THE INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

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SEMINAR ON FARMERS AND THE LAW

The President of the Society, Mr. Gerald Hickey, with from left: Mr. Dermot Johne, A.C.C., Mr. Michael Keogh, Chief Executive of the I.F.A. and Mr. W. D. McEvoy, Chairman, of the Society's Public Relations Committee at the one-day seminar held in Blackhall Place on 14 February 1979. (The text of Mr. Donal Binchy's paper on Captial Taxation will be published in a subsequent issue.)

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ANNUAL GENERAL MEETING OF THE SOCIETY

The President Mr. J. L. Dundon took the Chair at 11.30 on Friday, 24 November 1978 in the Members' Room in Blackhall Place. A list of those attending the meeting is filed with these minutes. The Director General Mr. James J. Ivers was in attendance. The notice convening the meeting was read by the Director General.

Minutes:

Having been published in the May issue of the GAZETTE the minutes of the Ordinary General Meeting held in Killarney on 7th May, 1978, were taken as read. There being no objection, the minutes were signed by the President.

Annual Report:

The adoption of the Auditors Report and financial accounts for the year ended 30th April, 1978, was proposed by *Mr. A. Smyth,* seconded by *Mr. P. D. M. Prentice* and agreed.

On the proposition of *Mr. P. C. Moore,* seconded by *Mr. J. Carrigan,* Messrs. Coopers and Lybrand were re-elected as the Society's Auditors for the year ending 30th April, 1979.

Council Elections:

The Scrutineers Report on the Council Election was read by the Director General as follows:-

Valid Poll 1084

Buckley, John F. (747 votes); Dundon, Joseph L. (694); Quinlan, Moya (686); Blake, Bruce St. John (619); Beatty, Walter (592); Binchy, Donal G. (592); Bourke, Adrian Patrick (586); O'Mahony, Michael V. (582); Carrigan, John (580); Osborne, William Anthony (570); Shaw, Thomas D. (563); Curran, Maurice R. (554); McEvoy, W. D. (554); Hickey, Gerald (545); Houlihan, Michael P. (528); Allen, William Brendan (525); O'Donnell, Patrick Frank (521); Prentice, Peter D. M. (515); Shields, Laurence K. (514); O'Connell, Michael G. L. (503); Smyth, Andrew F. (499); Collins, Anthony E. (493); Pigot, David R. (489); Fitzpatrick, Thomas J., T.D. (489); Monahan, Raymond Thomas (480); Margetson, Ernest (476); Killeen, Sarah Carmel (466); Cullen, Laurence,(457); O'Connor, Patrick (445); Donnelly, Andrew J. O. (438). The foregoing were returned as ordinary members of the Council for the year 1978-79.

The following members also received the number of votes placed after their names: Doyle, Gerard M. (423); Maher, Austin V. (374); Hoey, B. Vincent (371); O'Connor, James Philip (351); McCourt, Philip E. (274); Brunker, Eric (262); O'Leary, Mona (242); O'hUadhaigh, Donal (228).

Provincial Delegate (Leinster) Valid Poll 153: Smyth, Michael M. (89); Hogan, Christopher, (64).

Provincial Delegates Returned Unopposed (Connaught): Patrick J. McEllin, Claremorris, Co. Mayo. (Munster): Patrick Glynn, 84 O'Connell Street, Limerick. (Ulster): Peter F. R. Murphy, Ballybofey, Co. Donegal.

Declaring the results of the election, the President expressed his thanks to the Scrutineers. In doing so, he remarked that he was glad to see that the poll was increasing.

Report of Council

As a report had been circulated in the October issue of the GAZETTE, the President took it as read. Speaking to the report *Mr. T. C. G. O'Mahony,* asked if as a small community, we could face the cost of computerising the processes associated with legal practice. *The President* said he was advocating that the profession familiarise itself with and learn to control the computer process in the legal area. *Mr. O'Mahony,* then went on to comment on the lack of progress being made in the matter of solicitors' remuneration and to advocate a stronger line of action on the part of the profession. In the discussion which followed, the *President* and *Mr. Osborne,* Chairman, Costs Committee reviewed the developments to date. They indicated that some progress could be expected in the near future. The adoption of the report was proposed by *Mr. D. Pigot,* seconded by *Mr. J. Jermyn,* and agreed.

Bond Scheme:

At the request of the President, *Mrs. Quinlan* drew the successful bonds as follows: £1000 prize – Bonds Nos. 1024 and 1455; £500 prize – Bonds Nos. 1185 and 1060; £250 prize – Bonds Nos. 1239 and 1469. At the conclusion of the draw, the President encouraged members, especially the younger members to participate in the scheme, designed to help the financing of the Blackhall Place project.

Annual General Meeting 1979:

This was fixed for 11.30 a.m. on Friday, 23rd, November, 1979.

Motion:

Mr. J. Heney proposed the following motion: "That the Council of the Society appoint a professional member of staff to deal with Government Departments, Local Authorities and other agencies in respect of all problems arising in solicitors offices in their dealings with such bodies."

In proposing the motion, *Mr. Heney,* referred to the countless delays, beyond the control of the solicitors in everyday practice. While he could take steps to improve his own organisation, there was little he could do in the case of official agencies. He was referring particularly to the Adjudication Office, the Registry of Deeds and Local Authorities whose delays presented great difficulties for solicitors practising in Dublin. To deal with the problem on an individual basis was not adequate and it was unfair to expect a voluntary committee to deal with the problem on a continuing basis. It seemed to him that what was needed on the staff of the Society was a professional person who would deal with the problems on a general basis and ensure that the situation with the various agencies was continuously monitored.

Also, there was a need to encourage the profession to present their difficulties to the Society. He emphasised that in proposing the motion, he was not in any way to be taken as attacking the public bodies he mentioned. Seconding the motion *Mr. K. O'Brien* referred to the difficulties experienced with the Dublin Corporation sealing procedure and the Land Registry. *Mr. R. O'Donnell* as Chairman of the Conveyancing Committee, accepted that there was much merit in the proposal. He then outlined for the information of the meeting, various representations which had been made over the year by the Conveyancing Committee *Mr. D. McEvoy* was of the opinion that the proposer and seconder should submit a detailed memorandum since the resolution dealt with a very wide area. *Miss C. Killeen* favoured the establishment of a special committee to review the position. *Mr. A. Mulligan* felt that if the decision was to set-up the Committee, then it should have a definite time limit within which to report. The President said he appreciated the difficulties being experienced by the profession. Members of the staff and particularly the Director General had been dealing continuously with the problems outlined in association with the Professsional Purposes and Conveyancing Committees. The difficulty for the Society was twofold. The recruitment of a suitable professional person was a costly step, and ultimately the profession would have to decide if it would be prepared to make the necessary funds available. Also, the Society's past experience indicated that it would not be easy to recruit staff of the required calibre. He suggested that the matter be referred to the incoming Council with a view to a report back to the members at the next half-yearly meeting in Galway. *Mr. M. O'Mahony* suggested that the item be a specific one on the agenda for that meeting. This was agreed.

Other Business:

Mr. D. Moran indicated that the present lay-out of the Conditions of Sale was not satisfactory and he suggested a reversion to the old system. The President indicated that he would refer the point to the Conveyancing Committee.

Vote of Thanks:

Mr. G. Hickey, Senior Vice-President took the Chair at this point. *Mr. D. Moran*, in proposing a vote of thanks to the President, said the past year had been a memorable one in the annals of the Society. The activites of the year of which the high-light had been the official opening of Blackhall Place, had placed a great burden on the President. He had graced the office with dignity and was due the thanks of the Society for excellent services far beyond the normal line of duty. *Mr. McCarron* in seconding the resolution, thanked the President for his kind remarks about the work of the scrutineers. *Mr. G. Doyle* said he would like to be associated with the vote of thanks to the President for all that he had done for the Society and for the encouragement he had given to the Council during his year of office. *Mr. Hickey*, associated himself with the previous comments and paid tribute to the help given by Mrs. Dundon. He then put the Resolution, which was carried with applause. The Senior Vice-President then declared the meeting closed.

Appointment of Committees for 1978/'79:

By agreement, the following arrangements were made:-

Registrar's and Compensation Fund:

T. D. Shaw, Chairman;
A. J. Donnelly, J. Hooper, C. Killeen, P. O'Connor, M. V. O'Mahony, L. K. Shields, A. Smyth, M. Quinlan.

Finance, Premises, Services and Costs:

W. Beatty, Chairman
M. Curran, Vice-Chairman

Staff Relations Matters

B. St. J. Blake, Charman, Services;
M. Quinlan, Chairman, Premises;
W. A. Osborne, Chairman, Costs;
G. Overend, (Past President);
P. D. M. Prentice.

Parliamentary:

D. Binchy, Chairman;
J. Carrigan, Vice-Chairman;
J. L. Dundon, R. Glynn, S. Killeen, R. T. Monahan, M. G. L. O'Connell, P. F. O'Donnell, B. Russell, B. McGrath (Past President), A. Bourke.

Professional Purposes:

E. J. Margetson, Chairman;
D. R. Pigot, Vice-Chairman;
R. O'Donnell, Chairman, Conveyancing Committee;
L. Cullen, A. J. Donnelly, G. Doyle, (non Council) Michael Enright, (non Council) P. Glynn, R. Grattan D'Esterre Roberts, C. Hogan, (non Council) M. P. Houlihan, J. Maher, (Past President) P. Murphy, P. McEllin, M. M. Smyth.

Public Relations:

W. D. McEvoy, Chairman;
M. V. O'Mahony, Vice-Chairman;
J. F. Buckley, Chairman, Publications and Library;
D. G. Binchy, F. Daly, C. Meredith, P. Murphy, P. O'Connor, P. F. O'Donnell, M. Quinlan, A. Bourke.

E.E.C. and International Affairs:

J. Dundon, Chairman;
R. T. Monahan, Vice-Chairman;
A. Collins, J. Fish, (non Council) B. T. McGrath (Past President) G. J. Moloney, L. K. Shields, A. F. Smyth.

Policy Committee:

Gerald Hickey, President;
Walter Beatty, Brendan Allen, Mrs. M. Quinlan, T. Fitzpatrick, Bruce St. J. Blake, J. Carrigan, W. A. Osborne, Peter D. M. Prentice, Joseph L. Dundon, John F. Buckley, W. D. McEvoy, Maurice Curran, Donal Binchy, Thomas D. Shaw, Ernest J. Margetson.

Education:

John F. Buckley, Chairman;
F. Daly, Vice-Chairman;
A. Bourke, M. Curran, W. D. McEvoy, Rory O'Donnell.

Company Law Committee:

B. O'Connor, Chairman;
W. Beatty, A. Collins M. G. Dickson, M. Finlay, R. Flynn, H. Fry, M. Irvine, P. Kilroy, J. O'Dwyer, L. K. Shields.

TRADE MARKS AND PASSING OFF. THE IRISH – E.E.C. REGIME

By DENIS LINEHAN, LL.M., Lecturer in Law at University College, Cork and JERRY G. HEALY, B.A., B.C.L.

INTRODUCTION

Trade marks constitute an important species of industrial property. Manufacturers and distributors regard them as a vital aspect of their marketing strategy, since the interest and good will generated for a product can be embodied in the mark under which it is sold. Trade marks also serve the consumer, who will use them to differentiate between competing products.

A sharp rise in the level of the activity relating to trade marks has occurred in recent years.[1] This development can be ascribed in part to a growing awareness of the necessity to protect one's commercial insignia. Instrumental also, no doubt, has been the overall quickening in Irish commerical life, owing to such factors as E.E.C. membership and the success of national investment programmes in attracting industries from overseas.

Specialist agents have traditionally been dominant in the service of trade marks.[2] Lawyers who are not registered trade mark agents have, however, increasingly become involved in the field – in an advisory capacity to their business clients, and also in connection with litigation.

This article seeks to outline our legal code on trade marks. It refers, first, to the Trade Marks Act, 1963, and to the related case-law. It then treats the protection afforded unregistered marks by the common law action of passing off. Finally, it focuses on the regulation of trade marks under the Treaty of Rome, and on proposals of the E.E.C. Commission for a community – wide system of protection.

TRADE MARKS ACT, 1963

REGISTRABLE TRADE MARKS

General

A trade mark means "[except] in relation to a certification trade mark, a mark used or proposed to be used in relation to goods for the purpose on indicating, or as to indicate, a connection in the course of trade between the goods and some person having the right either as proprietor or as registered user to use the mark, whether with or without and indication of the identity of that person, and means, in relation to a certification trade mark, a mark registered or deemed to have been registered under S.45".[3]

Marks used in relation to service industries are not trade marks within the meaning of the Act.[4] A trade mark cannot, therefore, be registered in respect of, for example, a travel service, a repairing process or credit card facilities.[5] Such marks may, however, be protected in a passing off action and possibly even in an action for infringement of copyright.

A "mark" includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, or any combination thereof. The Act does not preclude other possible marks.[6]

A register of trade marks is kept at the Industrial and Commercial Property Registration Office; it is divided into two parts, Part A and Part B.[7] Registration in Part A, as will later be seen, affords greater protection than registration in Part B.

Part A Marks

Registration in Part A protects the owner of a trade mark against the use in the course of trade of an identical or a mark so resembling it as to be likely to deceive or cause confusion.

A trade mark, in order to be registrable in Part A, must contain or consist of at least one of the following essential particulars:[8]

(a) The name of a company, individual or firm, represented in a special or particular manner;

(b) the signature of the applicant for registration or some predecessor in his business;

(c) an invented word or words;

(d) a word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary signification of a geographical name or surname;

(e) any other distinctive mark, but a name, signature, or word or words, other than such as fall within the descriptions in paragraphs a, b, c, and d, is not registrable except upon evidence of its distinctiveness.

The particulars referred to in (a) and (b) above are self-explanatory. It is arguable that trade marks consisting of an invented word or words, i.e. marks which comply with (c) above, constitute the best type of trade mark. Invented words make highly distinctive trade marks, and are, moreover, highly flexible marketing instruments. The word "Aspro" is a typical example of such a mark.[9] Re *Hamilton Cosco Incorporated*[10] concerning an appeal from a refusal by the Controller of Industrial and Commercial property to register the word "Cosco" as a trademark. The applicant company had sought its registration as an invented word. The Controller refused registration because the word appeared twice in the New York Telephone Directory – once as a surname and once as part of the name of a company. The evidence before the court showed that "Cosco" was not a word which was, or ever had been, in use in this country as an ordinary English word. It was held, therefore, that, in all the circumstances of the case, the word "Cosco" was registrable as an invented word.

