

Review Article

**"PROPERTY TEXTS IN THE COMMON LAW WORLD: A REVIEW
OF ROBERT PEARCE'S IRISH LAND LAW"***

By

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No law textbook can adequately serve students of Papua New Guinean law unless it examines the national law derived from all sources, namely custom, statute and common law, and also the historical emergence and current social context of this law. (Paliwala, A, "Legal Publishing in Papua New Guinea: Severing the Colonial Link" (1977) 5 MLJ 70). But the prospects of a full supply of detailed studies of this type on all, or even the principal areas of Papua New Guinean law are extremely dim. (See generally on the problem: Twining, W, and Uglow, J, Legal Literature in Small Jurisdictions (1981)). For the time being it is necessary to make use of foreign texts on similar laws in other jurisdictions.

The Republic of Ireland and Northern Ireland are common law jurisdictions. After the invasion of Ireland by the English in the twelfth century, the common law as it was then being developed in the English royal courts became the state law of Ireland, and eventually superseded almost entirely the indigenous customary law. The legislation in force today, modifying or developing the common law, consists of: statutes of the Irish parliament enacted before its abolition in 1800; statutes of the parliaments of England and of the United Kingdom of England and Scotland enacted before 1800 and expressed to apply to Ireland; statutes of the parliament of the United Kingdom of Great Britain and Ireland, which existed from 1801 to 1921; in the Republic of Ireland, statutes enacted by the legislature of the Republic since 1921, when independence was achieved; and in Northern Ireland, statutes of various Northern Ireland legislatures, and statutes of the parliament of the United Kingdom of Great Britain and Northern Ireland expressed to apply to Northern Ireland, enacted since 1921. Some important Westminster statutes, which did not take direct effect in Ireland, were re-enacted for application there. Thus the Statute of Uses 1535 was re-enacted

* Pearce, R.A., LAND LAW (Irish Law Texts) London: Sweet & Maxwell, 1985, XXVI, 245 pp, Paperback - 15.75 (Sterling).

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in the Statute of Uses (Ireland) Act 1634, and the Statute of Frauds 1677 in the Statute of Frauds (Ireland) Act 1695. Some of the legislation enacted in the Republic and Northern Ireland since 1921 has been closely modelled on British legislation, some independently designed. Generally, legislation has not been as plentiful or far-reaching in Ireland as contemporaneous legislation in Britain. Thus, in its history and present condition Irish law resembles the laws of many common law commonwealth jurisdictions, including Papua New Guinea.

The law publishing problems of Ireland are also similar. The two jurisdictions have relatively small legal professions and student bodies, and therefore constitute a small, commercially unattractive market for practitioners' and student texts. The writing of such texts is also not an attractive prospect to scholars, because, the common law being relatively unreformed, its exposition entails primarily re-telling the pre-twentieth century history of English law which has already been so fully told by English writers. Consequently, as the series editor of Irish Law Texts writes, in Ireland "for many years law students and the legal profession made do with the older editions of English text-books or else did without". The words could have been written of most common law jurisdictions in Africa, the Caribbean, and the Pacific. Admittedly many of them have the added need of texts on their customary laws, but that does not make their need for, and their difficulty in acquiring, texts on their common law any less serious.

The editor explains that the series has become possible as a result of the increase in the Irish legal profession, which has doubled in the last decade. The need for specifically local texts has simultaneously been increased by a greater output of local law. These changes of circumstances facilitated the publication of Professor J.C.W. Wylie's "definitive work" (as Pearce, the author of the present work, rightly calls it) *Irish Land Law* (1975). The series editor might have mentioned also that technological development has recently made possible the cheaper production of texts, were it not that the price of Pearce's book shows that the publishers are unpersuaded of the force of that argument. Perhaps none of these factors exists to such a degree in Papua New Guinea, so the local equivalent of this book may still be a distant prospect. However, the similarity of the two laws suggests another question: given the unfeasibility of a Papua New Guinea equivalent of this book, is it possible that the book itself might be more helpful to the Papua New Guinean student than the current or older editions of textbooks from the larger commonwealth jurisdictions which he or she has to make to do with at present. The answer turns first on the quality of this book as considered for use in Ireland.

