a claim on *indirect* contributions to the acquisition or improvement of the property in question.[29] In the landmark decision in *McC* v *McC*[30] the Supreme Court declared that indirect contributions by a wife (by adding her earnings to a general family fund) inferred, in the absence of any agreement to the contrary, a trust in her favour, on the ground that she thereby relieved her husband of the financial burden incurred in purchasing the family home. It remains to be seen how far the courts will push this approach.[31] In *BL* v *ML*[32] Barr J invoked the provisions of Article 41 of the Constitution which, in guaranteeing to protect the family as the "natural primary and fundamental unit group of Society," implicitly recognises the support given by a woman "by her life within the home" and requires the State "to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home". In his view this justified recognising in a married woman a beneficial share in the house commensurate with her domestic work, regardless of any direct or indirect contributions in money or money's worth. Other judges doubted this approach[33] and on the appeal in *BL* v *ML* the Supreme Court unanimously held that, much as it sympathised with Barr J's approach, neither judicial precedent nor Article 41 justified it.[34]

26. See Shatter, *Family Law in the Republic of Ireland* (3rd edn, 1987); Duncan and Scully, *Marriage Breakdown in Ireland: Law and Practice* (1990). See also O'Halloran, *Adoption Law and Practice* (1992).
27. See further on the constitutional dimension on p 351 *infra*.
28. See the detailed analysis of the recent case law in Lyall, *Land Law in Ireland* (1994), ch 17.
29. *Cf* the House of Lord's view in *Gissing* v *Gissing* [1971] AC 886, followed by the NI Court of Appeal in *McFarlane* v *McFarlane* [1972] NI 59.
30. [1986] ILRM 1. Lyall, n 28 *supra*, notes that later cases seemed to have missed the significance of this holding and must be regarded as of doubtful authority.
31. So far the courts have refused to extend the *McC* principle to a "stay-at-home" wife whose indirect contributions consist of unpaid domestic work: see *C* v *C* [1976] IR 254; *McC* v *McC ibid*.
32. [1992] 2 IR 77.
33. *Eg* Barron J in *EN* v *EN* [1990] 1 IR 383 (upheld by Supreme Court, [1992] 2 IR 116) and Lardner J in *JF* v *JF*, Unreported (21 December 1988). *Cf* Barrington J in an *ex tempore* judgment in *H* v *H*, Unreported (20 June 1989).
34. To some extent the wide discretion to make orders relating to family property conferred by the Republic's Judicial Separation and Family Law Reform Act 1989 (and see now Pt II of the Family Law Act 1995) may enable the courts there to protect wives as against their husbands, but the position vis-à-vis third parties remains unaddressed. See, on the 1989 Act, Duncan and Scully, *op cit*, Chap 13.

DISTINCTIVE LEGISLATION

No consideration of the "Irishness" of land law would be complete without some reference to distinctive legislation enacted over the years. This is clearly not the place for any detailed consideration of the legislation, but mention should be made of the significance for the development of Irish land law of the following.

(i) Deasy's Act 1860

There is no doubt that the Landlord and Tenant Law Amendment Act (Ireland) 1860 (to give it its full title) had many distinctive features. Not the least of these was its core provisions in section 3, basing the relationship of landlord and tenant on *contract* rather than *tenure* and removing the need for a reversion. The effect of this has long been debated and it must be admitted that it is doubtful whether it has had any really fundamental impact on the development of the law.[35] Of perhaps rather more practical significance were the provisions relating to the running of the benefit and burden of covenants,[36] which clearly extended the law applicable in England.[37]

Vitally important in modern times is the provision in section 16 limiting a tenant's liability on his covenants to the period he remains the tenant,[38] a subject which has caused great difficulties in England.[39]

(ii) Land Law and Land Purchase Acts

The impact of this nineteenth-century legislation was, of course, immense not only in terms of the development of land law but also in social and economic terms. Equally immense has been the literature it has generated.[40] All that need be said here is to reiterate the main consequence of the radical solution to the Irish "land problem" which it effected. This was to remove landlord and tenant law from the Irish agricultural scene and to turn Irish farmers into freehold proprietors.[41] And, by a remarkable instance of legislative foresight and initiative, the opportunity was seized to register their titles under the land registration system established by the Local