The particulars mentioned in (d) above will be understood if it is remembered that the primary function of a trade mark is to distinguish between the goods of competitors. A mark containing a "[Direct] reference to the character or quality of the goods" will obviously not

be distinctive, since any trader in the goods concerned may be expected to refer to his own particular goods in terms of their character or quality.[11] Trade marks incorporating geographical names or surnames are, similarly, vulnerable on the basis of non-distinctiveness. This is particularly true in the case of marks incorporating the names of countries or substantial towns, and of marks incorporating common surnames.

The category of trade marks registrable under (e) above is a residual one; the overriding consideration is that the mark be distinctive.[12]

Part B Marks

Trade marks registered in Part B, because they carry less protection than is afforded to part A marks, are sometimes referred to as second class marks.

In order that a trade mark be registrable in Part B, it must be capable "[In] relation to the goods in respect of which it is registered, proposed to be registered, of distinguishing goods with which the proprietor of the trade mark is, or may be, connected in the course of trade from goods in the case of which no such connection subsists, either generally or, where the trade mark is registered, or proposed to be registered, subject to limitations, in relation to use within the extent of the registration."[13] This, in effect, means that the standard of distinctiveness required of Part B marks is lower than that required of Part A marks.[14] Thus, for example, a Part B mark need not be distinctive when registered, so long as it is capable of becoming distinctive in use.

It was held in a recent case that the *potential* distinctiveness of a mark for purposes of registration in Part B could be shown by "[Proof] of the development of a secondary meaning which outweighs the apparently non-distinctive character of the mark when viewed in isolation ... (or by showing that) in spite of the absence of a sufficient distinguishing characteristic in the mark itself, distinctiveness can be acquired by appropriate user, thereby overcoming a negative quality in the mark."[15] Two illustrations may clarify these criteria. It has been held, for example, that the word "Aphrodisia" is capable of acquiring by user a distinctive character in connection with soaps and perfumes, but not in connection with drugs and medicines.[16] It has also been held that the word "Kreuzer", a surname, is so unusual in Ireland as to be capable of distinguishing a manufacturer's goods.[17]

Defensive Trade Marks

The trade mark classiffication is divided into thirty-four classes. These classes include such product groupings as machines and machine tools; vehicles; wines, spirits and liqueurs; and agricultural products, etc. A trade mark can be registered in respect of one or more classes of goods, depending on the product scope desired for the mark by the owner.[18] There is no general prohibition on the use of similar trade marks by firms in different trades. Thus, for example, there would normally be no infringement of trade mark if one concern marketed oranges under a trade registered by another concern in Part B in respect only of cosmetic products.

If a trade mark is so well known, however, that its use in connection with goods in respect of which it is not registered would be likely to indicate a connection in the course of trade with the owner of the goods in respect of which it is registered, then the latter may be entitled to obtain a defensive registration of the trade mark; the effect of such registration would be to preclude the use of the trade mark in connection with the first-mentioned goods.[19] Defensive registration may be obtained only in respect of trade marks consisting of an invented word or invented words.

Certification Trade Marks

Certification trade marks are used to certify goods in respect of origin, material, mode or manufacture, quality, accuracy or other characteristics.[20] Thus, a certification trade mark differs from an ordinary trade mark, a primary function of which is to indicate a trade connection between its owner and the goods in respect of which it is used.

Certification trade marks may be registered, not by a trader in the goods concerned, but only by an individual or association whose business includes the certification of goods in respect of origin or standards. Moreover, before registration of a certfication trade mark, regulations governing the use of the trade mark must be deposited at the Controller's office; these regulations must have the prior approval of the Minister for Industry, Commerce and Energy.

Certification trade marks are registered only in Part A of the register.

Associated Trade Marks

The owner of a trade mark in respect of a class of goods, who wishes to register an identical or similar trade mark in respect of the same class of goods, may obtain their registration as associated marks.[21] An owner can moreover split a mark by registering a part of parts of it as separate marks, and he may also register a number of similar marks as a series.[22]

Prohibited Marks

A trade mark the use of which would, by reason of its being likely to deceive or cause confusion, be disentitled to protection in a court of law, is not registrable. It is also unlawful to register a scandalous design, or a trade mark the use of which would be contrary to law or morality.[23]

In addition, a trade mark will not be registrable in respect of goods if there is an identical trade mark already on the register in respect of the same goods. Finally, a trade mark cannot be registered in respect of goods if it is so nearly resembles an already registered trade mark in respect of the same goods as to be likely to deceive or cause confusion.[24] An illustrative case is *Re Mediline Aktiengesellschaft*.[25] The applicants here appealed against the Controller's decision to register the word "Bidex". The refusal to register was on the basis that the trade mark would be likely to deceive or cause confusion with the previously registered trade mark, "Barbidex". It was held by the High Court that the two words did not so nearly resemble each other as to be likely to deceive or cause confusion, and that, therefore, "Bidex" was registrable as a trade mark.

REGISTRATION

Application

Any person caliming to be the proprietor of a trade mark may apply in writing to the controller for its registration.[26] The Controller may refuse application on the ground that the mark concerned is not distinctive, on the ground that the specification of goods sought to be covered by the registration is too wide. He may also

refuse an application if, for example, he considers that the mark is immoral, illegal, improper, scandalous or misleading.

An appeal lies to the court against any objection raised by the Controller in respect of a registration.[27] One instructive case concerned an appeal against an appeal against a refusal by the Controller to register the mark "Durex" in respect of surgical gloves. Hamilton J. upheld the appeal. He found that the word "Durex", although associated in public mind with a particular brand of contraceptives, was not associated with contraceptive generally to such an extent as to be synonymous therewith, or to such an extent as to be likely to deceive or cause confusion if registered in respect of surgical gloves.[28]

Opposition

An application for registration, after it has been accepted, is advertised by the Controller. Any person may, within one month from the date of the advertisement of an application, give notice to the Controller of opposition to the registration.[29]

Opposition may be based on any ground that would preclude or invalidate registration – the most common ground of opposition is that the mark concerned is too similar to an existing mark. An appeal lies to the court from the decision of the Controller as to whether an opposed mark should be registered.

When an application for registration has been accepted and the time for opposition has expired, or where the application has been opposed but not successfully, the trade mark is registered as of the date of application.[30]

Certificate , Duration and Renewal

A certificate is issued under the Controller's seal on the registration of a trade mark.[31] The duration of the initial registration is seven years. Registration may be renewed indefinitely thereafter for fourteen-year periods.[32]

Disclaimer

If a trade mark contains any part not separately registered by the proprietor as a trade mark, or matter common to the trade or otherwise of a non-distinctive character, the Controller or the court, in deciding whether the trade mark should be entered or remain on the register, may require a disclaimer by the proprietor. As a condition to the trade mark being on the register, the proprietor may be required, for example, to disclaim any right to the exclusive use of any part of the trade mark.[33]

The recent case of *Western Brands Inc. v. The Controller* provides an illustration.[34] It concerned an application for Part B registration of the name "Silva-Thins", in respect of cigarettes. On appeal from the Controller's refusal to register the name, it was held that "Silva-Thins", with a hyphen between the two words, was capable of distinguishing within the meaning of section 18. The presiding judge set out however, as a pre-condition to registration, that the applicant disclaim any right to the exclusive use of either the word "Silva" or the word "Thins".

It is clear that a disclaimer under the Act does not affect any rights which the proprietor may have in respect of the mark at common law.

EFFECT ON REGISTRATION

The effect of registration depends on whether the mark is registered in Part A or Part B. A person entitled to a trade mark registered in Part A has the exclusive right to the use of the mark in relation to those goods for which it is registered.[35]

A person entitled to a mark registered in Part B is also entitled to exclusive user.[36] The degree of protection afforded this right is, however, lower than that given in respect of Part A marks. If another manufacturer or trader uses a similar or even identical mark, the person entitled to a Part B mark will fail in an infringement action if the defendant proves two points: first, that the use complained of is not likely to deceive or cause confusion; and, secondly, that the use complained of is not likely to be taken as indicating a connection in the course of trade between the goods and the person entitled to the registered trade mark.

DEALINGS ON THE REGISTER

Trade marks may be assigned, transmitted or licensed. The register, moreover, may be rectified in certain instances.

Assignment and Transmission[37]

Registered trade marks are, subject to certain conditions, assignable and transmissable, either in connection with the goodwill of the business or not.[38] An assignment may be in respect of all or only some of the goods in respect of which a trade mark is registered.

Unregistered trade marks are assignable and transmissable under the Act, but only in conjunction with registered trade marks.

Assignment of a trade mark without the goodwill of a business has no effect unless and until, upon application by the assignee, notice of the assignment is published by the Controller in the Official Journal of Industrial and Commercial Property.[39]

Associated trade marks are assignable and transmissible as a whole, and not separately.[40]

A registered user has no assignable or transmissible right in the mark.[41]

Licences: Registered Users

The Act contains a number of closely circumscribed provisions for the licensing of trade marks.[42] The prospective licensee of a mark must, together with the proprietor of the mark, apply in writing to the Controller for registration of the user required. The Controller has a discretion in deciding whether or not to grant the licence; he is obliged, in particular, to have regard to the public interest.

Rectification

The register may be rectified either by the Conroller or by the court at the request of the proprietor of a trade mark, or on the application of a "person agrieved".[43] The possible grounds for rectification are numerous. For example, a registration obtained by fraud, or an entry made in the register without sufficient cause, may be rectified. In *Re Carl Zeiss Stiftuna,*[44] a German company applied for the removal of the trade mark "Punktal" from the register. The mark had previously been registered by an Irish company in respect of "lenses of all kinds". The application for rectification was granted, on the ground (among others) that the Irish company had not been the proprietor of the trade mark at the time of its registration.

Rectification may also be made on the breach of a condition attaching to a registration, or by way of correcting any errors in any entry on the register. A registration may, moreover, be altered by way of variation of a trade mark, or by way of amending the classification of goods in respect of which a mark is registered.

INFRINGEMENT OF TRADEMARKS

The principal form of infringement is where a person, not being the proprietor or the registered user of a mark, uses an identical mark or a mark so nearly resembling it in a manner likely to deceive or to cause confusion in the course of trade.[45] Examples of infringements which have occurred in this way include the use of "Pem books" in the light of the registered mark "Pan books", and of "Watermatic" in the light of the registered mark "Aquamatic". On the other hand, the use of "Gala" has been held not to infringe "Goya", and the use of "Kidax" has been held not to infringe "Daks". The difficulties that arise in border-line cases were well illustrated in *United Biscuits Ltd. v. Irish Biscuits Ltd.*[46] The plaintiff in that case was the owner of the mark "College Creams", which was registered in respect of certain biscuit products. The defendant marketed a similar type of biscuit under the name "Cottage Creams". In a subsequent action for infringement, it was held that the defendant's mark did not so resemble that of the plaintiff as to be the likely to deceive or cause confusion in the course of trade.

The owner of a trade mark may, by contract in writing with a purchaser or owner of goods, extend in certain ways the rights given him by registration.[47] Thus, for example, he may prohibit the alteration, removal or obliteration, or a trade mark upon the goods, or the addition to the goods of any other written matter that is likely to injure the reputation of the trade mark. The doing of any of these prohibited acts will constitute an infringement.

The use of a trade mark by a person other than the one entitled to its use will not, in certain instances, constitute an infringement. Instances include the sale of accessories, spares and components, by reference to the trade marks used on the "principal" goods, provided such use is reasonably necessary to show the adaptable use of the accessories, etc.[48] Thus, the sale of a brand of oil "for use in Ford Motors" would probably not constitute an infringement of the "Ford" trade mark. Furthermore, the use by a trader of his own name will generally not constitute an infringement of trade mark.[49]

POWERS AND DUTIES OF THE CONTROLLER

The Controller has the general responsibility for administering the Trade Marks Act.[50] Some of his functions have already been noted, e.g., those in connection with applications for registration or rectification, and with the issue of certificates of registration. The Controller has the power to award costs in all proceedings before him. He may also initiate criminal proceedings in the event of a false representation that a trade mark is registered. In the event of any doubt or difficulty in relation to his functions, the controller is empowered to seek directions from the Attorney General.

One of the Controller's functions relates to the giving of preliminary advice as to distinctiveness; a prospective applicant for registration of a mark may obtain such advice on application in the manner prescribed.

The Controller, in relation to any power exercisable by him, must permit an opportunity to be heard to an applicant for registration or to the registered proprietor of a mark.

Evidence received by the Controller must generally be given by affidavit, though he may take oral evidence in lieu thereof, or in addition thereto.

An appeal lies to the courts from most decisions of the Controller.

PROTECTION OF MARKS AT COMMON LAW

PASSING OFF

Protection of business goodwill generated by advertising and other means is not confined to actions for infringement of *registered* trademarks. The common law action of passing off may also avail a manufacturer or trader in a suitable case.

A proprietary right in one's business (including the goodwill) is recognised at common law. The passing off action is based on the principle that this right will be infringed if one concern represents its merchandise in such a manner as to mislead the public into believing that it is the merchandise of another.

The varieties of passing off are numerous. They include the application to products of "badges" or signs which are identical or similar to those used by a rival. The use of another's trade mark (whether registered or unregistered) is one example. So is the use of another's business name. Another form of passing off is to "get-up" a product (e.g. in terms of colour scheme, shapes, sizes, designs or packaging) in a way similar to that of a competitor's. A case in point is *Polycell Products* v *O'Carroll and Others*.[51] The plaintiff there had, since 1954, marketed a cellulose adhesive under the (unregistered) mark "Polycell". The defendants, in 1959, introduced to the market a similar product under the name "Clingcell". That product was sold in a "get up" which closely resembled that of the Plaintiff's product – the packaging, colour schemes, slogans, etc., were in each case similar. It was held, on an application for an interlocutory injunction, that the activities of the defendant could amount to a passing off of the palintiff's goods.

The passing off action has in many respects a wider application than the action for infringement of registered trade marks; it is not uncommon, moreover, for the two actions to be combined in litigation. The action at common law has, however, two sizeable drawbacks. In the first instance, the plaintiff must prove both that his product has acquired a reputation among customers, and also that the defendant's product presentation will deceive or confuse these customers. Secondly, a successful passing off action against one business rival will not be conlcusive against other business rivals. These shortcomings in the common law approach were, indeed, a motivating influence in the initial provision for registration of trade marks in 1875.

