

THE LANGUAGE OF LAW COURTS IN WALES : SOME
HISTORICAL QUERIES

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THE earliest attempt to regulate by law the language used in the law courts of Wales was made in the Act 27 Hy. 8 c. 26, the so-called ' Act of Union of England and Wales ' of 1536, by a clause which is variously cited as "Clause 20" or "the language clause": this was a clause which legislated about the use of the English language in law courts in Wales. It has become traditional for commentators, even for those among them who have been professional lawyers, to assert that the Act 27 Hy. 8 c. 26 "prohibits the use of the Welsh language in all courts of justice in Wales".¹ It was therefore not surprising that a Departmental Committee appointed by the President of the Board of Education in 1925 "to enquire into the position of the Welsh language" should have reported that "perhaps the heaviest blow that was ever given directly and intentionally to the Welsh language was the 20th section of Statute 27 Hy. 8 c. 26, whereby it is enacted that all proceedings in any Courts of Law shall be conducted in the English tongue."² It is thus necessary to begin with the query: what was expressly ordained by the Statute of 1536? Did the Act expressly ordain that "all proceedings were to be conducted in the English tongue", and still more that "the Welsh language was abolished in all the courts"?³

The express words of "Clause 20" are those ;

"Also be it enacted by the authority aforesaid, that all Justices, Commissioners, Sheriffs, Coroners, Escheators, Stewards and their Lieutenants, and all other Officers and Ministers of the Law shall proclaim and keep the Sessions Courts, Hundreds, Lects, Sheriffs Courts, and all other Courts in the English Tongue ; and all oaths of Officers, Juries and Inquests, and all other Affidavits, Verdicts and Wagers of Law, to be given and done in the English Tongue ; and also that from henceforth no Person or Persons that use the Welsh speech or Language shall have or enjoy any Manner Office or Fees within this Realm of England, Wales or other the King's dominion, upon Pain of forfeiting the same Offices or Fees, unless he or they use and exercise the English Speech or Language."⁴

It is noteworthy that "Clause 20" expressly mentions only eight things that were to be performed in English :

- (1) the "proclaiming" of law courts ;
- (2) the "keeping" of law courts ;
- (3) the swearing-in of justices and other officers ;
- (4) the swearing-in of juries ;
- (5) the swearing-in of inquests ;
- (6) the swearing of affidavits ;
- (7) the giving of verdicts ;
- (8) the waging of law.

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Now all these eight procedures together did not amount to "all" proceedings of a court; they did not cover, for instance, the procedures known as "the pleadings", which were the central and essential feature of the proceedings of a court. If the framers of "Clause 20" had intended to ordain that all proceedings were to be in English, they would presumably at the very least have mentioned pleadings as well as "affidavits, verdicts and wagers of law." So if we have due regard to the wording of "Clause 20" we cannot justifiably conclude that the clause did ordain, or was intended to ordain, that all proceedings were to be conducted in the English tongue. All that the clause expressly ordained was that eight specified proceedings were to be conducted in English. This built-in limitation of the scope of "Clause 20" is a basic fact that deserves more attention than it has yet received from some of the commentators.

Our next query concerns the linguistic position of the courts before 1536, firstly in England, secondly in Wales.

(a) Owing to the circumstances in which English common law had evolved in the 12th-13th century, its oral language, and consequently its elaborate technical vocabulary was not English: it was French. But while French had remained the language of English law, English had become the language of English life. Not until 1362 was an attempt made to regulate the matter by a statute, which ordained that as from 27th January 1363, pleas in all courts in the realm should be "pleaded, shown, defended, answered, debated and judged in the English tongue and . . . enrolled in Latin." The reason given in the statute itself is that the French tongue "is much unknown in the realm", so that parties to cases in the courts "have no knowledge or understanding of what is said for them or against them by their counsel and other pleaders."⁵