35. See Wylie, *Irish Landlord and Tenant Law*, para 2.07 *et seq*. S 3 did, of course, facilitate the creation of fee farm grants creating the full relationship of landlord and tenant between the grantor and grantee: see p 337 *supra*.
36. Especially ss 12 and 13.
37. See Wylie, *op cit*, ch 21.
38. *Ibid*, para 21.30.
39. See Law Com 174 (Landlord and Tenant: Privity of Contract and Estate) (1988) and now the English Landlord and Tenent (Covenants) Act 1995.
40. See Wylie, *op cit*, ch 1, especially para 1.38 *et seq*.
41. There were some incidental consequences, such as the growth in conacre and agistment "lettings": see p 342 *supra*.

Registration of Title (Ireland) Act 1891.[42] The result was that most of the landmass of Ireland became registered land at a much earlier stage than that of England and Wales. Regrettably little progress has been made in registering titles to urban land, in contrast to the vast strides made in England and Wales during the past decade or so.

(iii) The Republic's Landlord and Tenant Acts

These Acts contain many distinctive features which have greatly influenced the development of the law in the Republic.[43] What is distinctive about them is their wide-ranging application to most types of rented property.[44] It is also arguable that the extensive system of security of tenure they provide has in recent times had a depressing effect on the commercial and business sector. Much time and effort is spent by lawyers on behalf of their clients in the Republic trying to find ways around the legislation, usually with little success.[45] The Law Reform Commission recently criticised the "petrification of the business letting market" induced by the legislation,[46] in particular its prohibition on parties "contracting out" of its provisions.[47] Yet the Government in the Republic has shown little willingness to embark upon a radical review of the legislation and gave only lukewarm support to a TD's private Bill recently, introducing some very limited reforms.[48]

(iv) The Republic's Family Home Protection Act 1976

This is one of the most controversial pieces of legislation to be enacted in either part of Ireland. The controversy lies not so much in its purpose[49] as in the method of implementation adopted. Its purpose is similar to that of, for example, the English Matrimonial Homes Act 1966, *viz* ensuring that a spouse who may have no legal or equitable interest in the family home has protection against dealings which the other spouse may, as owner, enter into with third parties. Unfortunately, in seeking to achieve this purpose the Act

42. See *Re Keogh* [1896] 1 IR 285 at 294 (*per* Madden J). Madden had been the Attorney-General for Ireland who had piloted the 1891 Act through Westminster. He was also the author of the leading text on registration of deeds: *Registration of Deeds, Conveyances and Judgment Mortgages* (2nd edn, 1901).
43. See generally Wylie, *Irish Landlord and Tenant Law*, Chaps 30 and 32.
44. *Cf* the Business Tenancies Act (NI), 1964, which is very similar to Pt II of the English Landlord and Tenant Act 1954. See Dawson, *Business Tenancies in Northern Ireland* (1994).
45. See, *eg*, the Supreme Court decisions in *Gatien Motor Co Ltd* v *Continental Oil Co of Ireland Ltd* [1979] IR 406; *Irish Shell & BP Ltd* v *Costello Ltd* [1981] ILRM 66; *Irish Shell & BP Ltd* v *Costello Ltd (No 2)* [1984] IR 511.
46. See its *Report on Land Law and Conveyancing Law: (1) General Proposals* (LRC 30-1989), para 63.
47. See s 85 of the Landlord and Tenant (Amendment) Act 1980, which has a very wide scope: *Bank of Ireland* v *Fitzmaurice* [1989] ILRM 451.
48. See the Landlord and Tenant (Amendment) Act 1994.
49. For the "family law" perspective, see, *eg*, Duncan and Scully, *Marriage Breakdown in Ireland* (1990), ch 11.

introduced somewhat draconian sanctions from the conveyancing point of view. It renders void contracts and conveyances which are executed without the consent of the "non-owning" spouse. The difficulties these provisions were likely to create for the conveyancing system were anticipated by the writer shortly after the Act's enactment.[50] It gives no pleasure to record that the voluminous case-law which has emerged in the short time since its enactment, often dealing with very difficult questions of interpretation and application to various property-related transactions, provides testimony to what was anticipated.[51]

