# GEORGE GAVAN DUFFY

COLUM GAVAN DUFFY*

## I. PART I

George Gavan Duffy was the eldest son of the third marriage of Charles Gavan Duffy. Charles married Louise Hall, who was a niece of his second deceased wife, Susan Hughes, in 1880, after he had finally returned to Europe from Australia.

George was born in his maternal grandfather's house, Rose Cottage, Rockferry, Cheshire, one hundred years ago, on the 21st October 1882, just a week after Éamon de Valera. Subsequently, Louise Hall had three more children - Louise, who later opened Scoil Bhríghde, her Irish speaking school, in Dublin; Bryan who, as a Jesuit of the English province, ministered for many years in South Africa; and Tom, who joined the French Society of Foreign Missions and founded the first large training school for catechises in Southern India.

George's mother died in 1888, when George was six years old. In 1888, my grandfather, Charles, was seventy-two years of age. He entrusted the education of these young children to his three unmarried daughters of the second marriage, Susan, Harriet and Geraldine, who had come from Australia to Nice in France to care for him. Charles felt that the damp Irish climate would not suit him, though he visited Ireland every summer.

It was during the next few years that Charles was to produce his historical works, *Young Ireland*, *Four Years of Irish History*, *The League of North and South* and *My Life in Two Hemispheres*. His home in Nice was a meeting place for

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the Irish *literati* of the time - John Dillon, Douglas Hyde and many others. At the same time, Charles was a Victorian father who did not associate readily with his young children.

George was first sent to the Petit Seminaire in Nice and became fluent in French. At the age of thirteen, he went to the Jesuit College of Stonyhurst in Lancashire in 1895, and for the next seven years was normally first in his class and carried off several prizes, having attended the post-secondary School of Philosophy. His brothers Bryan and Tom subsequently joined him in Stonyhurst. The correspondence with his half sisters shows them to have been imbued with Victorian ideas of propriety. My grandfather, Charles, died in Nice in March 1903.

In 1902, George became articled to a solicitor's firm and, having passed all the law examinations *magna cum laude*, was admitted a solicitor in England in 1907. One of his tutors was Edward Jenks, whose *Digest of English Civil Law* was a legal masterpiece. At this time, he met Margaret Sullivan, daughter of A.M. Sullivan, who had succeeded Charles as editor of *The Nation* when he went to Australia in 1855, and they were subsequently married, in Irish, in Commercial Road Church, East London, on 20th December 1908. My mother, Margaret, had been secretary of the Irish Literary Society founded by Charles in London in 1896.

As my grandfather, Charles, had not manifested much interest in the Irish language, it is surprising that George took a great (if not passionate) interest in it all his life and acquired a good knowledge of it. In 1910 he spent his holiday on the island of Inish Maan in Aran, and eventually leased an old Coast Guard Station on the shores of Lough Swilly, at Glenvar, in Co. Donegal. This was where my sister and I learnt Irish as infants. He had been a member of the Irish Club in 1906, and frequently travelled over Ireland and Britain to attend Sinn Féin Executive meetings. From 1910, he tended to become more radical and was not content with the resolutions of the Executive.

From his French and English upbringing, it was perhaps natural that he had acquired an English accent and continental manner, which were somewhat alien to his surroundings, once he had decided to live in Ireland in 1917. In 1921, Frank Pakenham described him as "an Irishman of refinement and cosmopolitan culture".[1]

My father showed in various most generous ways his deep affection for my sister and myself. He sent me to schools on the Continent where study was paramount. When we were on holidays with my father, he would always think of ways and means for us to enjoy them to the full. He greatly liked musical comedies.

Although George had a busy practice as a solicitor in London from 1906 to 1916, no traumatic events occurred until Roger Casement was arrested near Tralee in April 1916 and subsequently brought to the Tower of London to be charged with treason.

Casement had gone to Germany in October 1914, for the express purpose of keeping Ireland out of the war. He eventually conceived the hope that he might form an Irish Brigade from the Irish prisoners of war in Limburg. By May 1915, it was clear that this effort would fail. From December 1915 to March 1916, Casement was very ill in Munich. Casement thought that the Rising had been planned on the basis of German aid and, as this was not forthcoming, he felt compelled to try to stop the rising. The submarine in which he travelled should have reached Ireland on 17th April 1916, but for a breakdown which delayed it until the 23rd.

George had known Casement and, many years later, described him as "of a dark and rather Spanish type of countenance, handsome, very tall, a man of most distinguished appearance - a man of the highest integrity and highest courage and of exceptional charm".

He had been put on the Executive of the Irish Volunteers, once he had retired from the British Consular

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[1] Pakenham, *Peace by Ordeal* (2nd. ed., 1962), p. 133.

Service in 1913, after his wonderful work in the Congo and the Putumayo.

My father was with the family in Glenvar at the time of the Easter Rising. He returned to London immediately in order to defend Casement, knowing that in war fever conditions, the defence would be difficult. It was only two weeks later, on 9th May, that George was allowed to see Casement in a damp cell in the Tower. During the trial, my uncle, Sergeant Sullivan for the defence, who was an able and expert lawyer and quite fearless, dominated the proceedings.

There was little prospect of an acquittal and Casement was duly convicted of treason. When his appeal had been turned down, F.E. Smith would not give his *fiat* to allow Casement to appeal further to the House of Lords - an iniquitous decision.

Let me now quote the final paragraph of a letter which Casement wrote to my father from Pentonville Prison on 30th June 1916:

> My dear Gavan Duffy,
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> > I shall bear your friendship with me as one of the precious gifts of God, given by Him to those whose hearts are faint and broken - for it was you, and your help and courage that gave me courage to the end - and now that it is all over I am happier than you can possibly conceive - with heart, and mind and soul, too, at peace - and reconciled with all men and all things.
>
> Ever Yours,
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> Roger Casement.

Casement had already been prejudged in the eyes of the law and of the public. There is no doubt that Casement's trial and execution had a deep and lasting effect on my father.