Unfortunately it seems at present impossible to know at all clearly what effect this statute had upon the linguistic usages of the courts in England. Sir John Fortescue, an ex-Chief Justice of the King's Bench, writing about 1470, seems to imply that the Statute of 1362 did have some effect in extending (though he does not specify in what way) the use of the English language in the courts in England, but he also makes it very clear that in the courts in England the professional pleaders still continued to use French, both in the formal pleading and in the debating of cases with the judges in court, in spite of the statute of 1362.⁶ They were still doing so in the middle of the 16th century. Thus in 1549 Archbishop Cranmer remarked that he had "heard suitors [in the courts in England] murmur because their attorneys pleaded their case in the French tongue which they understood not."⁷ This long-continued use of French in the courts in England is not really surprising, and in one sense was quite justifiable. Most of the technical terms of English common law were French words which had not yet been naturalized into the English language and these very numerous French technical terms could be used more naturally and conveniently in French speech than in English speech: in fact the French which the English lawyers used in court was a technical language which used its terms in an exact technical sense, and this was a great advantage from the technical legal point of view of judges and advocates.⁸

(b) In the courts in Wales during the two and a half centuries before 1536, the linguistic position is not free from ambiguity. It is at least clear from the Welsh law books that legal Welsh as a language was mature and highly developed, and was probably extensively employed



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in the courts. But we must not assume off-hand that Welsh had any monopoly of the linguistic field in the proceedings of the courts. The basic consideration is that in Wales between 1284 and 1536, two laws (broadly speaking) were current. On the one hand, in the five shires of the Principality and in Flintshire the law that was current had been defined by Edward I's Statute of Wales of 1284. The law as there defined consisted very largely of institutions and procedures of English common law which were set out in detail in the Statute of 1284; but in part it also included a few institutions and procedures of Welsh Law, which the Statute of 1284 had expressly allowed to continue in operation. On the other hand, in the rest of Wales, which was divided into Marcher Lordships, each of which was juridically a self-contained franchise, the laws that were current varied from lordships to lordship, but beneath all the variations in the laws current in the March,⁹ one can clearly discern two features in common: the laws current in the Marches had adopted many of the institutions and procedures of English common law; at the same time the laws current in the Marches preserved, in many of the lordships, a good deal of the most characteristic institutions and procedures of native Welsh law, including some which had been specifically disallowed in the Principality and Flintshire by the Statute of 1284.¹⁰ Thus in both the Principality and Flintshire on the one hand, and in the Marcher lordships on the other, there were two laws current, each consisting of varying proportions of English common law and native Welsh law.

Now it is clear that there existed in a number of Marcher lordships institutions called a "Court of the Welsh" and a "Court of the English." "Not only were Marcher lordships divided into Englishries and Welshries along tenurial and economic lines, but also in several of them—including Denbigh, Caus, Kidwelly, Gower and Brecon—a parallel system of English and Welsh courts seems to have existed with the clear assumption that the law of Wales would prevail in the latter."¹¹ There are clear signs also that a similar arrangement existed at any rate in the two south-western shires of the Principality. Some pleas pleaded under Welsh law in the 15th century, in the Marcher lordship of Llandovery in the south, and in the Marcher lordships of Denbigh and Ruthin in the north, have been preserved in some formularies printed by Aneurin Owen in Vol. II of *The Ancient Laws of Wales*.¹² These indicate that in the 15th century, at any rate in the courts of the Marches, cases under Welsh law were not only being taken in the "Welsh courts" but also in the Welsh language. This, of course, would not be surprising: the technical terms of Welsh law were Welsh words, and it would be more convenient to handle Welsh terms in speech that was Welsh. The same consideration of convenience would have applied, not only in the courts of the Marches, but also in those of the Principality and Flintshire. So we may conclude provisionally that in the period 1284—1536 cases taken under Welsh law would probably be taken in Welsh. There is some difficulty, however, in discovering what language was used when, in the same period, cases were taken under English law. We must realise that such cases were probably by no means few, and we must remember also that in districts like Flintshire and the Englishries of the Marcher lordships, a considerable proportion of the pleas taken under English law would be pleas in which both the parties would be English. We must bear in mind too that the chief officers, both in the Principality and in the Marcher lordships, were as a rule not merely



men of English origin, but quite often men imported from England, more or less as professional administrators, with English experience and above all with English legal training. They were naturally the key men in running the courts in Wales and they were men whose whole background made them automatically, so to speak, aware of, and responsive to, the usages of the courts in England. So it seems not unlikely that when, under their aegis, pleas in the courts in Wales were taken under English law, particularly if both parties to the plea happened to be English, that the language which would be used in the court in Wales would be the language that would be used in the courts in England—the language *or languages*, because in England, as we have seen, it would be a mixture of English and French, French being reserved for the all-important “pleading.”