TRADE MARKS IN E.E.C. LAW

PRESENT POSITION

Treaty Provisions

Ireland's accession to the E.E.C. in 1973 brought a new dimension to our law on trade marks. The Treaty of Rome contains certain provisions, pertaining to trade marks, which are of direct applicability.

Article 222 contains one such provision: it states that the "[Treaty] shall in no way prejudice the rules in Member States governing the system of property ownership. That provision, if taken is isolation, would appear to guarantee the unfettered assertion of, inter alia, national conferred trade mark rights. It must, however, be read in the light of articles 85, 86 and 30-36 of the Treaty.[52] Agreements or practices having as their object or effect the erosion of competition in transnational trade within the common market are prohibited by article 85. Article 86 strikes at the abuse by an undertaking of a dominant position within the common market or in a substantial part of it. Finally, articles 30-36 embody general principles designed to promote the free movement of goods between member states. Article 36 expressly refers to industrial property (which includes trade mark rights): impediments on the export and import of goods my be imposed for the protection of such property provided, however, that these shall not "[Constitute] a means of arbitrary discrimination or a disguised restriction on trade between Member States."

Case Law

Reconcilliation of the foreging Treaty provisions – which on first view seem to comprise the proverbial "can of worms" – has been achieved by the Court of Justice in a number of cases on trade marks.[53] A central feature of the Court's approach has been to hold that, while the Treaty of Rome does not affect the *existence* of national trade mark rights, the *exercise* of these rights may be curtailed in order to promote competition and the free movement of goods between the member states.

A number of illustrations will indicate the approach of the Court. It has, for example, occasionally been alleged that agreements on trade mark rights have been used to divide up or allocate markets. The case of *Sirena* v *Eda*[54] concerned a mark "Prep", which was registered in Italy in respect of shaving cream by an American company, Mark Allen. That company transferred the mark in Italy to Sirena, which commenced to use the mark in its trading. The Mark Allen company subsequently permitted a German enterprise to use the mark.

Sirena sued in an Italian court for infringement when the German enterprise began to market in Italy a shaving cream under the "Prep" mark.

The Court of Justice – to which the case was referred under article 177 – ruled in part as follows: "Article 85 is applicable where the trade mark is invoked to prohibit imports of products coming from other Member States and carrying the same trade mark, if the owners of the trade mark acquired the mark or the right to use it under agreements between themselves or agreements with third parties."[55]

Even in the absence of a restrictive agreement or practice, the exercise of national trade mark rights may be restrained in order to prevent the abuse of a dominant postion within the meaning of article 86. In *Sirena* v *Eda* (noted above), the Court of Justice elaborated on this possibility: "The owner of a trade mark does not enjoy a 'dominant position' within ... Article 86 of the Treaty merely because he can prohibit third parties from marketing products bearing the same trade mark in the territory of a Member State ... (It) is necessary in addition that the trade mark owner should have the power to prevent the maintenance of effective competition in a considerable part of the market in question ... With regard to the improper exploitation of a dominant position, the higher price of the product, although it does not *per se* constitute sufficient proof, may nevertheless become so, in view of its size, if it does not seem objectively justified."[56]

Contention has also arisen where, although again no restrictive practice or agreement existed, it has been alleged that trade mark rights have been exercised so as to derogate from the principle of free movement of goods. *Van Zuylen Frères* v *Hag A. G.* is a case in point.[57] Hag A. G. was the holder of trade marks in Germany, Belgium and Luxembourg. The most important element in these marks – which were registered in respect of coffees – was the term 'Hag'. The marks registered in Belgium and Luxembourg came, by a series of transactions, into the hands of the plaintiff.

When Hag A.G. began to deliver its coffees to Luxembourg under the German Hag trade mark, Van Zuylen Frères sued for infringement.

The Court of Justice on a request for a preliminary ruling, held that "[One] cannot allow the holder of a trade mark to rely upon the exclusiveness of a trade mark – which may be the consequence of the territorial limitation of national legislations – with a view to prohibiting the marketing in a Member State of goods legally produced in another Member State under an identical trade mark having the *same origin*".[58]

The Hag case made inroads on the territorial protection afforded by national trade marks. The confinement of the holding in the case to conflicts involving marks of common origin was, however, confirmed in the more recent case of *Terrapin* v *Terronora Industrie*.[59] The plaintiff, an English company, was the owner of the mark 'Terrapin', registered in the U.K. in respect of prefabricated houses. The defendant, which had a German subsidiary, was the owner of the mark 'Terranova'; this mark was registered in Germany in respect of building materials.

Proceedings ensued when the plaintiff company sought registration of its 'Terrapin' mark in Germany.

It was held, on a referral to the Court of Justice for a preliminary ruling, that "[An] industrial or commercial property right legally acquired in a Member State may legally be sued to prevent under the first sentence of Article 36 of theTreaty the import of products marketed under a name giving rise to confusion where the rights in question have been acquired by different and independent proprietors under different national laws."[60] This decision, thus, substantially reverted the balance in favour of national trade mark systems.

One theme recurs, whtether explicitly or implicitly, in the foregoing cases; namely, the interplay between nationally conferred monopoly rights and the European ideal of a single and competitive market. The Court of Justice has furnished substantial guidelines. Further litigation is, however, inevitable, according as the balance in emphasis swings between the two opposing concepts.

PROPOSED E.E.C. TRADE MARK

Rationale

Trade marks within the E.E.C. are divided, at present, into seven national varieties.[61] This diversity in national systems clearly impedes the free movement of goods between the member states.

The Court of Justice has curtailed, in exceptional circumstances, the exercise of national rights to prevent the sale of imported branded goods.[62] The Court is, however – in its efforts to promote a unified and competitive Community market – relatively powerless to undermine the territorial protection conferred by national trade mark rights.[63] Realization of this fact, perhaps more than any other reason, has recently prompted the Commission to adopt a memorandum which urges the creation of an E.E.C. trade mark.[64]

The memorandum in question takes the form of an advanced-level discussion document. Its central proposal – the creation of a unitary and autonomous Community trade mark – is recommended in preference to the approximation of national trade mark laws.[65] The latter expedient could obviate some discrepancies – e.g., in the criteria for registration – between the different national systems. It would, however, leave untouched the principle of territorial protection.

The course recommended, therefore, anticipates resort to the reserve powers vested in the Community institutions by virtue of Article 235 of the Treaty of Rome. That provision states that "[If] action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall acting unanimously on a proposal from the Commission and after consulting the Assembly, take the appropriate measures."

Basic Concepts

The proposals envisage a balanced and attractive code of protection, which will represent a genuine alternative to the existing national and international systems.

It is conceived that the E.E.C. mark should have both a unitary and autonomous character. The unitary aspect implies that the mark could be applied for and registered only in respect of the entire area of the E.E.C. A firm insistence on the unitary principle would entail, however, that any prior national mark could be raised to obstruct the registration of an E.E.C. mark. For that reason, departure from the unitary principle is foreseen in respect of national rights as having only a local or regional importance.

The autonomous nature of the Community mark would be ensured by providing that, in general, it be subject only to the proposed law.

A fundamental assumption in the Commission's perspective is that national trade mark laws will co-exist with the E.E.C. code. Continuing protection for marks at national level is regarded as essential for a number of reasons. The majority of trade marks in the Community, for example, are registered in the one state only, and this implies that their owners do not require a more far-reaching protection. Many trade marks, moreover, are unsuitable on linguistic grounds for use outside their own language field. Finally, unregistered marks would not be protected within the Community code.

Substantive and Procedural Principles

The law proposed to govern the E.E.C. trade mark reflects to a large extent the principles contained in, for example, the Irish Trade Marks Act. It refers to such matters as the various categories of marks, the registration procedure and also the disposition of registered rights.

In certain respects, however, the proposed law differs from the Irish scheme. It provides, for example, for the protection of *service* marks: the Commission takes the view that service sectors – such as transport, banking and insurance – have a justifiable interest in their commercial insignia. In addition, the definition of trade mark would be sufficiently wide to cover colour combinations, as well as the shapes and packaging of articles.

Applications for registration would be addressed to an E.E.C. Trade Mark Office. The grounds suggested for refusing a mark divide into absolute and relative categories. Absolute grounds of refusal refer to exclusions on the basis of public interest – contemplated here are non-distinctive, and also descriptive or deceptive marks. Relative grounds of refusal to exclusions of marks by virtue of prior registered rights.

In the event of opposition to a registration, referral could be made to a Conciliation Board. Should settlement proposals made by the Board prove unacceptable, a series of appeals would lie – in the first instance, to the appeals section of the E.E.C. Trade Mark Office; and from there, to the Court of Justice.

CONCLUSION

Most trade mark issues encountered by the Irish lawyers are likely to be governed by the Trade Marks Act, 1963. On questions of interpretation under that Act, it may however be necessary to refer to the fast-growing case law. It is significant that the majority of decided cases relate to the criteria for registration. Many of these cases, moreover, concern marks which in other countries are established surnames or geographical names, or which in languages other than English are descriptive of the goods in respect of which registration has been sought. Examples are 'Farah', 'Silva-Thins', 'Miele', 'Aphrodisia', Kreuzer', and 'Kiku'. A recurring issue for the courts has been whether such marks, notwithstanding their significations elsewhere, would *for people in Ireland* possess the standards of distinctiveness necessary to secure registration.

The common law action of passing off is probably of declining importance, owing to the growing appreciation of the advantages of registration. It retains nevertheless an essential place in the regime of protection since it covers, not only marks in the statutory sense, but also any other characteristics which form part of the presentation of a product. Moreover, the possibility of an action at common law will in most instances be seen as a sufficient safeguard for the trade marks of the smaller type business.

The provisions on trade marks in the Treaty of Rome have relevance only in the context of transnational trade. They stand however as a potential litigation-trap, and merit attention when, for example, an Irish concern proposes to take an assignment or licence of a trade mark from a company with trading connections in other E.E.C. mamber states.

Finally, the proposals for an E.E.C. trade mark will hold interest for the increasing number of Irish concerns

who are looking towards the European export markets. Implementation of these proposals is expected in the 1980s.[66]

FOOTNOTES

1. This point is demonstrated by the following figures: during the year ending in December, 1977, the applications for registration of trade marks numbered 3,319; the corresponding figures for 1963 and 1967 were 1,661 and 1,999 respectively.
   Notice that subsequent references to figures for acts and dealings under the Trade Marks Act, 1963, in respect of the year 1977, are based on the Fiftieth Report of the Controller of Patents, Designs and Trade Marks; that report was issued in April, 1978.
2. Recognition of trade mark agents is provided for in section 69 of the Trade Marks Act, 1963. At the end of 1977, there were 95 persons and 10 partnerships entered on the register of trade mark agents.
3. Trade Marks Act, 1963, section 2(I). Further references to sections will refer to the Trade Marks Act, 1963, unless the contrary is indicated.
4. Id.
5. See, e.g., *Re Bank of America National Trust & Savings Association* (H.Ct.) [1977] F.S.R. 7; *Western States Bank Card Association* v *The Controller of Patents, Designs and Trade Marks* [1978] unrep. (H.Ct., 126-1975). See also, e.g., Re *Royal Inns of America Inc.*, [1977] F.S.R. 144, a case which concerned marks used in catering services.
   Notice that, in future citations, the Controller of Patents, Designs and Trade Marks will be referred to simply as The Controller.
6. Supra at footnote 3. In Re *Parke Davis & Co.* (H.Ct) [1976] F.S.R. 195, for example, a blue band on a capsule containing a pharmaceutical product was held to be a trade mark within the Act. See also, e.g., *Arby's Inc.* v *The Controller* [1978] unrep. (333-1976).
7. Section 9. In 1977, regisgrations of trade marks numbered 1,380 in Part A, and 380 in Part B.
8. Section 17(I).
9. See also e.g., Re *A.C.E.C. (Ireland) Ltd.* [1964] I.R. 201.
10. [1966] I.R. 266.
11. See, e.g., Re *Mothercare Ltd.*, [1968] I.R. 359; *Application of Philip Morris Inc.* [1970] I.R. 82; *Application of Schweppes (Overseas) Ltd.* [1970] I.R. 209; Re *Kilku* (Sup. Ct.) [1978] F.S.R. 246.
12. See, e.g., Re *Mothercare Ltd.* [1968] supra at footnote 11; *Farah Manufacturing Co. Inc.* v *The Controller* [1972] unrep. (H.Ct., 172-1971); *Badische Tabak Manufacktur Roth Handle G.M.B.H.* v *The Controller* (1972) unrep. (HCt.); *Lever Brothers (Ireland) Limited* v *The controller* [1974] unrep. (H.Ct., 45-1972); *La Chemise Lacoste S.A.* v *The Controller* [1978] unrep. (38-1974).
13. Section 18(I).
14. For cases in which the criterion for Part B registration has been discussed, see, e.g., *Lever Brothers (Ireland) Ltd.* v *The Controller*, supra at footnote 12; *Miele & C.I.E.* v *The Controller* [1975] unrep. (H.Ct., 1965-1974); *La Chemise Lacoste S.A.* v *The Controller*, supra at footnote 10.
15. Passage from the judgement of the English Court of Appeal in *The Weldmark Trade Mark* [1966] R.P.C. 220, cited with approval by Kenny J. in *J. C. Penney Inc.* v *The Controller*, [1974] unrep. (H.Ct., 190-1973) at 12.
16. Re *Apphrodisia Faberge Inc.* v. *The Controller* (H.Ct.) [1977] F.S.R. 133.
17. Re *Kreuzer* (H.C.t.) [1978] F.S.R. 239.
18. Sections 3, 11 and 44. Of the various classifications, the most important in numerical terms have been Pharmaceutical substances etc., Chemical products etc., Bleaching preparations etc., Coffee, tea, cocoa, sugar, rice, etc., and Clothing, including boots, shoes and slippers. The classification of Pahrmaceutical substances etc. has, more or less consistently, been the one in respect of which most trade marks have been registered annually; 345 marks were registered for that classification in 1977.
19. Section 35.
20. Section 45.
21. Sections 31, 35(3) and 38(1).
22. Section 29.
23. Section 19.
24. Section 20.
25. [1970] I.R. 169. See also, e.g., *Carroll & Co. Ltd.* v *Phillip Morris Incorporated* [1970] I.R. 115.
26. Section 25.
27. Section 57. In 1977, hearings were held in connection with 218 applications for registration. No notice of appeal to the Court was received by the Controller in respect of his decisions.
28. *L.R.C. International Ltd.* v *The Controller*, [1976] (H.Ct, 599-1971).
29. Section 26. On December, 1976, 24 instances of opposition were pending. In 1977, notices of opposition were given in 34 cases. Out of this total (58), application for registration was withdrawn in four cases, opposition was withdrawn in ten cases, and the remaining 44 cases were still pending at the end of the year.
30. Section 27.
31. Id.
32. Section 28. The number of registrations of trade marks renewed in 1977 was 2,905.
33. Section 22.
34. [1974] unrep. (H.Ct., 127-1971).
35. Section 12.
36. Section 13.
37. Section 30.
38. In 1977, 173 persons were entered in the Register as proprietors of trade marks consequent on assignments or transmissions; 674 marks were affected.
    It has been held that there can be no assignment within the Act of a pending trade mark appllication; *Western States Bank Card Association* v *The Controller*, [1978] unrep. (H.Ct., 126-1975).
39. The Official Journal of Industrial and Commercial Property is issued fortnightly, and occasionally with supplements. It contains particulars of current acts and dealings with patents, designs and trade marks.
40. Section 31(1).
41. Section 36(10).
42. Section 39. In 1977, the number of persons as Registered Users was 77; 165 registered trade marks were affected by the entries. In the same year, nine registered users were, on application, removed from the register.
43. Sections 40-43.
44. [1963] I.R. 221. See also, e.g., *Bulmers Ltd.* v *Showerings Ltd.* [1962] I.R. 189, where an application for the removal of the mark 'Babycham' from the register proved unsuccessful.
    As to the removal of a mark from the register on the ground of non-user under section 34, see for example the recent case of *Beecham Group Ltd.* v *Goodalls of Ireland Ltd.*, [1978] unrep. (H.Ct., 4662-1977).
45. Section 12. Also on infringement, see sections 10, 11, 13, 14, 15 and 16.
46. [1971] I.R. 16. See also, e.g., *Coca-Cola Co.* v *F. Cade & Sons* [1957] I.R. 196; *I B P Industrie Buitoni Perugina S.P.A.* v *Dowdall O'Hahoney & Company Manufacturing Ltd.*, [1978] unrep. (Hct., 5715-1977).
47. Section 14.
48. Section 12(3).
49. Section 16.
50. For the provisions relating to the Office of the Controller, see in particular Part 3 of the Act, i.e., sections 48-62. It is worth noting that the Minister for Industry, Commerce and Energy is empowered under section 3 and 44 to make rules governing the admininstration of the Act: current rules are the Trade Mark (Amendment) Rules, contained in Statutory Instrument 26/1977. Notice also that, under section 84 of the Patents Act, 1964, the Controller is obliged to furnish an annual report to the Oireachtas.
51. [1959] I.G.R. 35. See also, e.g., *Sterling & Winthrop* v *Farbenfabriken Bayer* [1967] I.R. 97; *Cantrell & Cochrane (Dublin) Ltd.* v *Savage Smith & Co. Ltd.* [1975] unrep. (H.Ct., 2884-1975); *C. & A. Modes and C. & A. Ireland* v C. & A. (Waterford) Ltd., and Others [1975] unrep. (sup. Ct., 103-1975); *Grange Marketing Ltd.* v *M. & Q. Plastic Products Ltd.* [1976] unrep. (H.Ct., 80-1976).
52. For an account of the relevance of these articles to industrial property rights generally, *see* C. Bellamy & G. Child, Common Market Law of Competition, pp. 196-959 (1973).
53. For a treatment of the recent trends in the relevant case law, see *J. Temple Long, Recent Developments in E.E.C. Restrictive Practices and Monopoly Law, 1 Journal of the Irish Society for European Law 4* (1977).
54. Case 40/70, *Sirena* v *Eda;* C.C.H. Common Market Reporter (Court Decisions, 1971-1973) at para. 8101. See also, e.g., Case 96/75, *E.M.I.* v *C.B.S. Schallplatten G M.B.H.;* [1976] 2 C.M.L.R. 235.