As is obvious from its appearance, this is an introductory, concise account which does not attempt to provide much detail. After an Introduction there follow three Parts, on Ownership and its Limits, Transfer of Land, and Rights in the Land of Another. Any such general classification poses difficulties. For example, in the present instance the question arises whether leases and tenancies are a type of ownership or are rights in the land of another. (Here they are recognised as participating in each in varying degrees, but for convenience are discussed primarily as a type of ownership.) Such difficulties are clearly explained, and the arrangement seems analytically sound, and apt to give the new student a clear grasp of the structure of the land law. The exposition is succinct. The writer's skill in this respect will be appreciated by any lecturer who has struggled to convey the essentials of a complex legal issue, with sufficient supporting authority sufficiently explained, in what always seems to be too brief an allotted time. There are few errors or omissions. Those noted were: the omission to mention and explain the common formula "unto and to the use of B on trust for C" to create a trust, when an account had been given of the less usual "unto A to the use of B on trust for C" (p14; on p109 the former phrase is mentioned, in relation to a different purpose); the statement that on the death of a joint tenant "the survivors automatically share" the land (p87; the word "share" seems both misleading and strictly incorrect); the summary of the law (admittedly excruciatingly complex and doubtful) on rights to require partition or sale of interests held on co-ownership (p94); and the writing of coparcenary as "coparceny" throughout. Only occasionally does the reader wonder whether a description of an area of law might possibly have been clearer, or an expression more elegantly framed. (See for example, respectively: the description of the doctrines of estoppel at p151 and pp175-77, which does not clearly distinguish between estoppel by representation and by promise, express or implied by conduct in each case, each of which was discussed in one of the speeches in *Ramsden v Dyson* (1866) LR 1 HL 129; and the sentence beginning "Although not a power of sale belonging to the mortgagor another way in which a sale can take place is where...", p226).

A notable achievement also is that the format eliminates all footnotes, and in the process only rarely falls into unclarity, stylistic clumsiness, or inconsistency. (But on p197 there are two departures from the format, and also one erroneous date). Misprints occur at the rate of less than one per ten pages, which is a considerably better record than that of most law texts today. (As to one of these - I look forward to hearing of the "contractive trust", p183, in examination scripts).

Thus the author has generally set out very well all that he chose to include. His selection of subject matter, on the other hand, leaves some room for criticism. He declares his objective to be to set out the "guiding principles and as much of the detail as will ordinarily be required by students and in practice", and also "to relate the theory to practice". He writes firmly in the tradition of the textbook as an exposition of doctrine, untouched by social reality. The tradition lives on in England, especially in the field of land law where Cheshire and Burn and Megarry and Wade reign, and Sackville and Neave is little known. It may however be doubted whether it is possible to constitute a coherent introductory text from a bare statement of rules, especially if it is intended to be related to "practice".

It can be argued that, even for the purpose of explaining formal doctrine, it is not enough to state the rules of law. If the reader is to understand the interrelations between those rules, and is to learn to apply them to new circumstances, some explanation is needed of the more general underlying principles of which the rules are particular manifestations. Perhaps Pearce intends to include them, since he refers to "guiding principles" (although in the previous line he had called them "concepts", which are surely not the same). But repeatedly the reader finds that Pearce states one of those rules of the land law which have no self-evident rhyme or reason, or he expresses a doubt about the law, and then passes on without any explanation to the next rule. Any student worthy of a place on a law course will want explanations of the following statements, among many others: "special rules of descent, known as the rules of occupancy formerly governed entitlement to the interest on the death of a tenant *pur autre vie* ..." (p45); "It will often be a question of dispute whether a change amounts to an improvement [for the purpose of classifying acts as ameliorating waste]" (p45); "The period chosen for the rule against perpetuities was one taken by analogy from the strict settlement..." (p69); "An interest is valid [under the rule against perpetuities] only if it must vest, if at all, within the perpetuity period" (p70); "...the final words of *Page Wood VC* in the passage cited appear to envisage the possibility of severance [of co-ownership] taking place in equity by virtue of a unilateral declaration of a desire to sever. This view has received some support in England in a number of cases, notably ... although the point cannot by any means be considered settled, and it has been criticised, for instance by..." (p92); "Overriding interests ... include ... 'the rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where upon enquiry made of such person, the rights are not disclosed' ... This last category has been held to protect the proprie-

tary rights ... of all occupiers, including husbands or wives of registered owners ..." (pl10); "somewhat oddly, the right to take the cultivated or artificial produce of land is not properly classified as a profit ..." (pl89). For all of these the question "why?" is answerable, and the answers if given, would have revealed the underlying principles and practical considerations which give some measure of sense to the rules.