Another line of speculation would be to consider Clause 20 in the light of the over-all purpose of the Act of 1536 as a whole. There can be little doubt that its over-all purpose was to bring the whole land of Wales, Principality and Marches alike, under a single uniform law assimilated to the law of England. So the particular intention of the language clause would presumably be to assimilate the linguistic practice of the courts in Wales to that of the courts in England. We have already seen that Sir John Fortescue provides a few scraps of information about the linguistic usages of the courts in England some sixty years before the Act of 1536. He implies that by about 1470 the statute of 1362 was having some effect, though he does not specify exactly what effect, in extending the use of English in the courts in England. But he also states quite unmistakably that the use of English had not extended to the “pleadings” or to the discussions between judges and counsel, which continued to be done in French. Eighty years later, Archbishop Cranmer in 1549 makes it clear that the use of English had still not extended to the pleadings. I have already emphasised that Clause 20 of the Act of 1536 ordained the use of English only in certain specific proceedings. It ordains nothing about using English either for pleadings or for enrolments. Is it perhaps permissible to suppose that the various specified proceedings for which Clause 20 ordains the use of English may represent the proceedings to which the use of English had perhaps already extended by 1536 in the courts in England? Is it perhaps permissible also to suppose that the silences of Clause 20 about the use of English for pleadings and enrolments, may have been due to the fact that pleadings and enrolments were proceedings to which the use of English undoubtedly had *not* extended by 1536 in the courts of England, where French was still the language for pleadings and Latin for enrolments?

At any rate these suppositions appear to hang together well enough to be put forward just as queries. I hold no particular brief for them, though I am inclined to think that there is something to be said for their general line of approach; an approach which regards the “language clause” of the Act of 1536 not to much in relation to a supposed Tudor “policy” of “extirpating” the Welsh language, but rather in relation to the more technical question of the language problem that arose when Welsh law was finally displaced by English law; in other words by a “technical” rather than what one might call a “national”, approach. As compared with the “national”, the “technical” approach at least seems likely to lead to rather more light, and rather less heat.



NOTES

¹Sir T. Artemus Jones, K.C., in his Introduction to *The Union of England and Wales* by William Rees (1948), p. iv.

²See the Report of the Departmental Committee in *Welsh in Education and Life* (1927), p. 164.

³Judge Ivor Bowen, K.C., in his Introduction to his volume of *The Statutes of Wales* (1908), p. lxi.

⁴This proviso is obviously vitally important, for without it the mere fact of ability to speak Welsh would legally have been a disqualification for office. Actually as the clause stands the disqualification consists not in the ability to speak Welsh, but in the inability to speak English. By an uncharacteristic inadvertence, Pollard left out this proviso in his summary of the Statute in his *Henry VIII* (New edition, 1905) p. 365.

⁵*Statutes of the Realm*, pp. 175-176.

⁶Fortescue, *De Laudibus Legum Anglie*, ed. S. B. Chrimes, pp. 114-115.

⁷F. W. Maitland, Introduction to Selden Society, *Year Books of Edward II*, Vol. i (1903), p. xxxv.

⁸Holdsworth, *History of English Law*, ii (3rd ed.), pp. 480-482.

⁹R. R. Davies, "The Law of the March", *Welsh Hist. Review*, vol. v, pp. 1-30.

¹⁰*q.g.*, the Welsh procedure of *aynwrys*, abolished by section xiii of the Statute of Wales; Bowen, *op. cit.*, p. 26.

¹¹R. R. Davies, *loc. cit.*, p. 16.

¹²*Op. cit.*, ii, pp. 460-474.