DUBLIN SOLICITORS' BAR ASSOCIATION

DUBLIN CIRCUIT COURT

Rumour has it that it has become more difficult of late to obtain adjournments by consent in the Dublin Circuit Court! Perhaps regrettably, the Bar Association must acknowledge a certain complicity in this state of affairs, having played a modest part in, first, pressing the President of the Circuit Court to clear off the very considerable arrears which he had inherited and, subsequently, give such modest assistance as we could in achieving an improvement.

In the event, the President of the Circuit Court achieved a miracle and the vast volume of both Criminal and Civil arrears was eliminated.

The Association felt moved to express to the President the appreciation of Dublin practitioners of his heroic efforts on our behalf and was delighted to receive in reply a very kind letter from the President which, with his permission, is reproduced below.

An Chúirt Chuarda
(The Circuit Court)
Na Ceithre Cúirteanna
(Four Courts)
Baile Átha Cliath 7
(Dublin 7)

Dear Mr. Smyth,

My colleagues and I are very grateful to you and to the Council of the Dublin Solicitors' Bar Association for your very kind letter concerning the elimination of the arrears in the Dublin Circuit. We appreciate greatly the generous gesture of The Council in sending us their thanks. We are pleased that the result of our effort is satisfactory to the Dublin Solicitors.

My colleagues and I wish to thank the Solicitors of Dublin for their co-operation and help which we received from them during the past strenuous twelve months. That co-operation and help were decisive factors in our success.

Yours sincerely,

Thomas J. Neylon.

CONVEYANCING NOTE

LAND REGISTRY FOLIOS

Note from the Dublin Solicitors' Bar Association

To avoid confusion, it is perhaps worth reminding practitioners that the Land Registry has in the recent past instigated the practice of including the letter "F" in the numbers of newly created freehold folios.

The profession has long been familiar with the concept of the letter "L" designating leasehold folios, so the recently introduced practice is not, of itself, strange.

What may, however, be misleading to the unwary is that the Land Registry is not applying the letter "F" to every freehold folio, both old and new. Instead, the Registry is using the same numerical range as was already utilized both for "L" folios and for the former "undesignated" freehold folios. Thus there are now many recently created freehold filios designated by the letter "F", but bearing the same number as the older "undesignated" folios.

When bespeaking documents or conducting dealings in the Land Registry it is now essential to ensure, in the case of freehold folios, that all documentation should include the letter "F", if appropriate, and should carefully *avoid* that letter in the case of older folios.

DUBLIN SOLICITORS BAR ASSOCIATION

CAREER PROSPECTS MEETING

The Association will be holding a meeting for Apprentices who are about to qualify and recently qualified Apprentices on **Career Prospects** on Wednesday 16 May in Blackhall Place.

(Continued from previous page)

55. *Sirena* v *Eda*, supra at footnote 54, para. 8101.
56. Id.
57. Case 192/73, *Van Zuylen Frères* v *Hag A.G.*; [1974] E.C.R. 731 at 744.
58. Id. (Emphasis added).
59. Case 19/75, *Terrapin Ltd.* v *Terranora Industrie*; [1976] 2 C.M.L.R. 482. See also, e.g., Case 24/67, *Parke Davis* v *Probel and Others*; [1968] E.C.R. 55; [1968] C.M.L.R. 238.
60. *Terrapin Ltd.* v *Terranova Industrie*, supra at footnote 49, at 506.
61. A uniform system of trade mark law exists in the Benelux countries.
62. See, e.g., *Van Zuylen Frères* v *Hag A.G.*, supra at footnote 57.
63. See, e.g., the cases cited in footnote 59.
64. This memorandum was written in the light of earlier work by the E.E.C. Commission on trade marks. Initiatives on the harmonization or unification of industrial property law were taken in 1959. These gave rise in 1964 to a draft Convention for a European Trade Mark. Further work in the field was suspended until 1973, when preparation of the latest proposals began.
65. Article 3(H) of the E.E.C. Treaty provides for the approximation of the laws of the member states to the extent required for the proper functioning of the common market.
66. This prediction was made by the Controller, Mr. M. J. Quinn, in his report for 1977. The Office of the Controller has been represented at several meetings called by the Commission on the proposals.

MAPPING AND THE ROLE OF THE ORDNANCE SURVEY

This article has been prepared through the kind co-operation of the Assistant Director, Ordnance Survey Office, Phoenix Park, Dublin.

While the Ordnance Survey is recognised as the official central survey and mapping organisation for the country, the full scope of its operations are not widely appreciated. It is responsible for geodetic surveys, topographical surveys and the production of maps at various scales from these surveys.

The historical roots of the organisation go back some hundreds of years, but its activities today evolved from decisions taken by a Committee set up by the then Minister for Finance in 1964 to advise on the mapping requirements of the State.

At present the main task is to bring the 19th and early 20th century 1:2500 maps up to date and to produce and maintain up to date surveys at 1:1000 scale for urban areas.

The older maps were surveyed and published on a county basis showing no detail beyond the county boundary. New mapping is surveyed and published on a National basis and is drawn on a Transverse Mercator projection.

The Mapping Plan

The main recommendations of the 1964 Committee were:

Ireland should be surveyed and mapped on a National basis (Transverse Mercator, National Grid).

The standard Ordnance Survey (O.S.) scales would be:

Large scale: I 1:1000, for urban areas, towns and villages with a population of 1000 or more. Number of plans 5000 in State. Plan size – 600 x 800mm.

II 1:2500. Base scale for all Ireland. Number of plans 30,000. Plansize – 600 x 800mm.

III 1:5000. Derived Mapping for all Ireland. Number of Plans 7500. Plan size – 600 x 800mm.

Small scale: IV 1:25,000 for all Ireland.
V 1:50,000 for all Ireland.
VI 1:100,000 for all Ireland.
VII 1:250,000 for all Ireland.
VIII 1:500,000 for all Ireland.

Mean sea level would be adopted as datum for height information.

Contours at five metre intervals would be shown on the 1:5000 sclae map.

The large scale mapping programme was first priority. How the policy was to be implemented was left to the Ordnance Survey.

Large Scale Maps

In the Ordnance Survey the 1:1000, 1:1250 (50 ins.) 1:2500 (25 ins), 1:5000, and 1:10560 (6 ins) maps are considered to be large scale. It is always difficult to define the status of a product or an organisation at a time of great change and this is the position in which the Ordnance Survey and its mapping finds itself at this time. The old is still with us and new has not arrived (except for some of the 1:1000 urban mapping). Since the last large scale survey (1:2500 or 25 ins) at the end of the 19th and the beginning of the 20th century only five counties have been completely revised. Other counties have had partial revision carried out. The 1:2,500 mapping was surveyed and published on a county basis and covered the country with the exception of some mountainous areas, some areas of bogland and islands. These areas were surveyed and published at 1:10,5000 scale. (1:1250 or 50 inch maps were photographic enlargements).

This was still the position for rural mapping up to 1978 when the first new 1:2500 maps surveyed on a National basis were published for Limerick. The first 1:5000 derived maps with five metre contours were also published. These are the first steps in a 25 year remapping programme for the State. Urban mapping has, since 1968, been surveyed on a National basis and this programme is now nearly half-completed in terms of map sheets to be surveyed and published.

The Ordnance Survey now has two large scale mapping programmes running in parallel:

(1) Urban Mapping.
(2) Rural Mapping.

It is planned that the urban mapping programme will be completed within the next eight years, (an urban area is defined as one with a population of a 1,000 or more according to the census records) and this mapping will be maintained on a continuous basis as well as cyclic basis. Derived maps are now becoming available at 1:2500 scale for some urban areas. Urban mapping will not in the future be restricted to locations where rural mapping is also taking place; urban surveys will proceed independently.

Rural mapping at 1:2500 scale will be the main task of the Ordnance Survey over the next 25 years. Maps at 1:5000 scale will be derived from these and in addition will have contours at five metre intervals.

It is not proposed at this time to replace the 6 ins map. Using present compilation methods the publication of a 1:5000 series and 1:10,000 series would be prohibitively costly. Developments in compilation methods, however, indicate that 1:10,000 mapping could be provided in the near future should there be a demand for it.

Main mapping efforts are now centred in the Limerick, Waterford and Galway areas. The names of counties only indicate general locations and, in fact, the Limerick centre includes parts of Clare and will soon include Tipperary. It is hoped to open other centres within the next few years

such as the North East (Louth/Westmeath) and the South East. Preparatory mapping is now taking place in these areas.

What is accuracy?

"How accurate is the map?" This question, so often asked bur rarely if ever answered, is a fundamental issue and of universal concern to most map users. The reason why the question is so difficult to answer is that it cannot be defined rigidly. Accuracy is relative rather than absolute as far a cartographers are concerned, maps being generalisations and copies of the detail shown on the ground. Accuracy will vary with scale but not necessarily in proportion to the scale and even over a single map sheet accuracy may vary for different types of detail. A map quite suitable for use by a solicitor, as a conveyancing document showing a parcel of land, may not have been accurately described in land use terms and as such may be of little value to a botanist or an agriculturalist. The apparently simple question of how accurate is a map can then conjure up many, possibly unforseen, difficulties in providing a simple answer.

Recognising that accuracy will vary, depending on what is being defined, it would be reasonable to expect a root mean accuracy of 0.5 metre on 1:1000 mapping and 2 metres on 1:2500 for the positional accuracy of firm detail.

Supply of O.S. Maps

The Ordnance Survey has approximately 700 1:1000, 18,000 25 ins and 1,600 6 inch maps to keep in stock. The demand varies greatly. A particular map sheet might only be issued at the rate of one or two per year. Then suddenly due to development, exploration etc., the demand could rise to a hundred or more. The fluctuation in demand for individual large scale maps makes stock control particularly difficult. However at any one time there are usually less than 50 map sheets out of print.

If, due to unexpected demand, a particular map sheet goes out of print delays can and do occur in replacing it. Unfortunately most of the master documents from which the maps and printing plates are reproduced are still paper. To make a satisfactory printing from these documents is a time consuming task and can take up to four weeks and longer on occasions. A delay of six to eight weeks may occur if a map, when ordered, is out of print. This is very much the exception, maps being normally available ex-stock and sent by return post. The Ordnance Survey also endeavours to expedite the delivery of a map if it is urgently required, and to this end it will supply a sub-standard product (in terms of printing quality) if this will meet the immediate requirement of the customer. Obviously the Ordnance Survey does not like to supply such product but if it facilitates the customer it will do so.

Representations have been made to include the customer's reference code on the dispatch voucher when fulfilling an order, and every effort is made to do so. Because of the time involved, however, it is not possible in every case, and the Ordnance Survey is not always at fault. Some difficulties the Office finds in attempting to meet the request are:-

(a) Illegible reference codes.