There is, however, a more far-reaching criticism. Both rules and principles are founded ultimately on policy. It is at that level that land law is related to social structure and economic ordering. Therefore these underlying policies need to be revealed if the student is to be helped to achieve genuine understanding, rather than being given dogma. Pearce sometimes seems on the verge of speaking about policies. Thus in introducing co-ownership he points out that similar results can be obtained by vesting title in a corporation (p86). In beginning his discussion of the creation and transfer of leasehold interests, he speaks briefly of the different "functions" of short-term and long fixed-term leases (pl12). But in each case he then moves directly on to statements of doctrine. He does not ask why corporate ownership is not always used in preference to co-ownership; or why the same rules generally govern leases with different functions. Similarly, he mentions the common law policy favouring free alienability of land (pp44, 57-58, 67), but does not consider what model of an ideal society may have inspired this policy. An analogous question could have been asked about the rule against perpetuities in the modern law: it is not enough to let the reader think that it is based upon the policy of free alienability, because that policy has been secured for the past century by the Settled Land Act 1881.

Given the restricted approach of this book, reasoned critique of the law is not to be expected. Perhaps critique on social, moral or other extra-legal grounds is not necessary in the study of law. Pearce does occasionally indulge in critical comments, but they are not supported by substantial reasons, nor is there any indication of what such reasons might be. Thus, in a short section entitled "Abolition of the fee tail", he notes that "it [is] extremely uncommon for a landowner to seek to entail his property", adds that the English property legislation of 1925 made personal property entailable, and concludes "Is it not time in Ireland to assimilate the law of real and personal property in this respect by abolishing the fee tail?" (pp49-50). I have found when teaching land law in England that the question, should entails be abolished, could be used to stimulate discussion of some fundamental issues of policy. The question leads one to ask, for example: how far should landholders be free to create arrangements at will; is simplicity in the law an

important objective, and if so why; and what consequential provisions are necessary if a legislative abolition of an interest is not to have undesirable ramifications. But it is difficult to understand how the particular facts noted by Pearce in any way demonstrate the position of the hands on the Irish entail-abolition clock.

It could be objected that these criticisms all call for additions for which there would not be space in a book, the size of which has been determined by practical economics. One possible rejoinder is that, if it is not yet feasible to produce satisfactory introductory Irish law texts, at least so long as publishers are unable to reduce the prices of longer books, we should recognise this fact. It is not necessary that, because the publishers insist they can readily publish short works and cannot publish anything else, scholars should produce trivial works tailored to the publishers' requirements. An alternative rejoinder is to point to sections of this book which might have been excluded. Despite the author's concern to be "practical", he includes lengthy accounts of doctrines which according to his own statements have virtually no application today. The instance of the entail has been mentioned: if it occurs so rarely, need we wait for that clock to strike before excluding the three pages devoted to it? Several more pages are given to the legal contingent remainder rules, although interests affected by them "are now very rare indeed" (p62). Consolidation of mortgages occurs "in very limited circumstances" (p235), but receives nearly half a page.

These problems arise with even more force when we consider the possible use of this book in other jurisdictions. If it does not adequately explain the doctrinal and policy bases of the common law of land for Irish students, who belong to a society not altogether different from that in which the common law was fashioned, it is unlikely to be of great assistance elsewhere. The smaller jurisdictions will have to continue to use their copies of the heavyweights from the larger jurisdictions, preferably combining very old editions, for their accounts of the basic common law, with new editions, for their reports of the recent case-law.

This unhappy conclusion may lead us to reflect again on the type of book which is truly needed. The difficulties with Pearce illustrate a deep and universal problem with property texts in the common law world. This particular section of law book writing is in crisis. The leading works today are superb, impressive, towering examples of a particular type of legal treatise, the analysis of doctrine-true dinosaurs of lawbook evolution. This type has survived in the land law for several reasons, but primarily because of the dominating influence of conveyancers with their special

needs, because of the formalism, conservatism and reverence for established property rights fostered by the leading property practitioners' close association with the property-holding classes, and because of the technical fascination of the archaic scholasticism of this law. Nevertheless, the scene is changing. In the larger jurisdictions texts are emerging which encourage radically new understandings of land law, in which the social origins of its rules are examined, and in which it is seen as a central component of society, its characteristics determined by and integral parts of this context. It may be possible for scholars in the smaller jurisdictions to participate in this development by writing about the transformed operation of the common law in the special circumstances of their societies.