In particular, Casement's noble, historic speech from the dock was most inspiring.

George's partners in the solicitors' firm told him that, if he persisted in Casement's defence, he would have to leave the firm. Without notice, his name was removed from the firm. My father had now to set up his own solicitor's practice. He was fortunate to have as client the French Consul General in London. He also undertook the defence of several conscripted conscientious objectors, and often succeeded.

George would not, under any circumstances, have fought in the British Army. He had been called up twice and rejected on medical grounds. After 1916, he wanted to live in Ireland. He decided to become a barrister and, as a qualified solicitor, he obtained exemptions and was called to the Irish Bar in October 1917.

At the election of December 1918, which secured a victory for Sinn Féin in Ireland, George was elected for South County Dublin.

The Sinn Féin members were determined to establish a republic and a constituent assembly, Dáil Éireann. This first assembly met in the Mansion House, Dublin, on 28th January, 1919, and it was modelled on British precedent. At that meeting, George read the Declaration of Independence in French.

In March 1919, owing to his command of French, he was sent as an unofficial delegate of the Irish Republic, together with Seán T. O'Kelly, to the Paris Peace Conference. The idea was to exert such influence and propaganda on the victors, and more particularly on President Wilson, to get them to recognise the claims of an independent Irish Republic. Owing to extreme British opposition, this was unsuccessful. However, the propaganda did succeed in exposing the Black and Tan methods in Ireland, particularly as a result of the publishing, in French, of pamphlets such as *A Memorandum for the recognition of Ireland as a sovereign and independent State* and *The Irish Republic and the French Press*. George was a friend of Y. M. Goblet, who wrote in French the

outstanding pro-Irish book *Ireland in the World Crisis*.[2] Although his relations with O'Kelly, who had subsequently gone to Rome, were somewhat strained at times, my father remained in Paris until September 1920, when he was expelled by the French Government for sending a telegram to President Millerand, exposing the conditions under which Terence Mac Swiney was carrying on his hunger strike, and asking the President to intervene with Britain on behalf of Terence. George was sent to Brussels, but the Belgian authorities, under British pressure, also expelled him. He was then sent to Rome, where the Italian Government allowed him to remain. From there, he became a roving delegate, travelling all over Europe, to put forward Ireland's claim to independence. He occasionally returned to Ireland and, in August 1921, had a dispute with de Valera in the Dáil, when he protested that de Valera should not be both President of the Republic and Prime Minister of the Dáil at the same time. This important interlude is disposed of summarily in one page in Golding's legal biography of my father.[3] I have recently given the detailed correspondence of my father on this mission to the Public Record Office and the numerous documents will be available to the public shortly.

On October 7th 1921, the Irish and British plenipotentiary delegates were appointed to prepare a Treaty between Britain and Ireland and, because of his legal background, George was among the Irish delegates.

The main Irish negotiators, including de Valera in the background, were sincerely endeavouring to secure for Ireland as much freedom as possible, while Lloyd George, Birkenhead and Churchill were equally determined to keep Ireland within the Commonwealth. This was bound to lead to conflict. It would be tedious to give a detailed account of the two months' negotiations which are so well developed by Pakenham in his *Peace by Ordeal* and by Joseph Curran's *The*

[2] Goblet, *L'Irlande dans la crise universelle (du 3 août 1914 au 25 juillet 1917)*.

[3] Golding, *George Gavan Duffy 1882-1951 : A Legal Biography*, p. 20.

*Birth of the Irish Free State.* Suffice it to say that George became very friendly with Erskine Childers, who had been a former clerk in the House of Commons, and with Childers' cousin, Robert Barton, a landowner in Co. Wicklow, who had been in the British Army in the 1914-18 war.

It was Childers who, during the negotiations, had been the main protagonist of External Association within the Commonwealth, and this was one of the reasons why George espoused that attitude. Griffith had tried, unsuccessfully, to get the British to accept this, but his cool relationship with Childers was not helpful. On 27 November, a memorandum of Childers' pleading for an independent Irish State recognising the Crown as a symbol of association rendered Griffith furious, as the British had already rejected this. Although the Irish Cabinet had unanimously confirmed Childers' attitude, Lloyd George threatened war.

In many arguments, George and Barton were in a minority. George offered his resignation to de Valera on 4th December, but de Valera refused to accept it. It was essential that the delegation should present a united front. Lloyd George's view of grappling with de Valera's thought at this time was that it was akin to trying to pick up mercury with a fork.

George was not always wise. Pakenham describes him as irrepressible when George said to the British on 5 December: "We should be as closely associated with you in all large matters as were the Dominions and in the matter of defence still more so - but our difficulty was coming into the Empire." The British immediately jumped up and said: "In that case it is war."[4]

On 3 December 1921, at a Cabinet meeting in Dublin, Griffith refused to break on the question of the Crown. He was disposed for conflict if his proposals for Northern Ireland were not accepted by the British. My father and Barton thought that the British threat of war was a bluff, and

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[4] Pakenham, *Peace by Ordeal* (2nd. ed., 1962), p. 273 *et seq.*

considered the drafted Oath of Allegiance to be unacceptable. The final draft of the Treaty was approved on the evening of 5th December and, when Collins had convinced George that the Irish forces would be unable to pursue any hostilities successfully, and after some hours of grave anxiety, George became the last signatory of the Treaty. In the circumstances of a British ultimatum, Griffith had found it impossible to get the British to defer signature of the Treaty until the Irish Cabinet was consulted.

The law, practice and constitutional usage of Canada did give internal autonomy to a Dominion like the Irish Free State, but there was the fact that there might be overriding circumstances in which Britain could intervene. There was also British insistence upon the Oath in the Constitution, on the appointment of a Governor General and, ultimately, on Privy Council appeals. Undoubtedly, the Imperial Conference of 1917 had initiated the procedure, followed later by the Conferences of 1926 and of 1930, which was ultimately to lead to complete independence of the Dominions under the Statute of Westminster 1931.