Administration and Procedure

It is important to record that what might be called the "administration" and "procedure" of our land law and conveyancing system has some distinct features, especially when compared with the English position. Some of these have already been alluded to. For example, the land registration system has several important features which are distinct. Ireland retains a universal Registry of Deeds system,[52] which applies to a very wide range of documents relating to land transactions.[53] Registry of Deeds searches remain a standard procedure for many transactions. As mentioned earlier,[54] most agricultural land is, on the other hand, registered land, because it was a feature of the land purchase scheme, as it was finally developed, that the freehold titles purchased by the tenant-farmers should be registered in the Land Registry.[55] However, most urban land remains unregistered and therefore subject to the Registry of Deeds system. Here titles can be extremely complicated, especially where a "pyramid" exists involving numerous superior owners holding under fee-farm grants and leases of varying lengths, ranging from the very long to the relatively short.[56] Although much progress in solving this matter has been made in the Republic as a result of the ground rents legislation,[57] it remains to be tackled in Northern Ireland.[58] Neither part of Ireland adopted the system of land

50. *Irish Conveyancing Law* (1978), para 6.31 *et seq*.
51. For up-to-date discussion of the Act and the case-law on it, see Farrell, *Irish Law of Specific Performance* (1994), Ch 7. Note that various attempts at amendment have been made, only two of which has so far been put into effect, *viz* s 10(1) of the Family Law Act 1981, which validates the consent of minor spouses, and s 54 of the Family Law Act 1995, which renders some conveyances immune from attack after six years.
52. In the sense that it applies to all land in the island which is not registered land (*ie* land the title to which is registered in the Land Registry).
53. Including those not involving execution of a deed, such as a mere contract for the sale of land: see *O'Connor* v *McCarthy* [1982] IR 161.
54. Para 348 *supra*.
55. Another feature of this scheme, which remains of particular importance in the Republic, was the need to obtain in respect of such land the consent of the Land Commission to subsequent dealings with the land. See Wylie, *Irish Conveyancing Law* (1978), chap 8. *Re* the NI position, see *ibid*, para 7.096.
56. See p 338 *supra*.
57. Especially through the "vesting" system administered by the Land Registry which was introduced by the Landlord and Tenant (Ground Rents) (No 2) Act 1978. See Wylie, *Irish Landlord and Tenant Law*, Chap 31.
58. See the *Final Report of the Land Law Working Group* (1990), Vol 1, Pt 1.

charges introduced in England by the Land Charges Act 1925.[59] This was, no doubt, partly because the Registry of Deeds system[60] rendered such a charges system unnecessary, though it is to be noted that a system of registering "statutory" charges was introduced in Northern Ireland in the 1950s.[61]

There is one other "procedural" matter which might be mentioned. Until recently conveyancers in both parts of Ireland eschewed such developments as the extensive pre-contract enquiries system which has evolved in England over the past 50 years or so. Instead they stuck to the traditional system of leaving enquiries to the post-contract investigation of title and the requisitions on title.[62] In Northern Ireland a substantial move towards the English system was prompted in 1969 by the Law Society's Conveyancing and Law of Property Committee, which suggested use of a printed form similar to that then used in England.[63] In the Republic there has been much more resistance to such a move, but to some extent it has been forced on practitioners there by legislation such as the Family Home Protection Act 1976.[64] The Law Society's Conveyancing Committee has recently recommended the use by purchasers' solicitors of a *Pre-Contract Check List* in the case of acquisition of a private dwelling-house.[65] The Committee also recommended use of a set of *Pre-Lease Enquiries or Check List* when acting for a tenant taking a new lease.[66] The Committee has emphasised that these forms have a more limited scope than the equivalent English forms and are not to be treated as indicating a general shift from post-contract requisitions to pre-contract enquiries.