(b) Reference codes located in varying positions on order forms thus making it difficult to find them.

(c) No reference codes included, the despatcher still having to check carefully to see if one is included.

Map Reference Systems

Ordnance Survey large scale maps are published in two series, the National Grid and the County Series. The County maps will gradually be replaced by National Grid sheets but the changeover will take many years to complete. In the meantime a dual system will operate. The sheet lines of the two series do not coincide and there is no direct relationship between both systems.

Numbering for National Grid large scale maps is based on the 1:5000 series. They are numbered from 1 starting in the North-West corner, reading from left to right, and ending in the South-East of the country.

The National Grid 1:2500 maps are distinguished by letters A, B, C and D. The sheet reference for that scale would first give the relevant 1:5000 sheet numbers, followed by the appropriate 1:2500 letters A, B, C andD. 4866-A would, for example, uniquely define a 1:2500 map. There are twenty five 1:1000 map sheets in a 1:5000 plan and these are numbered from 1 to 25. A unique reference for a 1:1000 map sheet would, for example, be 6384-6. These map sheets all have a 600 x 800mm format.

The reference system for the County Series is based on the county. In this series each county was surveyed as an entity having its own 6 inch sheet numbering system. Depiction of topographical detail ceases at the county boundary. Map sheets are numbered serially for reading left to right from the North to the South of the county. There are sixteen 1:2500 maps in a 6 inch sheet which are numbered 1 to 16. There are four 1:1250 sheets in a 1:2500 urban map and they are identified by the letters A to D.

Always quote the *County name* when giving reference numbers for county sheet. A reference for a 1:1250 map should be as follows:-

Wexford 37–12–B.

37 identifies the 6 inch sheet. 12 identifies the relevant 1:2500 map within the six inch map and B identifies the 1:1250 map within the 1:12500 map.

If the customers expect reasonable service it is essential that they identify the map clearly and unambiguously, the most common fault being omission of the county name. The fact that the customer may have a Carlow address does not necessarily mean a Carlow map is wanted. Another major cause of delay is when the customer sends in a copy of a small portion of the map with no identifying detail and asks for the corresponding map sheet. This creates delay when it is appreciated that it might be any one of 17,000 sheets.

Metrication and Revision

All large scale national grid maps published since January 1st, 1969, are in metric form. Bench marks, spot heights and contours are given in metres, areas in hectacres and boundary mereings (the exact positioning of a boundary in relation to the adjacent physical feature) are also given in metres. It will be many years before the process is completed for all maps.

The basic map scale for Ireland was already in decimal form (e.g. 1:2500). However the six inch (1:10560) is being replaced by the 1:5000 sclae with metric contours.

One of the most important changes introduced in recent years has been the concept of continuous revision.

In the past it was considered that the publication of a map was a once only operation not to be updated until some suitable time in the future when a complete resurvey or revision would again take place. In the interim no maintenance of the sheet was carried out. The continuous revision system generally attempts to ensure that the pace of map revision will keep abreast of the change taking place.

Surveyors have been appointed to areas that have been updated to keep the maps revised and copies of these revisions can be purchased. The Ordnance Survey will also, on request, carry out special revisions for customers in areas under continuous revision. In addition, mapping which is not yet published but is at some stage of pre-publication can be purchased.

Areas at present under continuous revision are the counties of Dublin, Carlow, Kildare, Meath and Laois. Continuous revision information and pre-publication information is also available for Cork City and Galway City. Requests for such information should be sent to the Ordnance Survey, Phoenix Park, Dublin.

The Ordnance Survey also offers a number of other services which can be of assistance, to solicitors. They include the supply of enlargements or reductions of published large scale maps, continuous revision documents and pre-publication data. These are normally supplied on transparent plastic material with paper copies, dyelines or photostats also available. Composite transparencies may also be obtained. Delivery times and quality depend on the nature of the requirement and on the quality of the original material. The Surevy can undertake map mounting on board or cloth for single or composite maps. Other services include heat-sealing and edge-binding of maps.

Details of mapping control for both height and planimetric positioning are available and approximate National Grid co-ordinates for all County Series maps and can be supplied.

Copyright and Pricing

No Ordnance Survey publications may be reproduced using mechanical, electronic, photocopying or other methods without prior permission of the Director of the Ordnance Survey. State copyright subsists on O.S. maps, transparencies of maps and field documents.

Speical licences to cover all forms of copying are obtainable from the Ordnance Survey and sufficient flexibility exists to meet the particular needs of those who have a need to copy maps.

Unauthorised copying in many cases is due to innocence, but as usage in maps and copying is increasing the Ordnance Survey is progressively taking a much more positive approach in relation to the infringement of copyright. There are two reasons for the more strict attitude:-

(a) The first and most obvious is the loss in revenue;

(b) The less obvious reason is that it provides the Ordnance Survey with information regarding map usage and the statistical data to prove the requirement for maps in the economy of the country.

Concern has been expressed about the cost of maps and related documents. The Ordnance Survey is anxious to keep these costs to a minimum but there is no short cut to good mapping and it is not possible to produce "a bit of a survey" on the cheap. So if adequate mapping is to be provided it will have to be paid for by the user and the taxpayer or by a combination of both.

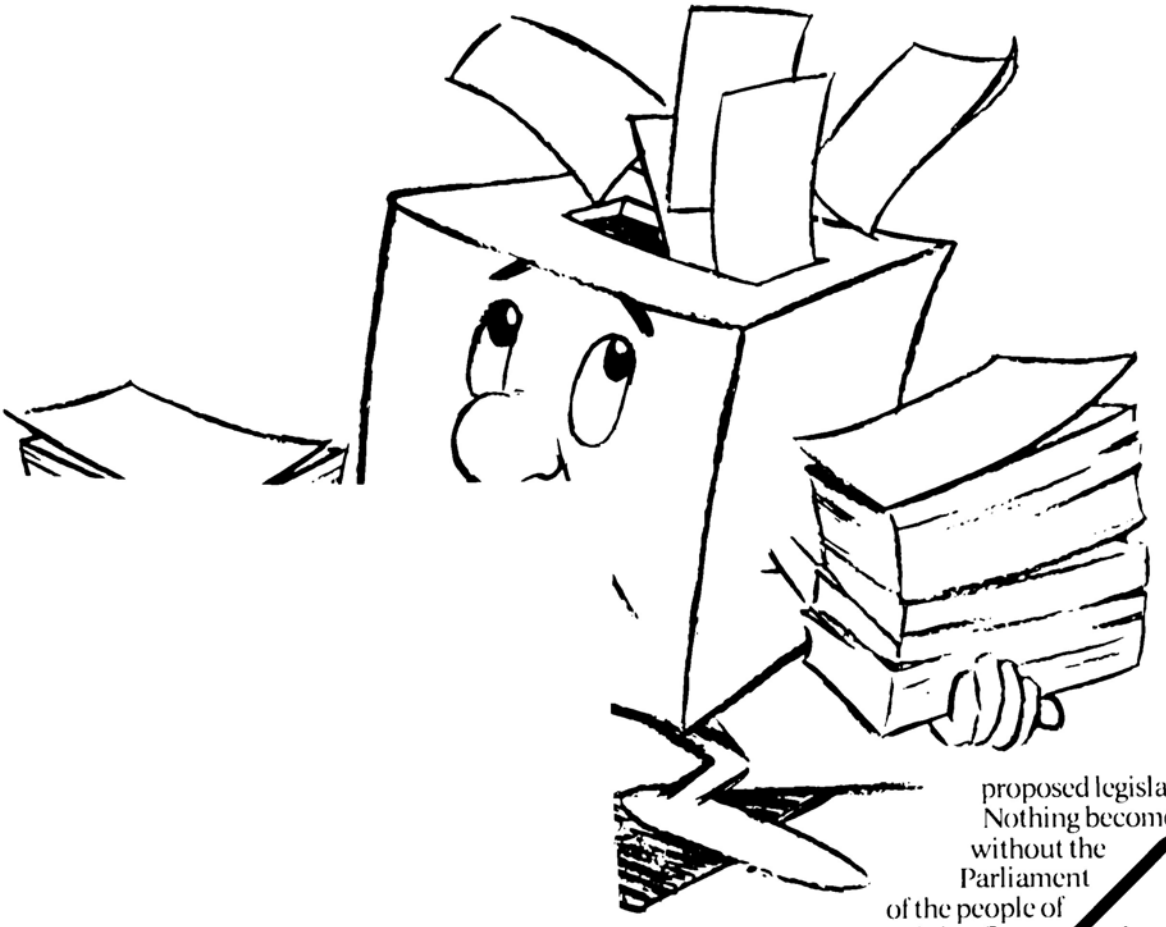
The cost of older maps has also been raised. It has been suggested that these are too expensive. The cost of storing and particularly reproducing existing mapping is very considerable. Reprints of older map sheets have to be reproduced from paper manuscripts and these, due to their age and to the material on which they are printed, are far from ideal for reproduction. They are distorted and the quality of the detail has deteriorated with the result that when the need to reproduce arises, considerable work has to be done on them before an adequate printing can be achieved. The cost of reproduction and storing of existing mapping is therefore considerable and as the number of copies produced is small the unit cost is high.

Ordnance Survey Agents

Large scale maps cna be obtained from the following: Willis Bookshop, Cork, Coleraine and Derry; Collins' Book Store, Tralee; Easons, Dublin; Day's Bazaar, Mullingar; T. M. Griffin, Kilkenny; Hayes O'Connell, Ennis; Hodges Figgis, Dublin 2; T. Hogan, Athlone; Keohane's Bookshop, Ballina and Sligo; K. M. Mulcahy, Wexford; News Bros., Cork; O'Gorman's Ltd., Galway; Erskine Mayne, Belfast; O'Mahony & Co., Ltd., Limerick; Sifton Praed & Co., Ltd., Knightsbridge/London.

The following are firms with a licence to copy Ordnance Survey large scale maps: J. D. Hackett & Co., 4 Lower Baggot St., Dublin 2; Kells Art Studios, John St., Kells, Co. Meath; Truemans Ltd., Molesworth St., Dublin 2.

On June 7th, the biggest election in European history will pick a Parliament for Europe.



proposed legislation. Nothing becomes law without the Parliament of the people of Europe giving their opinion first.

So if you don't vote on June 7th you could end up with no one representing your point of view in Europe.

To: Information Offices of the European Communities. 29 Merrion Square. Dublin 2.
Please send me further information on the European Parliament Elections.

NAME .....

ADDRESS .....

I know keep an eye on things.

SOCIETY OF YOUNG SOLICITORS SECTION

WORKING CONDITIONS OF NEWLY QUALIFIED SOLICITORS

This is an extremely sensitive subject for a member of our Profession to write about because you can never hope to make friends among your own profession by criticising them. However, this memo is being prepared in order to assist a newly qualified Solicitor in his search for a job and not specifically as a criticism of our profession. It is hoped that some of the ideas set out in this memo will be of assistance to both the Employers and the potential employees resulting in improved conditions for young Solicitors.

Yo may ask what is wrong with the conditions of newly qualified Solicitors? We would like to answer this question by way of an illustration.

The story which follows is that of Mr. S. O. Licitor but it could be that of anyone.

"The first thing S.O. did after hearing that he had passed his third law exam was to purchase the Irish Times and Inish Independent. As you would expect, he examined the legal Section of the appointments page for jobs and saw some possibilities. That evening he prepared his letter of application and curriculum Vitae. Having no prior experience of these things S.O. did not prepare his application properly; it was not typed and it put emphasis on the wrong things. He sent the application to Messrs. Box No. Z 2002 & Co.

While waiting for replies to his applications he dreamt about the great career he was about to commence and the terific salary he would earn. He was not worried by the fact that he had no previous legal experience; after all he had a good law degree and had passed all his Solicitors exams.

So he waited and waited and waited ...

He applied for more jobs but before doing so took the advice of his father and had his sister type his application and C.V. He also made photocopies to save typing new C.V.'s every time he made a fresh application.

At last there was some joy, he received a reply to one of his many applications. But the joy was short lived because the letter stated:

> "Dear Ms. S.O.
>
> Many thanks for your letter of the 2nd ulto. I regret to inform you that the position has now been filled.
>
> Yours sincerely,
>
> Mr. Humble".

More applications were prepared, the odd one producing a reply but always the same – "We regret etc." One day, however, there was some good news, he received a letter which stated quite simply: "Could you please attend for an interview?" He certainly could. S.O. got out his new suit, cleaned and polished his shoes, even got his hair cut; he prepared for his interview. He attended punctually at the interview and discussed his career and legal experience with the interviewer between important telephone calls the interviewer had to make. S.O. felt that the interviews had gone quite well (he did not know any better) and even told his friends that he would be working very soon; the interviewer having told S.O. that he would contact him in the near future about the job.

He waited and waited and waited ...

The penny was finally dropping. He consulted with friends who had recently got jobs and compared notes on his letter of application, his C.V. and his interview technique. He now changed his letter of application emphasising his legal experience (rather than the lack of it). He applied for further jobs. Oh! by the way he did hear from that man who interviewed him. He received a letter which read:

> "Dear S.O.
>
> I regret the delay in writing by way of follow-up to our recent interview. The vacancy has been filled by a person better suited to our needs. Thanks for your interest.
>
> Yours sincerely,
>
> Mr. Flushed".

S.O. kept his head up and finally his luck changed. One day he got invited back to a second interview. He felt relieved. He attended the interview – "Yes they did need a Solicitor with his ability and yes, they would like to offer him the job". However, they were going through a bad patch at the moment and could not offer him a very high starting salary but it would be reviewed regularly. A further problem was that they were short of staff and space and would he mind sharing a room with another Solicitor and sharing his Secretarial facilities".

If you were starting out and had applied for many jobs, got a few interviews and one offer what would you do? Accept the offer? Of course you would and so did S.O. Furthermore, he worked extremely hard and did everything he was asked to do. His employers were impressed and said so but S.O. never got a wage increase. He started on £2,500 and a year later was still earning that sum. What do you think he did?

He waited and waited and waited ...

To many young Solicitors this ia familiar story so what lesson can be learnt from it? There are a number of lessons to be learnt, some by the employer, some by the employee and some by the profession. We will take each in turn.