George had the foresight to predict, during the Constitution Debates in October 1922,[5] that this was bound to happen in time, but it was difficult to understand why he insisted upon External Association almost immediately. Presumably, Irish history had led him to the conclusion to have such revulsion for the Crown and the Oath which, even in Canada had, in 1922, become largely unimportant symbols. George maintained that his proposals for amending the Constitution did not infringe the Treaty which he had signed.

George was appointed Minister of Foreign Affairs by Griffith in January 1922 but, because George wanted to ensure that Foreign Affairs would be independent of the Executive, he was not appointed a member of the Provisional Government. At this period he initiated talks with various

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[5] See for example 1 *Dáil Debates* 1913-1914.

countries, which eventually led to diplomatic relations with them.

In June 1922, Count Plunkett brought a *habeas corpus* application on behalf of his son, George, who was imprisoned by the Free State authorities for possessing arms, before Judge Crowley, a judge appointed by Dáil Éireann in 1920. Judge Crowley duly granted an absolute order of *habeas corpus*. This would normally have the effect of releasing the prisoner. When the matter was discussed at the next meeting of the Provisional Government, the authorities refused to release Plunkett, despite my father's strong recommendation. My father acted as courageously and with the same integrity as he had done in undertaking Casement's defence. He resigned from his post as Minister, but made it clear that he backed any necessary military operation which the Government would feel compelled to take as a result of the outbreak of the Civil War. At Griffith's request, his letter of resignation was withheld from the public for six weeks. Like Lord Denning, George had a tremendous sense of justice and felt that there could be no legal reason for not complying with an order of *habeas corpus*.

After George's resignation, Judge Crowley overreached himself by ordering the arrest of General Mulcahy, Minister for Defence, for not complying with that order. Because of this, the Provisional Government decided to retire all judges appointed by Dáil Éireann, save in Dublin, and to recognise the judges appointed by the British Administration. In view of this, George felt all the more justified in tendering his resignation, although whether it was a wise move at that time may be questioned.

The present Irish courts were first established in 1924. The debates on the Irish Constitution of 1922 took place in September and October 1922. It will be recalled that the public had no opportunity of reading the text, as it was only published on the morning of the election. George strongly criticised this.

George had been re-elected for South County Dublin as an Independent deputy at the election of June 1922, and took a prominent part in these constitutional debates. His main concern was to follow the Irish Draft Constitutions A and B which had been sent to London in May 1922, but which the British had insisted on amending, inserting the Crown into various Articles. George's purpose was to show that, while fully himself adhering to the Treaty as a signatory, the Constitutional practice and usage of Canada did not necessarily always involve the Crown, and that, ultimately, the power of the Crown in the various Dominions would disappear as, in fact, happened after the Statute of Westminster in 1931. Unfortunately, these arguments, though sound and valid, were made before their time and did not commend themselves to ministers like Cosgrave, Blythe and O'Higgins, who seized many occasions not merely to reply, but to deliberately insult him.

It was perhaps as well that George did not succeed in being elected an Independent deputy in 1923, as his scholarly temperament and his notion of absolute integrity would not have suited him to be an active and successful politician, but he could not forget these ministerial rebuffs (though I never heard him refer to them) and he could never afterwards actively support the Cumann na nGael party. On account of his specialist knowledge, he had quoted experts, such as Berriedale Keith and Duncan Hall, to support his constitutional amendments. Some amendments drafted by him were accepted, for instance, the one indicating that the "sole and exclusive" power for making laws for the peace, order and good government of the Irish Free State is vested, under Article 12, in the Oireachtas.

In a memorandum to the Bureau of Military History written in 1950, George wrote as follows about the constitutional position:

> The Irish Government might have temporised against the British amendments; it might have assembled the Dáil and have published to the

> House the diplomatic situation which no one outside the Cabinet was aware of; it might have called in aid the compulsory arbitration of the League of Nations; it might have appealed to the Dominions; it might even have resigned and have left the British Cabinet face to face with de Valera and it might give in. It would seem that none of these alternatives, save the last, was considered.

George was very deeply affected by Collins's death in August 1922. Despite George's resignation from the Government, he wrote to General Mulcahy stating that he was ready to serve in any capacity.

It was unfortunate that, during the Civil War, the Government felt compelled to take drastic measures which, eventually, led to the execution of Childers on 24th November 1922. Childers was condemned at a secret court martial for possession of an automatic pistol given to him by Collins. The Master of the Rolls, in refusing an application of *habeas corpus* made by Childers, declared that a state of war existed and, accordingly, Childers should have been treated as a prisoner of war. George, and the Labour Party, in protesting vehemently against the execution of Childers, maintained that the Government had a paramount duty to ensure that it would not be influenced by anything that had not been proved against Childers in open court. Instead of being treated as a prisoner of war, Childers had been condemned to death, and executed for possession of a pistol in his own home, while others had been merely imprisoned for the same offence.

## II. PART II

After the summer of 1923, when he had not been re-elected as an independent deputy, George concentrated on the law and gradually built up a large practice at the Bar. After moving to Bushy Park Road, Terenure, in 1927, he acquired, in time, the best private law library in Ireland.

George argued his first *habeas corpus* in 1924, when he tried to get Michael O'Connell, a solicitor from Tralee, released from internment. However, Lord Chief Justice Moloney held that the power of internment was not judicial, but was merely a power conferred by the Legislature to meet a threatened danger to the State.

In the *Irish Independent* of 27 January, 1927, George set out his objections to the argument that the Free State was bound, in honour and in law, to pay land annuities to Britain.

In June 1927, George together with Arthur Meredith and Albert Wood, advised de Valera that there was no authority, either under the Constitution or under the Treaty, for excluding any deputy, whether he had taken the Oath or not, from any part of the Dáil.

In 1930, George was appointed a Senior Counsel and, after 1932, was often briefed by the State in constitutional cases. Also, at that time, he made an unsuccessful effort to become a member of the Senate.