The Constitutional Dimension

No discussion of the nature of Irish land law would be complete nowadays without a reference to the constitutional dimension which has emerged in the Republic[67] in recent decades. There the Supreme Court has

59. Now operating, with minor modifications, under the Land Charges Act 1972 and Local Land Charges Act 1975.
60. Plus the system of registering judgments and *lites pendentes*, and judgment mortgages, which has operated since the last century: see, *eg*, the Judgments (Ir) Act 1844 and Judgment Mortgage (Ir) Act 1850; Wylie, *Irish Land Law* (2nd edn, 1986), para 13.163 *et seq*. This system was replaced in NI by the new scheme for enforcing judgments introduced by the Judgments (Enforcement) Act (NI) 1969: see Wylie, *ibid*, para 13.183 *et seq*.
61. Statutory Charges Register Act (NI) 1951. See Wylie, *Irish Conveyancing Law* (1978), para 7.097 *et seq*.
62. See Wylie, *ibid*, para 5.07 *et seq*.
63. See *ibid*, para 6.02.
64. See p 349 *supra*.
65. The form warns solicitors of the need to raise special enquiries in the case of commercial properties, licensed premises, agricultural land and so on. The form was issued with the July/August 1990 *Gazette*.
66. The form was issued with the March 1990 *Gazette*.
67. Interestingly, when the writer was a student at Queen's in the 1960s, constitutional law was a live issue in the field of property law and resulted in debate over issues such as the prohibition in s 5 of the Government of Ireland Act 1920 against taking any property without compensation. See Calvert, *Constitutional Law in Northern Ireland* (1968), pp 197-204, 253-54 and 270-72.

over the past thirty-odd years developed a considerable jurisprudence centred on the "Fundamental Rights" provisions contained in Articles 40-44 of the 1937 Constitution.[68] Of particular relevance to land law[69] is the protection of private property rights afforded by Articles 40.3 and 43. This is not the place to discuss the ramifications of these provisions.[70] Suffice it to say that they have had a considerable impact on land law, highlighted by the Supreme Court in the early 1980s declaring that the core of the rent restriction legislation was unconstitutional.[71] It is an indication of the pervasiveness of the constitutional provisions that the initial legislative attempt to reintroduce protection for tenants was also declared unconstitutional.[72] Another indication was the fact that the Supreme Court also declared as unconstitutional the Matrimonial Home Bill 1993, which was designed, *inter alia*, to introduce the concept of automatic joint ownership of the family home.[73] All property lawyers in the Republic must now take into account the constitutional dimension.[74]

Conclusion

Irish land law as we know it today is the product of Ireland's turbulent social and economic history. The constant theme of that history has been the difficult relationship with its neighbour on the other side of the Irish Sea. Many of the difficulties in the past have centred on the land, which until recent times was the main source of wealth and power. All these forces have had an inevitable influence on the development of the land law system. As this article has attempted to illustrate, for several centuries now little of Irish land law could be described as unique but much has survived which is distinctive. In many areas the distinctiveness has been reduced largely to points of detail and that process is likely to continue, influenced increasingly by the common membership of the European Union. However, given the past history of the Island, it would be a brave soul indeed who predicted that the distinctiveness of Irish land law would disappear in the foreseeable future.

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68. See generally Casey, *Constitutional Law in Ireland* (2nd edn, 1992); Kelly, *The Irish Constitution* (3rd edn, by Hogan and White, 1994).
69. Note also the attempt by Barr J to use the special recognition by Art 41 of the role of a married woman to award her a share of the matrimonial home, which was overturned by the Supreme Court in *L* v *L* [1992] 2 IR 77.
70. See instead the detailed discussion in, *eg*, Casey, *op cit*, ch 18.
71. In two appeals heard together, *Blake and Others* v *Attorney-General* and *Madigan* v *Attorney-General* [1982] IR 117. See Wylie, *Irish Landlord and Tenant Law*, para 1.21 *et seq*.
72. After it was referred to the Supreme Court by the President: see *Re Reference under Article 26 of the Constitution of the Housing (Private Rental Dwellings) Bill 1981* [1983] IR 181. The second attempt has so far stood unchallenged, the Housing (Private Rented Dwellings) Act 1982. See de Blacam, *The Control of Private Rented Dwellings* (1984); Wylie, *op cit*, ch 29.
73. *Re Article 26 and the Matrimonial Home Bill 1993*, judgment given 24 January 1994. See also [1994] 1 ILRM 241.
74. For discussion of other examples of the constitutional dimension in the area of landlord and tenant law see Wylie, *op cit*, paras 12.15 (distress) and 31.75, 31.77-31.78 (ground rents scheme).