The Employer – Messrs. Box No. Z2002

1. It does not cost much effort to reply to all job applications. When you consider all the effort the applicant has put into preparing his application the least you can do is to say "thanks for trying".
2. Every applicant is entitled to your full attention at the interview. No phone calls should be put through to your office nor should your Secretary enter the room during the interview. This is common courtesy.
3. Every applicant is entitled to a proper living wage and proper working conditions. Nobody has spent four to five years preparing for their profession to be told that they are less than useless and for that reason cannot

be paid a proper salary. Bank clerks, Civil Servants, Insurance clerks (all straight out of school) start on better salaries than newly qualified Solicitors these days. Are they better qualified for their chosen profession than we are? . . .

4. Proper working conditions. All we can say is that if you want a person to do a job properly then do not put any obstacles in his way. A private office and Secretary will result in more work and greater efficiency.

The Employee — Mr. S. O. Licitor

1. Before you prepare your letter of application and curriculum vitae, consult with a Solicitor, your parents or someone who has gone through interviews and find out how to prepare a suitable letter and curriculum vitae. Your letter of application should then be brief and to the point. It should contain detrils of apprenticeship, legal experience and any relevant extra curricular activities.
2. Before going to an interview you should make inquiries among the profession about the interviewing firm, who they are, what type of work they do, so that you can ask intelligent questions at the interview.
3. The interview. No office wants a person to work for them who has no experience. If you have had any experience as an apprentice then emphasise it at the interview. The object of the interview as far as the interviewee is concerned is to impress upon the interviewer that he is capable of filling the vacancy. Remember you do not have to have worked in a Solicitor' Office to know how to write a letter.

   Do not be afraid to ask questions at the interview. Ask questions about the office, the staff, the type of work the office do, the hours, holidays and so on. It pays to show an interest at the interview.
4. The Salary. This is a difficult subject to advise on. Some firms start you off on a low salary but give you a substantial increase after six months once you have proven your ability. This is a fair system provided you get the increases. We would consider a low starting salary to be in the region of £3,000.

   In Dublin some offices forget to increase your salary after 6 months. If your salary is not reviewed then ask your employers for a reason and if a dissatisfactory one is not forthcoming then do not be afraid to leave the office. Never feel obliged to stay at an office because they offered you your first job. If they will not pay you someone else will.

The Profession

1. Proper salary guidelines should be arranged for the benefit of newly qualified Solicitors. This will enable them to know if they are being underpaid.
2. Some form of information service should be set up for newly qualified Solicitors to help them prepare for interviews and also to inform them about their future employers.

A lot of young Solicitors are having to put up with bad working conditions and even worse salaries. This should not happen. It is hoped that this memo might help shart some discussions with a resulting improvement of standards all around — here's to hoping . . .

S. O. Licitor

MEASURING DAMAGES IN BREACH OF CONTRACT CASES

Some Recent Irish decisions

Mr. Justice Declan Costello

A lecture on the above subject was given to the twenty-fourth seminar of the Society of Young Solicitors held in the Talbot Hotel, Wexford, October 1978 by Mr. Justice Costello.

Mr. Costello reviewed a number of cases which in the last couple of years had given rise to important developments in the law relating to damages in breach of contract cases and which draw attention to the principles applicable when a legal adviser is faced with the following problems:

1. The date on which damages are to be calculated

On this question the Judge referred to the case of *McMahon & Johnson* v *Longleat Properties (Dublin) Limited* (19th May 1976) in which after several unsuccessful attempts to remedy faults in a premises the Plaintiff had obtained a Bill of Quantities in November 1973 which gave particulars of the cost of making good the defect which the Plaintiff said still existed. On the case coming to hearing in 1976 the Court had held that the Plaintiff was entitled to damages in respect of certain defects which still existed in the premises calculated only in accordance with the November 1973 Bill of Quantities and not the much higher rate prevailing in 1976. The Judge quoted the judgment of Mr. Justice McMahon in that case which makes clear that the measure of damages is to complete the contract work as it was originally intended in a reasonable manner and at the earliest reasonable opportunity.

In this regard Mr. Justice Costello also considered the case of *Quinn & Anor.* v *Quality Homes & Ors.* (21st November 1977) where Mr. Justice Finlay, in the case where a house was so structurally unsound as to be incapable of repair, had rejected the Defendant's argument that the Plaintiffs were under an obligation to mitigate their loss and to take reasonable steps to purchase another dwelling. The original house had been purchased in 1973 for £11,500 and its market value at the date of the trial had it being in proper condition, would have been £26,500. Mr. Justice Finlay in applying a test of reasonableness had decided that it would have been unreasonable to expect the Plaintiffs to purchase another house when they had a loan of £8,000 outstanding on the house in question and he measured their damages at the true market value of the house at the time of the action.

2. Damages for mental distress in breach of contract cases

Mr. Justice Costello considered the case of *Jarvis* v *Swan Tours Limited* (1973) 1. Q.B. 233 where the Plaintiff had been awarded damages in compensation for the loss of entertainment and enjoyment on a skiing holiday which he was promised and did not get. The principle in this case was applied by Mr. Justice McMahon in *Johnson's case* (Supra). Mr. Justice Costello quoted that Judge as follows: "It appears to me that in principle damages may be awarded for inconvenience or

loss of enjoyment when these are within the presumed contemplation of the parties as likely to result from the breach of contract. That would usually be the case in contracts to provide entertainment or enjoyment but there is no reason why it should not also be the case in other types of contract where the parties can foresee that enjoyment or convenience is likely to be an important benefit to be obtained by one party from the due performance of the contract."

Substantially the same principles were applied by Mr. Justice Finlay in Quinn's case (Supra).

Mr. Justice Costello quoted two further cases showing the application of and the limitations on this principle. In *Heywood v Wellers* [1976] 1. Q.B. 446 a female Plaintiff sued in person her former solicitor who had failed to properly prosecute injunction proceedings against a former man-friend. This Plaintiff claimed damages for the mental distress she had suffered both through the Solicitor failing to prosecute the injunction proceedings and through having to bring proceedings against him in person. She was awarded damages on the first claim as being mental distress being a direct and inevitable consequence where the Solicitor's failure to obtain the very relief which was the sole purpose of the litigation to secure but failed on the second heading as it was held to be merely an incidental consequence of the misconduct of litigation by the Solicitor.

In *Cox* v *Phillips Industries Limited* [1976] 1 WLR. 639 an employee who had been relegated to a position of less importance by his employers in breach of contract had been awarded £500 damages for the distress that he suffered thereby.

3. When premises are damaged or destroyed should damages be measured by reference to cost of restoring them or by reference to the diminution in their value?

In this regard Mr. Justice Costello quoted the case of *Munnelly* v *Calcon Limited and Ors.* (5th May 1978) where a Plaintiff who carried on an auctioneering business on the ground floor of premises in Aungier Street had sued the Defendant Contractors for re-instatement of the premises which had been irretrievably damaged by their works on a new building on an adjoining site. Re-instatement costs were £65,000 and the pre-damage market value of the premises was £35,000. The Supreme Court reversed the decision of the High Court that he was entitled to damages on the basis of reinstatement and awarded damages on the diminution-in-value basis. The court applied the principle of restitutio in integrum in that the Plaintiff would be justly treated if he received damages on a diminution-in-value basis which would be sufficient to establish him in similar premises to his Aungier Street premises on the South side of the city which would be equally suitable for his business and that an award of damages based on re-instatement costs would constitute unjust enrichment.

Mr. Justice Costello also quoted a decision of Mr damages were limited to the cost of remedial and safety work the cost of removing debris and a small sum for damaged trade fixtures as damages simply based on diminishing value would not have been sufficient even to clear the site.

4. Are damages to be restricted to actual loss or can they be assessed by reference to any profit made by the wrong-doer?

In this regard Mr. Justice Costello quoted from the case of *Hickey & Co. Limited* v *Roches Stores Limited (Dublin)* (4th July 1976). In this case the Plaintiffs claimed that the Defendants had, upon terminating an agreement whereby the Plaintiffs traded in fabrics on the Defendants' premises, in breach of that agreement, themselves traded in fabrics six months after the termination of that agreement. The Plaintiffs claim inter alia the unjust profit which the Defendants had made from the sale of fabrics in that time.

Although refusing damages under this heading on the grounds that no mala fides was present on the part of the Defendant the Judge did assess damages based upon the loss the Palintiffs had suffered at the time when they were selling fabrics in the same area as the Defendants against the competition which had the benefit of goodwill which had been built up during the period of the agreement.

BOOK REVIEWS

MORE REMINISCENCES

Under the Wigs by Sydney Aylett. London: Eyre Methuen. £5.50 nett.

Reminiscences of English legal figures have a popularity with lay readers equatting with that of the "courtroom dramas" of televison.

Sydney Aylett's recollections of 58 years as clerk in Chambers – principal clerk for half that time – in the Temple, however, has a somewhat limited appeal and the sub-title of the book "the Memoirs of a Legal Kingmaker" is somewhat irritating. Mr. Aylett served with many well-known barristers, among them Kenneth (later Lord) Diplock, Quentin Hogg (later Lord Chancellor), Maurice Drake and Theobold Matthew (clearly his hero) and others. Undoubtedly proud of the men associated with his Chambers, he has satisfied his urge to chronicle his long experience with them, but the information-entertainment level of "Under the Wigs" is modest for Irish readers.

M. S.

BOOKS RECEIVED

1. Hoath, David C. *Council Housing*. London: Sweet & Maxwell 1978. (Modern Legal Studies). £2.50 net.

The Register

REGISTRATION OF TITLE ACT, 1964

Issue of New Land Certificate

An application has been received from the registered owners mentioned in the Schedule hereto for the issue of a Land Certificate in substitution for the original Land Certificate issued in respect of the lands specified in the Schedule which original Land Certificate is stated to have been lost or inadvertently destroyed. A new Certificate will be issued unless notification is received in the Registry within twenty-eight days from the date of publication of this notice that the original Certificate is in existence and in the custody of some person other than the registered owner. Any such notification should state the grounds on which the Certificate is being held.

Dated this 9th day of March, 1979.

W. T. MORAN (Registrar of Titles)

Central Office, Land Registry, Chancery Street, Dublin 7

Schedule

(1) Registered Owner: Daniel Nolan; Folio No.: 12016; Lands: Glannalappa Middle (part); Area: 59a, 2r, 18p; County: Kerry.

(2) Registered Owner: John Taaffe; Folio No.: 9837 (This folio is closed and now forms the property No. 2 comprised in folio 1345F, Co. Louth); Lands: Haggardstown; Area: 4a, 1r, 7p; County: Louth.

(3) Registered Owner: Patrick John Cullen; folio No.: (a) 14270, (b) 7562; Lands: (1) Brockagh Lower, (2) Brockagh Lower; Area: (1) 19a, 0r, 6p; (2) 0a, 1r, 17p. County Leitrim.

(4) Registered Owner: James O'Brien; Folio No.: 1321; Lands: Rathshanmore; Area: 51a, 2r, 3p; County: Wicklow.

(5) Registered Owner: Eugene Ryan; Folio No.: 12330; Lands: (1) Kilmurry, (2) Bctaghstown; Area: (1) 2a, 0r, 2p, (12) 59a, 2r, 32p; County: Kildare.

(6) Registered Owner: Michael Donohue; Folio No.. 49668; Lands: Tarramud; Area: 1a, 0r, 13p; County: Galway.

(7) Registered Owner: Thomas Kennedy (Junior); Folio No.: 17373 (This folio is closed and now forms the property No. 1 comprised in folio 37365 County Tipperary); Lands: (1) Curraheen (part), (2) Greenhall (part); Area: (1) 5a, 0r, 34p, (2) 16a, 2r, 0p; County: Tipperary.

(8) Registered Owner: Anne O'Mara; Folio No.: 13967; Lands: Anneville; Area: 9a, 0r, 38p; County: Clare.

(9) Registered Owner: George Henry Allison; Folio No.: 30654; Lands: (1) Dromkeen, (2) Dromkeen; Area: (1) 5a, 2r, 28p, (2) 8a, 2r, 3p; County: Cork.

(10) Registered Owner: Patrick Casey; Folio No.: 17654L; Lands: Newbrook; Area: 0a, 0r,8p; County: Dublin.

(11) Registered Owner: Rita Walsh (otherwise Rita Malone); Folio No.: 2334; Lands: Ballyhagan; Area: 22a, 3r, 35p; County: Kildare.

(12) Registered Owner: Philip McMahon; Folio No.: 18874; Lands: Dunelty; Area: 17a, 1r, 8p; County: Monaghan.

(13) Registered Owner: Helena Malone; Folio No.: 10288; Lands: Situate on the East side of Jamestown Road, P. Finglas, City of Dublin.

(14) Registered Owner: Patrick Devane; Folio No: 3912O; Lands: Tyone; Area: 0a, 1r, 19p; County: Tipperary.

(15) Registered Owner: Patrick Halligan; Folio No: 2035 (This folio is closed and now forms the lands No. 1 comprised in folio 1992F); Lands: Crannagh More; Area: 22a, 0r, 12p; County: Roscommon.

(16) Registered Owner: Catherine Rees; Folio No.: 10940; Lands: Dromore (Part); Area: 6a, 1r, 13p; County: Monaghan.

(17) Registered Owner: Finbarr P. Murphy and Ann Murphy; Folio No.: 26601; Lands: Cullenagh (situate on the North Side of Abbeyfeale Road in the Town of Newcastle West); Area: 0a, 1r, 16p; County: Limerick.

(18) Registered Owner: John Gilleran; Folio No.: 22224; Lands: Ardsallagh More; Area: 6a, 3r, 28p; County: Roscommon.

(19) Registered Owner: Ellen O'Reilly; Folio No.: 24423; Lands: Ballylanders; Area: 0a, 2r, 5p; County: Limerick.

(20) Registered Owner: Roadstone Limited; Folio No.: 15686; Lands: lands of Ballymun; Area: 11a, 3r, 37p; County: Dublin.

(21) Registerd Owner: Michael Hegarty; Folio No.: 10707; Lands: Boherard; Area: 114a, 1r, 26p; County: Cork.

(22) Registered Owner: Michael Murphy; Folio No.: 14830; Lands: Robinstown; Area: 3a, 1r, 12p; County: Kilkenny.

(23) Registered Owner: Thomas Courtney; Folio No.: 943; Lands: Ballyandreen; Area: 18a, 3r, 30p; County: Kerry.

(24) Registered Owner: Robert F. Dunne; Folio No.: 1518; Lands: Kilduff; Area: 31a, 3r, 24p; County: Cavan.