In 1930, George argued his first successful extradition case. O'Boyle and Rogers had been interned in Northern Ireland. They escaped to the Free State and were recaptured by the Gardaí, with a view to sending them back to Northern Ireland. George managed to obtain an order of *habeas corpus* from Judge Meredith.

George also enjoyed an extensive chancery practice, being frequently briefed by solicitors whose political views were poles apart from his own. As Thomas Conolly, S.C., said: "[H]is immense industry and capacity for research work stood him in good stead."[6]

Perhaps his most important chancery case was the *Erasmus Smith* case,[7] which lasted more than thirty-four days. The issue here was whether a charitable endowment was valid

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[6] Conolly, "A Supplementary Assessment of the Late Mr. Justice George Gavan Duffy as Judge", (1976) G.I.L.S.I. 70(8) 177, 178.

[7] *Governers of Erasmus Smith Schools v. Attorney General* (1932) 66 I.L.T.R. 57.

for religious or for educational purposes. The Governors of the Smith Trust contended that in fact the trust had been established with the object of creating an educational endowment, and Judge Meredith held with them. Before the Supreme Court delivered judgment, there was a settlement which was incorporated into the Erasmus Smith Schools Act 1938, and which provided that the Trust schools were to be nondenominational, instead of wholly Protestant, as heretofore. Incidentally, part of the proceeds from this case were used as a present to my mother of a beautiful yellow Chinese carpet for the drawing-room and always called 'Erasmus' by the family.

Many years later, my colleague, Frank Connolly, solicitor, described George as "[p]hysically ... a thick set man of middle height, with a small, well trimmed beard, fastidiously dressed, and [of] cosmopolitan appearance. If seen without his wig and gown, he looked more like a wealthy savant of a continental university than an Irish lawyer."[8] Connolly was glad that Ireland had in previous years been represented at international conferences by a man of such patent intellectual ability and distinguished bearing.

Thomas Conolly, S.C., wrote: "The widespread recognition of the fundamental nature of human rights [was] always a first priority in his mind ... As a lawyer he was ahead of his time and was always inspired by paramount liberal principles."[9]

George had been appointed Chairman of the Greater Dublin Tribunal in 1935 and the report of the Tribunal was very far-seeing in recommending that Dublin City and County should form one local administrative unit - a development which has not yet taken place. He also undertook, at various times, to write some legal books; first *A Register of*

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[8] Connolly, "An Interim Assessment of the late Mr. Justice George Gavan Duffy as Advocate and Judge", (1976) G.I.L.S.I. 70(6) 129.

[9] Conolly, "A Supplementary Assessment of the Late Mr. Justice George Gavan Duffy as Judge", (1976) G.I.L.S.I. 70(8) 177

*Administrative Law* from 1921 to 1933,[10] in which more than 3,000 orders were listed. This led the Government eventually to publish all administrative orders annually. Later, he spent a long vacation writing *A Calendar of the Statute Roll*, listing the valid Irish statutes from 1922 to 1943.[11]

George was also appointed in 1936 to a commission to consider whether there should be a second chamber, and he was a signatory of the majority report, whose terms were not heeded by de Valera. It was agreed that the Senate's main function would be advisory and would concentrate upon scrutinising non-controversial legislation from the Dái1.

In 1934, de Valera had proposed that George be appointed Attorney-General, but was overruled by a majority of the Cabinet. If appointed, George intended to specialise in an intensive programme of law reform. This was detailed in an article in the *Irish Law Times* of January, 1942, entitled "A Brief Survey of the Case for Irish Law Reform Twenty Years after the Treaty".[12] It would be too technical to mention the various reforms in detail, but most of these were subsequently made part of the law, either by statute or by decisions of the Supreme Court. For instance, he foresaw the enactment of the Arbitration Act, 1954, the Companies Act, 1963, the Hire Purchase Act, 1960 and the Statute of Limitations, 1957. He suggested that property, registered and unregistered, should pass to personal representatives and criticised the use of the Royal Prerogative, which had no place in Irish law, and which was ultimately abolished in *Byrne v. Ireland*.[13] The following matters mentioned by him were, in time, codified: the law relating to charities, fisheries, income tax, local government and bankruptcy (legislation drafted). The licensing laws are

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[10] Gavan Duffy, *A Register of Administrative Law in Saorstát Éireann, including the Statutory Rules and Orders from December 6, 1921 to December 31, 1933*.

[11] Gavan Duffy, *A Calendar of the Statute Roll for 21 Years*.

[12] (1943) 76 I.L.T.S.J. 1.

[13] [1972] I.R. 241.

ready for codification. The conservative Bar Council have not been sufficiently 'go ahead' to allow businessmen to consult counsel directly, as suggested by him.

George also wrote reviews of law books for the *Irish Jurist*. In comparing a well constructed continental code with our judge-made criminal code, George said:

> [The Criminal Code] is the work of many hands in many ages, some botchers, some great craftsmen. It has all the defects of judge-made law. It is not streamlined and symmetrical, it is not always rational. It is like a house that has been frequently added to for centuries. The entrance gate is gothic, the hall half timbered tudor, the facade 18th century Georgian and there is a great deal of Victorian patchwork.[14]

Finally, we shall mention a five page review of Professor Daniel Binchy's book, *Church and State in Fascist Italy*. George wrote:

> Professor Binchy is not unbiassed;... while an admirer of the abilities of the Italian people, he is an anti-Fascist but he admits the practical achievements of Fascism... His criticism and comments are courageous and far-seeing and the whole work, running to some 800 pages, is written with such verve and clarity, that the reader's attention and interest is compelled from the first page to the last. It is enlivened by brilliant sketches; of Pope Pius XI ...; of Signor Mussolini... One feels that, essentially, his conclusions on his central subject are well considered and correct.[15]

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[14] Gavan Duffy, "Review of *The Statutory Criminal Law of Germany: A Translation of the German Criminal Code of 1871, with amendments and the most important supplementary penal statutes*", (1947) 13 Ir. Jur. 27.

[15] Gavan Duffy, "Review of *Church and State in Fascist Italy*", (1942) 76

George was appointed a judge of the High Court on 22 December 1936. In Article 34.3.1° of our present Constitution, extensive functions are accorded to the High Court. It reads: "The Courts of First Instance shall include a High Court invested with full original jurisdiction in and power to determine all questions of law or fact, civil or criminal."

Art. 34.3.2° provides that the constitutionality of any law can only be determined by the High Court or by the Supreme Court. The effect of this was that George, who we will henceforth call the judge, could be called on to adjudicate upon any question of law, but in practice, he and Black J., and later Overend J. and Kingsmill Moore J., were chosen to be equity judges. They dealt mainly with abstruse questions relating to the construction of wills, whether a trust was a private trust or a charitable trust, the duties allotted to trustees, fraud and undue influence, the remedies available to mortgagors such as sale of the property or the appointment of a receiver, and the mortgagee's right to redeem the mortgage, and, finally, the application of equitable remedies such as injunctions and the strict observance of contracts. Although two thirds of the judge's work was, in fact, occupied with such matters, I shall refrain from referring to these judgments, as I frankly do not think that they would interest lay people. Apart from chancery matters, there is still a very wide choice of significant judgments.

It is necessary to emphasise first that, from the beginning of 1937, despite the fact that he was a judge, de Valera consulted him at every stage of the preparation of the Constitution.

There is little doubt but that the judge was responsible for drafting Article 40.3, which states not only that "The State guarantees in its laws to respect, and as far as practicable, to defend and vindicate the personal rights of the citizen", but further, "The State shall in particular by its laws protect as best it may from unjust attack, and in the case of injustice

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I.L.T.S.J. 113.

done, vindicate the life, person, good name and property rights of every citizen."

If de Valera had foreseen the many unwritten and additional constitutional rights sanctioned by the courts which have since flowed from this Article, it is very doubtful whether he would have allowed it to pass. These additional rights include the right to work, the right to freedom of movement, the right to follow a career and the right to privacy in marital relations.

It is also probable that the judge drafted the original Article 40.4 relating to *habeas corpus*, but this section was so altered by the Second Amendment to the Constitution Act, 1941 arising from the *Burke* case,[16] that it is now unrecognisable.

The judge had been counsel for the defendant in the case of *Lynam v. Butler*,[17] but did not then succeed in getting the Supreme Court to declare that the Land Commission was exercising a judicial function. As a consequence of this case, he was probably responsible for Article 37, which gave limited rights to non-judicial bodies, such as the Land Commission, to determine cases.

The judge also seems to have aided in the drafting of Article 38.5, which guaranteed trial by jury in criminal cases, unless the trial was held before the Special Criminal Court, or in summary offences.

It is, of course, known that John Hearne, Legal Adviser to the Department of External Affairs, took a very prominent part in the drafting.

Before embarking on the cases, it may be of interest to give you the average day of the judge. He would arrive at the courts shortly after 10 a.m. to have discussions with court officials. He would enter the court as the bells of Merchant's Quay Church were ringing eleven o'clock, would adjourn for a light lunch at 1 p.m., and resume the court hearing from 2

[16] [1940] I.R. 136.

[17] (1933) 67 I.L.T.R. 75.

p.m. to 4 p.m. He would usually get home at about 5 p.m. and would relax for an hour with the family. He would then select the legal authorities which he would consult to research the current judgments and, after dinner *en famille*, would retire to his study to prepare and type his written judgments, often working till the early hours of the morning. Like Chief Justice Kennedy, the judge was most anxious not merely to state the law concisely and clearly, but to write it in eloquent, literary English. He took enormous pains to use the exact, appropriate words. On a Friday night, he would play bridge with us, and sometimes would go to a theatre or the cinema, or to a sports match on a Saturday afternoon. In his younger days he would play tennis, billiards and ping pong with us and later took up golf and fishing. He was a keen philatelist and eventually had one of the best collections of air stamps in the world. He enjoyed good conversation with his friends among whom were men and women of differing religious and cultural traditions, and lasting friendships made in France and Italy during the 1919-21 period. The French Government honoured him by making him a Commander of the Legion of Honour in 1943.

As the judge was one of the draftsmen of the Constitution of 1937, he naturally took a special interest in cases where the Constitution had to be construed. Perhaps the best known of these is the case of *Burke v. Lennon*,[18] where the applicant, in December 1939, obtained an order of *habeas corpus* against internment, on the ground that, under the Offences against the State Act 1939, the Minister was exercising a judicial function by making an order of internment on being satisfied that it was necessary. The judge said, inter alia:

> [T]he authority conferred on a Minister by s. 55 is an authority, not merely to act judicially, but to administer justice and an authority to administer criminal Justice and condemn an

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[18] [1940] I.R. 136.

> alleged offender without charge or hearing and without the aid of a jury ... [T]he administration of justice is a peculiarly and distinctly judicial function, which, from its essential nature, does not fall within the executive power ... In my opinion, a law for the internment of a citizen, without charge or hearing, outside the great protection of our criminal jurisprudence and outside even the special Courts, for activities calculated to prejudice the State, does not respect his *right* to personal liberty and does unjustly attack his person ... [T]he right to personal liberty and the other principles which we are accustomed to summarise as the rule of law were most deliberately enshrined in a national Constitution, drawn up with the utmost care for a free people, and the power to intern on suspicion or without trial is fundamentally inconsistent with the rule of law ... The Constitution, with its most impressive Preamble, is the Charter of the Irish People and I will not whittle it away.[19]

As a result, de Valera was obliged to release all other interned prisoners. Some time later, on Christmas Eve, an attempt was made to seize ammunition from the Magazine Fort, Phoenix Park. Most of it was afterwards recovered. Because of this incident, President Hyde submitted to the Supreme Court the Offences Against the State (Amendment) Bill, 1940, passed by the Oireachtas, for a decision as to its constitutionality, and a bare 3 -2 majority of that Court held it to be constitutional, for largely opportune reasons.