(25) Registered Owner: Edward Eugene Burns; Folio No.: 16845; Lands: Derryilan or Knocknanullagh; Area: 6a, 0r, 5p; County: Monaghan.

(26) Registered Owner: Michael O'Callaghan; Folio No.: 24173; Lands: Coolroe More (Parts) Area: 28a, 1r, 30p; County: Cork.

LOST WILLS

Mary Josephine Behan, late of Graylingwell Hospital, Sussex, England, died on the 21st April, 1960. Would any Solicitor having a Will of the above deceased in his possession please contact the undersigned as soon as possible. Hayes & Sons, Solicitors, 15 St. Stephens Green, Dublin 2.

Francis Fallon, Accountant, deceased, late of Upper Cork Street, Mitchelstown, Co. Cork (previous addresses: Dublin; Limerick City; Hospital, Co. Limerick; Thurles Co. Tipperary). Will any person knowing the whereabouts of a Will of the above-named deceased, who died on 20th December 1978, please get in touch with Messrs. Sandys & Co., Solicitors, 10 Sea Road, Galway.

Estate **of Miss Jane Hoesey**, deceased, late of 38, Davitt House, Crumlin, Dublin 12, (also known as Mrs. Jane Turbett and formerly residing at 109, Lower Clanbrassil Street, Dublin 8). Miss Hoesey died at her home on 24th December, 1978, and her property is retained in Garda custody pending discovery of relatives. It is not known whether Miss Hoesey made a Will or whether a Solicitor was handling her affairs. Would any Solicitor having any knowledge of a Will made by Miss Hoesey please contact An Garda Siochana, Sundrive Road Station, 'G' District, Dublin 12.

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THE INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

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in session

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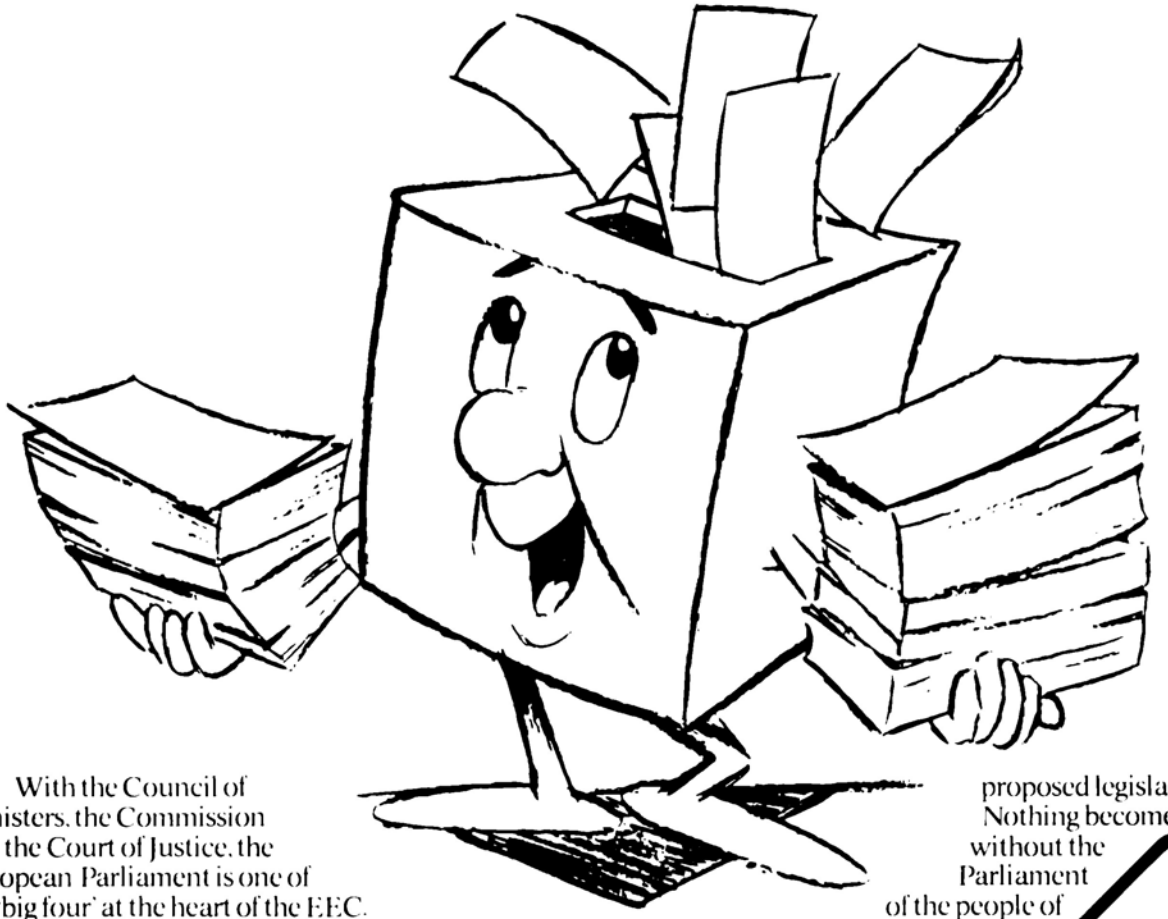
On June 7th, the biggest election in European history will pick a Parliament for Europe.



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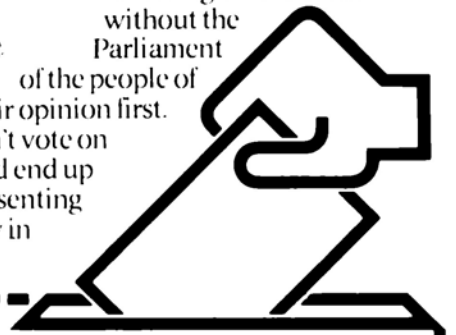

To: Information Offices of the European Communities, 29 Merrion Square, Dublin 2.
Please send me further information on the European Parliament Elections.

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VOTE! And let someone you know keep an eye on things.

The Companies Act 1963 - Section 60

— An Analysis

by

BRIAN J. GALLAGHER

Section 60, which is an apparently straightforward provision making unlawful the giving of financial assistance by a company for the purchase of its own shares, subject to some exceptions, is perhaps one part of the Act of 1963 which might receive a greater degree of judicial attention that it has hitherto received.

The general provision is as follows:—

"Subject to subsections (2) (12) and (13) it shall not be lawful for a company to give, whether directly or indirectly, and whether by means of a loan, guarantee the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company or, where the company is a subsidiary company, in its holding company".

Section 60 is derived in part from what is now Section 54 of the English Act of 1948 and the report of the Company Law Reform Committee.

As indicated it prohibits the giving of assistance by a Company in the purchase of its own shares subject to exceptions. It is the exceptions, their scope and inter-relation which gives rise to confusion. These exceptions are contained in subsections (2) (12) and (13). Subsections (3) to (11) are mainly concerned with the administration of the rule contained in (2).

Subsection (2) allows financial assistance to be given by a company if it is given under the authority of a special resolution of the company passed not more than 12 months previously; that is to say when at least 75% of the members have agreed to the company giving such assistance.

This is not all however and for the exceptions to be acceptable the company must furnish to the members and to the Registrar of Companies with the notice of the meeting at which the special resolution is to be put a copy of a statutory declaration made by the directors stating:—

(i) the form which the assistance is to take
(ii) the persons to whom such assistance is to be given
(iii) the purpose for which the company intends to use the assistance

and, most importantly,

(iv) that the declarants have made a full inquiry into the affairs of the company and that having done so they have formed the opinion that the company, having carried out the transaction whereby such assistance is to be given will be able to pay its debts in full as they become due.

Even when a company has complied with these conditions it cannot proceed to give assistance until 30 days have passed in order that minority shareholders who are not in favour of the scheme might apply to the High Court to have the special resolution cancelled. Where, however, all of the members of the Company who are entitled to vote at general meetings of the company have voted in favour of the special resolution, then the Company can so proceed.

The net effect of subsection (2) and the supplementary subsections is to allow companies, expecially those involved in take overs and mergers, who wish to furnish such assistance to do so without running foul of the general prohibitions contained in subsection (1).

Moreover the conditions ensure that any assistance which is given must have the general support of the shareholders of the company which has to have been declared solvent by the responsible officers.

The point of the conditions is not to hamper the free exercise of entrepreneurial acumen but to protect shareholders and creditors from the unknown and unseen risks inherent in any such transaction.

Subsection (12) is designed and does give protection from the rigours of the main rule in those actions of the company which otherwise would or might be unlawful, yet which in themselves would be unobjectionable. The payment of dividends properly declared or the discharge of liabilities lawfully incurred are not to be prohibited. This is perhaps an over-cautious approach yet the terms of subsection (1) are wide and strict.

It is perhaps those exceptions enacted by subsection (13) that will in any future litigation cause the greatest problems. The subsection contains three:—

(1) the first provision allows companies whose ordinary business is the lending of money to give such assistance where it is part of its ordinary business so to do. This proviso is of course designed to protect those institutions whose very business must put them in danger of contravening Section 60; for example the commercial and merchant banks.

(2) the second and third provisos can be dealt with together but it must be noted that they are different and in no way the same exception. Briefly they allow companies to make arrangements for the benefit of employees by way of what are more commonly known as profit sharing schemes.

The terms of these two provisos are contained in Section 60 (13) (b) and (c) and are as follows:

"(b) the provision by a company in accordance with any scheme for the time being in force of money for the purchase of, or subscription for, fully paid shares in the company or its holding company, being a purchase or subscription of or for shares to be held by or for the benefit of

The editor and the editorial board regret the large number of typographical errors in the January/February 1979 issue of the Gazette. These were due to circumstances of a technical nature beyond our control.

employees or former employees of the company or of any subsidiary of the company including any person who is or was a director holding a salaried employment of office in the company or any subsidiary of the company".

In short the provision by the company of money for the purchase or subscription of shares by or on behalf of the employees.

"(c) the making by a company of loans to persons, *other than directors,* bona fide in the employment of the company or any subsidiary of the company with a view to enabling those persons to purchase or subscribe for fully paid shares in the company or its holding company to be held by themselves as beneficial owners thereof". (authors italics).

In short the making of loans to employees for the purpose or enabling them to acquire shares in the company. It must not of course be forgotten that the proviso extends to cover subsidiaries of the company and the employees of subsidiaries. There are two intriguing points about the provisos the first is that it could be argued that (c) is contained and dealt with in (b) in that a loan comes quite easily within the ambit of the term provision. The second perhaps goes some way to explain the difference in that as between these provisos there is a divergence in the treatment of directors.

Paragraph (c) excludes directors with the result that even if they are holding a salaried employment, bona fide loans to them in this context are not authorised, whereas provios (b) specifically allows directors who are holding, or have held a salaried employment to participate in the schemes envisaged. In support of this view reference can be made to Palmer's *Company Law,* Volume 1, page 303 of the 22nd edition.

The restriction contained in proviso (c) has caused problems to companies, and those who control them who wish to make loans to directors, in order for them to acquire shares in the company without recourse to the provisions of subsection (2) and has caused them and their legal advisers to seek, or attempt to seek ways around the subsection. One attempt has been to argue that this whole question is dealt with by proviso (b), and that so long as there is a valid scheme in operation, a provision of money by way of a loan to a director in accordance with the scheme, is a lawful loan. This is a spuriously attractive argument. In the first place the whole of Section 60 must be read together, and from just such a reading it will be seen that the purpose of the section is to prohibit a company giving any financial assistance for the purpose of or in connection with the purchase or subscription of shares in the Company. Subsection (13) admits of certain exceptions. As between those exceptions there appears to be something of an overlap and/or dissonance between the terms of (b) and (c).

As to the existence of a scheme or not, the first question must be "what is a scheme?" The answer to that question can only be answered by way of litigation in each particular case.

The second question is "where does it appear in the Act that Section 60 (13) (c) is to apply only where there is no scheme in force"? Subsection 13 paragraph (c) quite clearly has been enacted to make statutory provision for the making of loans by the company to persons for their benefit, and not for the making of loans by the company where no scheme for such loans exists. Such an interpretation would cut down the effect of paragraph (c), making it almost nugatory. However, the construction of a statute cannot look to the desires of the subject, only to the intent of the legislature as evinced by the statute.

Furthermore, upon a careful reading of subsections (b) and (c) there does not have to be an overlap or dissonance at all. Accepting that words should be possessed of their natural and ordinary meaning for the purpose of construction, save where the context otherwise demands, it is quite clear that the phrase "provision of money" does not admit of a loan of money, notwithstanding views to the contrary — provision means to give — of course if you lend money, you in fact give it, but there is a world of difference between giving and lending, although in certain respects the transaction may be very similar.

In paragraph (b) the giving of money to trustees or to individuals, or groups of individuals is quite clearly envisaged. There is no question of the money being lent — the legislature would have said so — the money is provided for the purchase of shares in the company by employees. As to loans, they are dealt with in paragraph (c) and they are dealt with similarly save that directors of all types are excluded.

There is no real difficulty in attempting to reconcile paragraphs (b) and (c), unless one wishes to benefit directors by way of loans without recourse to subsection (2). Subsection 13 (c) is also unambiguous in its treatment of loans while subsection 13 (b) even for the moment accepting that it might cover loans, is ambiguous when read together with paragraph (c).

Paragraph (c) quite clearly is concerned with the making of loans to persons for themselves, and in the final analysis if there has to be a conflict with paragraph (b), then paragraph (c) must prevail as it is the general rule that the later enactment will override the earlier — but as sugoested above there is no need.

Putting the relationship of paragraphs (b) and (c) aside, and accepting that paragraph (b) does not trespass upon the making of loans, it is of interest to investigate the effect of each of the provisos. For assistance to be allowable under paragraph (b) a scheme must first of all be in existence. A scheme simply enough is a plan involving the participation of employees or former employees in the assistance that is sought to be given. However, as suggested earlier, schemes might in time find themselves the subject of litigation, perhaps on the ground that the scheme is one that is not for the benefit of the employees as such, bst for the benefit of a select few. For example — a scheme benefiting all employees of 10 years service or more would perhaps be quite acceptabte but one benefiting a group of managers might well not be; the point being, that whilst on the face of it a scheme is simple and straight forward, it could cover a multitude of practices and designs, which m ght not be countenanced by the Court.

Once however, a scheme is in operation for the purchase of shares, these shares are to be held by or for the benefit of employees. This is to say the shares may be held by the employees themselves, or for them by trustees.