Another important constitutional case was *Buckley v. Attorney General*.[20] Mrs. Buckley and other members of Sinn

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[19] [1940] I.R. 136 at 152-155.

[20] [1950] I.R. 67.

Féin started an action to determine whether she and the then Committee, or de Valera and his government, were entitled to funds collected by old Sinn Féin before the Treaty. To avert the expense of an action, de Valera had passed the Sinn Féin Funds Act, 1947 through the Oireachtas. Under the Act, the Attorney-General could apply of his own accord to the High Court to transfer the funds to a special trust. When this application was made before the judge, he dismissed it, saying: "The Court cannot, in deference to an Act of the Oireachtas, abdicate its proper jurisdiction to administer justice... This Court is established to administer justice and therefore it cannot dismiss the pending action without hearing the plaintiffs."[21] The Supreme Court affirmed the judge unanimously. O'Byrne J. said: "In our opinion, [the fact that the dispute is to be determined by the Oireachtas] is clearly repugnant to the Constitution as being an unwarrantable interference by the Oireachtas with the operations of the Courts in a purely judicial domain." As a result of this decision, the case was eventually heard in full by Kingsmill Moore J. in 1952 and the judgment contains interesting historical material.

Because of his liberal attitude in *Burke's case*,[22] the judge has been criticised by Golding for rejecting subsequent *habeas corpus* applications during the war.[23] Decisions in the cases of *MacCurtain*,[24] *McGrath and Harte*,[25] and *The State (Walsh) v. Lennon*[26] were based on the Emergency Powers Acts and not on the Offences Against the State Acts. Subsequent appeals in all these cases to the Supreme Court on various constitutional grounds were unanimously dismissed,

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[21] [1950] I.R. 67 at 70-71.

[22] [1940] I.R. 136.

[23] Golding, *George Gavan Duffy 1882-1951 : A Legal Biography*, p. 109-115.

[24] [1941] I.R. 83.

[25] [1941] I.R. 68.

[26] [1942] I.R. 112.

and ultimately no less than four of the plaintiffs were executed by de Valera's government. The position briefly was that the First Amendment to the Constitution Act, 1939 had placed the state of neutrality on the same basis as an actual state of war or emergency. Article 28.3.3° declared, *inter alia*, that "Nothing in the Constitution shall be invoked to invalidate any law enacted for the purpose of securing the preservation of the State in time of war or to nullify any act done in pursuance of such war." Although there was a later, more liberal construction in 1975, this provision of the Constitution was construed literally during a war in which our state of neutrality was constantly harassed and in danger, and all these plaintiffs had been found guilty of murdering Gardaí.

Another case, which aroused great historical interest, was that of the *Foyle and Bann Fisheries v. Attorney-General*.[27] The Judge spent all his vacation in 1948 preparing this judgment of 100 typed pages, which he delivered in October. Briefly, fishermen who lived on the branch stream a mile long on the Donegal side of the River Foyle, a mile below Lifford, pleaded that they and the public had a right to fish for salmon, which abounded there. The judge upheld their contention of the right to fish for salmon on the branch stream, and decided in favour of the Attorney-General as representative of the public. The plaintiffs, as owners of a private fishery, had been reasonably sure of winning, particularly as English decisions favoured them, and the Northern Ireland Court of Appeal had held that all Lough Neagh was a private fishery. But the judge detailed the history of this fishery on the River Foyle from the Flight of the Earls (1607), and compared the evidence of experts like Professors Binchy, Moody and others, before reaching the conclusion that in the River Foyle, there existed a public right to fish. Subsequently, the Foyle Fisheries Act, 1952 was passed which provides for fishing licenses for the public.

The judge had to take his turn, with other High Court judges, in presiding over the Central Criminal Court in Green

[27] (1949) 83 I.L.T.R. 29.

Street Courthouse, but he did not relish particularly the trial of criminal cases. He would impose liberal sentences.

In view of the undue prominence (seven pages) and misrepresentations given by Golding to *Schlegel v. Corcoran*,[28] I feel compelled to mention it. It is a well-known principle in the law of landlord and tenant that a landlord who has tenants for professional or occupational purposes in his own house, has an absolute right to choose unconditionally such tenants. The judge duly affirmed this principle in the case where an Irish dentist, who had a surgery in the plaintiff's house, assigned it, without the landlord's consent, to a Jewish dentist. Unfortunately, the main principle was forgotten, and the case was argued on the basis that the landlord had refused consent on the ground that the tenant was Jewish. There was, of course, no discrimination whatsoever on the ground of religious belief, as this matter dealt only with the law of property and could have applied equally to an African or Chinese tenant. It is true that the judge said that caprice was hardly a word for anti-Semitism, which is notoriously shared by a number of other citizens and that this antagonism between Christian and Jew had its roots in two thousand years of history.[29] It is absurd to contend, as Golding does, that the landlord, being Irish and Catholic, had a better claim, as such, than a Jewish tenant, and that Catholics were somehow on a higher plane of nationality than others. I have never, in the course of conversation, heard my father make a derogatory remark about Jews or about the Jewish religion. The fact that agencies such as Reuter or Havas, which refused to present adequately the case for Irish independence before the Treaty, were Jewish, is too obvious for comment. The fact that my father attacked these agencies does not, in any way, portend an attack on Jews, as such, or on the Jewish religion, and at no time did he share Mrs. Schlegel's prejudices against Jews. It is absolutely untrue, as Golding contends, that the judge tried to insert into Article 44 of the Constitution the proposition

[28] [1942] I.R. 19.

[29] [1942] I.R. 19 at 48.

which would have stated without equivocation that the Catholic Church was the one true church and that no rights were to be granted to other denominations. Under no circumstances would the liberal judge have held that Irish nationalism and the Catholic Church were identical. Golding subsequently states that, had the judge lived in the post-Vatican II era, he would have changed his mind and that, as we are all children of our age, his slip in *Schlegel*, which Golding so vigorously attacks, can be excused. This view is totally unsustainable, as there was no question of any slip in the first place.

Perhaps the best known trade union case the judge dealt with was that of the *N.U.R. v. Sullivan and named officers of the I.T.G.W.U.*,[30] which related to the constitutionality of Part III of the Trade Union Act, 1941. Part III enables a trade union claiming to have organised a majority of workmen of a particular class, for the purpose of negotiating conditions of employment, to apply to the constituted Trade Union Tribunal for a determination that the applicant union should alone have the right so to organise them. The judge dismissed the plaintiff's claim, stating: "But the complete answer to the plaintiffs seems to me to be that the Act is a law regulating that right [of the citizens to form associations in the public interest] ..."[31] Although the judge was subsequently reversed by the Supreme Court, most constitutional writers agree with his decision. The Supreme Court held that Part III of the Act of 1941 does not prohibit all association, but that it limits the right of the citizen to join the prescribed unions upon which a determination has been made by the Tribunal. In the opinion of the Court, a law which takes away the right of citizens of their choice to form associations not contrary to public order and morality is not a law which can be validly made under the Constitution.

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[30] [1947] I.R. 77.

[31] [1947] I.R. 77 at 88.

One of the judge's main principles was that the law is not static, but must change in accordance with the times. Save in Emergency Act cases, the judge was most careful to construe an action according to the intentions of the parties, and to avoid literal interpretations of the law.

In *Maguire v. the Attorney-General*,[32] a nun testatrix left the sum of £5,000 to found a convent of Perpetual Adoration in Lisnaskea, in Co. Fermanagh. The judge said that the purpose of the testatrix was unquestionably to secure the perpetual adoration of the Blessed Sacrament. In the 19th century, the principle of the recognition of religious purposes in law was well settled. In England in 1871, the case of *Cocks v. Manners*[33] decided, *inter alia*, that a gift to a contemplative convent was not charitable because, in the eyes of the law, the public is neither instructed nor edified by the gift. Farwell J. declared that there was no charity in attempting to save one's soul, because charity in law was not necessarily altruistic. My father held that there never had been the flimsiest warrant for attributing the same outlook to public opinion in Ireland as in England. The cloister is a powerful source of edification here and, accordingly, this gift is a valid charitable gift in law. The old common law of England, from which the common law of Ireland was generally indistinguishable before the Treaty, can apply to the present day. The old Common Law was impregnated with the faith of the people. "The common law knew the Mass. The common law knew the Blessed Sacrament. The common law knew the adoration of the Blessed Sacrament. Therefore," said the judge, "I know them judicially."[34]

In *Buckley and Others v. the Governors of the Meath Hospital and Others*,[35] the Protestant plaintiffs had been Governors of the Meath Hospital and County Dublin

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[32] [1943] I.R. 238.

[33] (1871) L. R. 12 Eq. 574.

[34] [1943] I.R. 238 at 253.

[35] (1951) 85 I.L.T.R. 143.

Infirmary, and had been automatically re-elected en bloc at the Annual General Meeting held in April each year. Twelve of the defendants were Knights of Columbanus, and had endeavoured to get control of the Meath Hospital by being elected as Governors. They had earlier paid, secretly, the sum of two guineas annual subscription for the year 1949 and this entitled them to become Governors for that year, if elected. At the Annual General Meeting of April 1949, various irregularities occurred, including the following which were fully substantiated: receipts were issued by the Secretary at the last minute to thirty-four prospective Governors who had paid the annual subscription secretly; the meeting was contrary to and in breach of established procedure; application for adjournment of the meeting was wrongfully refused by the Chairman; the method of ballot at the election was unfair and unsatisfactory; no effective check was made on persons voting; there were no printed or written lists of electors; the voting papers consisted of scraps of paper torn out of a notebook and consequently unlawful votes were cast. The judge said he had great sympathy with the plaintiffs, particularly in view of the irregularities that had taken place. He considered that this was essentially an internal matter of management for the hospital, and there was no reason why another meeting applying the proper procedure could not be convened. The defendants having paid their subscriptions were entitled to vote at that meeting. It followed that, although the method of election had been quite unsatisfactory and quite unworthy of a serious body, a judicial declaration that the proceedings at the meeting were irregular could not be made, as this was essentially an internal matter.

One of the most controversial decisions of the judge was that relating to the *Tilson Minors*[36] in 1950. Ernest Tilson, a Protestant, married Mary Barnes, a Catholic, in a Catholic church in 1941. The husband signed an ante nuptial agreement that any issue of the marriage would be brought up as Catholics. The couple later had four boys who were, in

[36] [1951] I.R. 1.

1950, aged 8, 7, 6 and 5 years. All had been baptised as Catholics. The husband left home unexpectedly, taking the three eldest boys with him. Eventually, he placed them in a Protestant orphanage and school. Mr. Tilson stressed that he wished the boys to be brought up in the Church of Ireland. Mrs. Tilson, although without means brought *habeas corpus* proceedings against the Governors of the orphanage. Up to that time, English law had been consistently followed, which meant, in practice, that the father's wishes prevailed at all times. Consequently, Mr. Tilson thought that he had a right to act as he did. The judge refused to follow the English precedents and, in accordance with the *Ne Temere* decree, which then prevailed, held very forcibly that Mr. Tilson was absolutely bound to adhere to his prenuptial promise to bring up his sons as Catholics, and that he had committed a grave breach of trust in failing to do so.

The orphanage was ordered to hand over the three sons to the mother immediately, and the order of *habeas corpus* was granted. The judge said:

> [F]or religion, for marriage, for the family and the children, we have laid our own foundations. Much of the resultant polity is both remote from British precedent and alien to the English way of life, and, when the powerful torch of transmarine legal authority is flashed across our path to show us the way we should go, that disconformity may point decisively another way. ... Consequently, however wide the unfettered patria potestas may be, a judicial theory, which, under cover of public policy would freely allow a father to spoil his children's birthright by uprooting their creed at his pleasure in plain defiance of his gravest express obligations undertaken as husband and

> father, can find no place in a jurisprudence moulded to fit the Constitution of Ireland.[37]

The Supreme Court, by four judges to one, affirmed my father's decision, but concentrated on educational rather than religious grounds. Murnaghan J. said:

> [T]he true principle under our Constitution is this. The parents—father and mother—have a joint power and duty in respect of the religious education of their children. If they together make a decision and put it into practice it is not in the power of the father—nor is it in the power of the mother—to revoke such decision against the will of the other party.[38]

Whether the High Court's judgment would still be decided in such black and white terms in these post-Vatican II days of ecumenism may be questioned.

My father was appointed President of the High Court in July 1946. The President is second in seniority among the judges. His lifestyle did not change much, and he worked on his legal cases as before. He sometimes honoured me by showing me some of the more interesting judgments the night before he delivered them, but contrary to what Golding says, he never discussed these with me in advance. He gave me unlimited help in my legal studies when becoming a solicitor. It would be quite impossible for me to thank him adequately.

Let me conclude with a final case. The facts of *Exham v. Beamish*,[39] are of little importance here. It is the principle of not following English precedents blindly that was authoritative. The judge said:

> As a matter of practice, we constantly refer to judgments in the English Courts and such

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[37] [1951] I.R. 1 at 15-18.

[38] [1951] I.R. 1 at 34.

[39] [1939] I.R. 336.

> judgments, as every lawyer will recognise, have often proved to be of great service to us; but let us be clear. In my opinion, when Saorstát Éireann, and afterwards Éire, continued the laws in force, they did not make binding on their Courts anything short of law. In my opinion, judicial decisions in Ireland before the Treaty, and English decisions which were followed here, are binding upon this Court only when they represent a law so well settled or pronounced by so weighty a juristic authority that they may fairly be regarded, in a system built up upon the principle of *stare decisis*, as having become established as part of the law of the land before the Treaty; and to bind, they must, of course, not be inconsistent with the Constitution.[40]

Golding has suggested,[41] without proving it, that the judge was more interested, as a philosophy of constitutional justice, in maintaining the dignity and integrity of his Court before the Executive rather than in showing concern for the rights of individuals. There could, in my opinion, be no greater defamatory statement concerning a judge whose *raison d'être* was essentially the application of human rights. It may well be that the judge sometimes exercised justice on the basis of fair trial in civil cases on too strictly a legal basis, and that he could perhaps have shown more flexibility in some equity cases. There is little doubt that he established the principle of preventing unfair bargains in equity thirty years before Lord Denning enforced it. As President of the High Court, the judge was liable to be reversed by some judges of the Supreme Court, who were not jurists like himself. In such cases he sometimes privately spoke of those Supreme Court decisions with urbane humour and wit.

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[40] [1939] I.R. 336 at 348.

[41] Golding, *George Gavan Duffy 1882-1951*, pp. 124-126.

The judge was a heavy smoker, and this eventually led to his death. Early in 1951, the first signs of the dreaded lung cancer were beginning to affect him. He did not sit in court after Easter and he bore with resignation his illness. He died on 10th June 1951. The funeral Mass, at which Dr. McQuaid, Archbishop of Dublin, presided, was celebrated on 12th June in St. Andrew's Church, Westland Row, Dublin. The attendance at the funeral was representative of all shades of political opinion, from left wing socialists to the conservative right wing. I am sure this would have pleased my father. His old colleague in the struggle for independence, President Seán T. O'Kelly, attended the burial in Glasnevin Cemetery.

In a letter to me, John Hearne wrote that my father had all the attributes to exercise with equal dignity and learning the functions of either Chief Justice or President of the State, and that he would always be remembered as one of the architects of the Constitution and a stout defender of fundamental rights.

Many years later, in the Dáil, on February 14th, 1979, Professor John Kelly said of him: "Judge Gavan Duffy was one of the greatest judges the State has seen. I believe that, were it not for him, the whole system of judicial review of the legislation here might never have got off the ground."[42]

In tribute to my father, Mr. G.A. Overend, on behalf of the Law Society, said my father was a keen lawyer and courageous and conscientious judge. The late President was courteous and kindly to all, high and low alike.[43]

Had he lived he intended to retire from his judgeship at Christmas 1951, and would have written his memoirs in 1952. I would then have spared you this paper.

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[42] 311 *Dáil Debates* 1109-1111.

[43] (1951) 85 I.L.T.S.J. 151, 151-152.

# COLUM GAVAN DUFFY

MARGARET BYRNE*

Colum Gavan Duffy was born in Dublin on 19th April 1913, the elder of the two children of George and Margaret Gavan Duffy. His father was practising as a solicitor in London and becoming increasingly involved in Irish politics, and Colum spent about two years of his early childhood with his mother and sister, Máire, at Glenvar, Co. Donegal on Lough Swilly. Colum's education reflected his father's early French upbringing and international outlook. His first school was Mount Saint Benedict's boarding school run by Fr. Sweetman O.S.B. in Gorey, Co. Wexford. This was followed by a year spent with a family in Chemillé, Anjou where he had private education at home from Monsieur Simoni. Following that he spent three years at the Benedictine College at Maredsous in Belgium and a final year being taught privately by his uncle Tom, a French missionary priest, near Madras in India. He graduated from UCD with an honours B.A. degree in French, German and Modern History in 1933, achieved second place in the LL.B. degree in 1935 and was awarded first-class honours for his M.A. thesis, *The Senate in the Irish Constitution* in 1947.

Apprenticed in the firm of Arthur Cox, Colum was admitted as a solicitor in 1938 and practised on his own account between 1939 and 1943. He subsequently studied librarianship in UCD and was awarded the Diploma in Librarianship in 1945. He was assistant librarian in the

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