The company provides this money, and it is a moot point whether the Act, unlike the English Act, which is somewhat differently worded, allows the company to provide the money direct to the employees etc., or

whether it can only provide money for the purchase of shares by itself, to be later distributed, which is unlikely, or to trustees to purchase who may then retain or distribute the shares.

Another moot point in view of the preceding discussion as to the relationship between paragraphs (b) and (c) with regard to loans, is whether the company under paragraph (b) could lawfully and by way of a scheme provide monies by way of loans to trustees who would then purchase the shares. This is mooted in view of the fact while paragraph (c) deals with loans, it deals with the making of loans to persons, with a view to enabling those persons to purchase shares in the company, to be held by themselves as beneficial owners thereof. It is however submitted that such a transaction would *not* be allowed in view of the differences between the meanings of the words "provision" and "loans". Also how would the trustees repay the loans if they had given the shares away?

But what about loans to trustees? As for assistance under paragraph (c) that has perhaps been dealt with above, save only as to the question of the exclusion of directors of all types. The making of loans to persons for their *own benefit*, is allowed generally, and the only reason for excluding directors is the fear that they might well abuse their trust, and thus prejudice the position of creditors and share-holders. (authors italics). However, loans to trustees are probably outside the scope of the exception.

As to what is to be made of all this and particularly in view of the many companies who desire to lend money to directors to enable them to purchase company shares, it can and ought to be said that for as long as the law remains as it is, then those companies ought to obey it, and make use of the provisions of subsection (2) of Section 60, rather than attempt to strain the language of the statute.

Of course much of the above is subject to judicial decision. Nonetheless, in view of the clear paths mapped out by the legislature for the permitting of assistance, companies ought to follow these paths rather than have recourse to dubious construction.

Footnote: The Society has been advised that the author's view that the phrase "provision of money" in paragraph (b) of sub-section 13 does not admit of a loan of money is not widely accepted in Ireland, and many companies have in fact made loans under the paragraph.

INCORPORATED LAW SOCIETY OF IRELAND

Employment Register

Members and apprentices are reminded that the Society keeps a register of

(i) Solicitors seeking Assistants;
(ii) Solicitors seeking Vacancies;
(iii) Apprentices seeking Vacancies.

Members or apprentices who wish to avail of this service (which is free of charge) should write to:

BRENDAN TWOMEY,
Education Officer,
The Law Society,
Blackhall Place, Dublin 7.

INCORPORATED LAW SOCIETY OF IRELAND

ANNUAL CONFERENCE

Great Southern Hotel, Galway — 3rd-6th MAY, 1979

PROGRAMME WILL INCLUDE:

Motions:
"That the Law is unduly weighted in favour of the Criminal".
"That divorce should be made available in Ireland".

Symposia:
"Are Young Solicitors getting a raw deal from the profession?"
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Programmes and Registration Forms have been circulated to as many members as possible.
Further copies are available at the Law Society.

Completed Registration Forms should be sent or telephone bookings made to:—

REGISTRATION SECRETARY,
The Incorporated Law Society of Ireland,
Great Southern Hotel,
Galway.
Telephone (091) 64041; Telex 8364.

INCORPORATED LAW SOCIETY OF IRELAND

LABOUR LAW SEMINAR

The same seminar will be held at the two following venues during the month of May.

Dates and Venues

12th May, 1979: Limerick Inn, Ennis Road, Limerick.

26th May, 1979: University College, Galway.

Speakers

His Honour Judge Gleeson, formerly Chairman, Employment Appeals Tribunal.

Brian Gallagher, Solicitor.

Ercus Stewart, Barrister-atLaw.

Fee: £30.

Complete Registration Forms should be sent or telephone bookings made to:

Miss Anne Kane, The Incorporated Law Society, Blackhall Place, Dublin 7. Telephone 710711, Telex 31219.

The Farmer and the Law. Taxation implications of property and inheritance transactions

by Donal G. Binchy, Solicitor

A revised version of a Lecture delivered to the Joint Incorporated Law Society/Irish Farmers Association Seminar 14th February, 1979.

Preliminary

In 1929 a Scottish Judge set out the principles which regulate the never ending combat between the taxpayer and the Revenue Commissioners in the following colourful language:

> "No man in this country is under the smallest obligation, moral or other, so to arrange his legal relations to his business or to his property as to enable the Revenue to put the largest possible shovel into his stores. The Revenue is not slow — and quite rightly — to take every advantage which is open to it under the taxing statutes for the purpose of depleting the Taxpayer's pocket. And the Taxpayer is, in like manner, entitled to be astute to prevent, so far as he possibly can, the depletion of his means by the Revenue".

This reasoning remains just as valid to-day. And the question I would like each person to ask himself is — Does *my* arrangement of *my* affairs allow the Revenue to put a bigger shovel than necessary into my stores? Or to put it in plainer language will the Revenue Commissioners collect more tax from me or my family after me by reason of the type of will or settlement I have made or by reason of my failure to make a will or settlement?

Before proceeding further I would like to explain that the expression "husband and wife" "man and woman" throughout this paper are interchangeable. If I seem to allocate a more important role to a husband or man this is purely for convenience and not by reason of any male chauvinism.

Succession/Will/Intestacy

The first basic principle that every property owner must remember is that he will have to part with it sooner or later voluntarily or involuntarily. He cannot take it with him when death's bright angel comes. But if he chooses he can arrange how and to whom it will go. If he does not exercise this choice himself the law will do so for him. This is called the law of intestate succession. In the case of a married person this law provides that two-thirds will go to his wife and one-third equally to his children; and if he is a widower it will all go equally to his children. In the case of a Bachelor or Spinster it will go his or her parents or surviving parent, if alive, and if no parents, to his brothers and sisters or nephews and nieces under certain rules. This is a fairly simple statement of the position and I do not have to tell you that there are many cases in which this is totally unsuitable. Most of you will be aware of families who have encountered serious problems because no will was made. In simple language a will is a document providing for the division of a man's property after his death among his family, relations, friends or charities as he wishes. A will is not the only way of disposing of property, however, — a man may also do so during his lifetime by way of deed or a settlement — and many people getting on in years do transfer some or all of their property to children subject to suitable provision for themselves and their wives. A young person should obviously make a will to provide for the contingency of premature or unexpected death — if a man has property no age is too young to do this.

Before considering tax implications and how to try and avoid or reduce the liability for taxes I would like to stress that the primary consideration must, in my opinion, be the proper disposition of a man's property or division of the family cake according to his moral and legal obligations — and to his preference — taking into account the capacity and worthiness of those whom he would like to succeed to his property. The full family circumstances must be considered. A man must obviously make suitable provision for his wife and children. On the other hand there is little point in making over a substantial farm on a Trappist monk or a Carmelite nun simply to avoid Inheritance Tax; and at the other end of the scale there is not much to be said for giving a large slice of one's peoperty to a child who is a confirmed drunkard or gambler and will dissipate it within a few years. Having said this the proper arrangement of a man's affairs by will or deed can frequently effect a substantial tax saving. Conversely an improvident arrangement or no arrangement at all can result in an unnecessary liability for taxes. I hope to illustrate both points by a few examples later.

Old and New Duties

Most of you will be familiar with the old Death Duties, particularly Estate Duties, which were mainly a tax on the estate or property of a deceased person. The amount of the tax depended upon the net value of his estate and the relationship of the Beneficiary had no relevance. The other duties viz. Legacy and Succession Duties depended on relationship with total exemptions for a wife and family. With some foresight and luck it was frequently possible to avoid the old Death Duties entirely by transferring most or all of your assets and then having the luck to live for five years. This is no longer possible because the new taxes are what is described as Donee orientated, that is they are taxes on the gifts or inheritance received by the Beneficiary and all gifts and inheritances from the same Benefactor to the same Beneficiary are aggregated for the purpose of determining the amount of tax and the effective rate of same. There are time limits within which the aggregation takes place as will appear later.

These Taxes were introduced by the Capital Acquisition Tax Act 1976. As the title of the Act implies they are taxes on the acquisition of property. There are two taxes involved — a Gift Tax which is payable on any taxable gift taken on or after 28th February 1974, with the aggregation of any gift taken on or after 28th February 1969 thus exceeding the thresholds; and an Inheritance Tax payable on any taxable inheritance taken on or after 1st April 1975. Both taxes apply to that portion of the aggregated gifts and inheritances exceeding a stated threshold. When the Act was being introduced these thresholds were generous and a more than fair substitute than the old Death Duties. In the case of a spouse or child the threshold was and remains £150,000.00 each. And in the case of "genuine" farmers the method of valuing agricultural property effectively increased this in the case of a spouse or child to a maximum of £250,000.00 subject to two main qualifications — (1) the Beneficiary should be a "genuine" farmer, i.e. he must be domiciled and ordinarily resident in the State and his gross assets after the gift of inheritance i.e. land, livestock, bloodstock and farm machinery had to comprise 75% of agricultural property or transfer by the farmer under a compulsory acquisition, and (2) there could be no sale within six years unless the property was replaced. Because the 75% calculation is made after the gift or inheritance the donee can be converted into a "genuine" farmer by the gift or inheritance itself. I do not intend to go into detail in regard to other thresholds outside the cases of spouses and children but we can answer any questions on these later. In the case of spouse and children and in the case of an inheritance the first £50,000.00 over the threshold is taxable at 25%; and the rate of tax rises by 5% for each successive £50,000.00 until we achieve a rate of 50% The same thresholds apply to Gift Tax but the rate is reduced to 75% of that amount payable for Inheritance Tax provided the person making the gift survives for two years.

Back in 1974 and 1975 we were talking of values of £600 to £800 an acre for good agricultural land and it was possible to transfer or bequeath in the region of 300 acres to a wife or child without liability for either of these taxes. To-day the same land is worth £3,000 an acre or possibly more. This inflation in the value of the land has so eroded the thresholds that it is not now possible for a farmer to make a transfer of 100 acres of good land to a son without substantially exceeding the threshold. A mere transfer of 100 acres on this basis without stock or farm machinery would involve tax on £50,000.00 which in the case of an inheritance would be £12,5000.00 or in the case of a transfer during the life of the donor £9,375.00.

This creates a problem which is potentially far more serious and far reaching for the farming community than either Income Tax or levies. It may make it very difficult for the farmer — in some cases even impossible — to pass a moderate size farm of say, in the category of 100 to 150 acres unto a son without Inheritance Tax or Gift Tax of almost penal dimensions; and this in turn is, of course, aggravated by the reduction in a farmer's real earning capacity due to Income Tax and any levies.

Avoidance

This brings us to the central point of my talk — the 64,000 dollar question. What can be done to avoid or reduce liability in respect of these taxes? On the political side farmers can, of course, campaign either for an increase of the thresholds or the agricultural allowances or both. In the meantime, however, we must play the game in accordance with the present rules. While liability cannot always be avoided it can very frequently be reduced and sometimes totally avoided by the proper arrangement of one's affairs. This is done by the use of a will, transfer or settlement that makes the maximum use of the thresholds and allowances.

A farmer can for example distribute 1½ million pounds worth of agricultural property without any liability between a wife and five children provided he leaves the property equally to them and each of them qualifies as a "genuine" farmer. This illustration is, however, over simple because we rarely meet the situation where it suits to distribute agricultural property equally on these lines. The principle remains valid, however, that as far as possible in each case the thresholds are fully used. In this context it can be very important to use the threshold of the wife; apart from the fact that such a bequest to a wife will make very ample provision for her, it may help to pass on a further £250,000 free of liability between one or more children. At this stage I would like to give a few examples that will illustrate the type of arrangement that on the one hand will result in unnecessary liability and on the other hand will avoid or very substantially reduce liability.

Examples

1. Farmer 'A' is married with wife and four young children. He owns a farm of 180 acres fully stocked. Total value of all his assets £600,000.00. He dies without making a will. Wife is entitled to £400,000.00 on which she will have to pay Inheritance Tax of £45,000.00. Children get £50,000.00 each — No Tax. Apart from Tax on 'A's' death this still leaves the following problems for 'A's' family. If the farm is to go to one of his sons — His wife has to make over her share and the other three children, if agreeable, have to make over their shares — possible further tax (£150,000 surplus from wife £45,000.00; £30,000.00 surplus from brothers and sisters — £4,760 x 3 = £14,280.00) in region of £60,000.00.

2. Same Family and Assets. In 1970 'A' made a simple will with his Solicitor leaving all his property to his wife. He died in 1979. Inheritance Tax payable — £137,500.00. Wife still has the problem of passing the property on to her children and again if the farm is to go to one child there will be another substantial tax liability.

3. Same family and same circumstances but 'A' by his will left his property to his wife for life and then to his children as she should appoint — a common type of will to avoid a double set of Death Duties under the Law as it stood in 1970. The widow is 42 years old. Her Inheritance is valued at .8204 of the total value, i.e. £492,200.00. She will have to pay Inheritance Tax amounting to £83,900.00 (being tax on £242,000.00 the excess over the threshold of £250,000.00). In the event of an appointment either inter vivos or by will, further tax liabilities may arise, depending on the value of the property appointed.

4. Again the same family and circumstances. On this occasion, however, his will provides:

1. For the appropriation to his wife of property or a share in his property to the value of £250,000

(provided that she keeps within the limits of a "genuine" farmer).

2. That the remainder of his property comprises a Trust Fund for the education, maintenance and advancement of his children with power to his wife to appoint the property to his children as she shall decide and in default of such appointment to the children equally.

On his death there is no liability to Inheritance Tax. Seven or eight years later his wife divides the farm between her two sons (having made appropriate provision for her two daughters) using her power of appointment and through a Deed or Will makes over the share she inherited under her husband's will; there is no liability.

If she makes over the entire farm to one son, however, (subject to suitable provisions for the three children) there will be a liability; at this stage, however, a half a million pounds worth of assets will have been vested in one son without liability; the liability is confined to the surplus over that, i.e. £100,000.00 less the value of benefits to the other children — a liability of perhaps £25,000.00 or less. This contrasts very favourably with all the other examples; apart from saving substantial tax this man has probably disposed of his property in the way he desires.

It is possible to work a lot of permutations on this basic example which, depending on the assets and circumstances will save Inheritance Tax entirely or at least make a very substantial saving. If the family are grown up with one son working on the farm and the other three children "done for" it may be possible to eliminate the complications of trusts and powers of appointment. For example a tenancy in common could be created in the farm by transferring a 5/12th share to his wife, a further 5/12th share to his son and retaining a 2/12th share. I have taken these figures because the 5/12th share is worth £250,000 or equal to the threshold and the transfer of these shares does not create any liability to Inheritance Tax. The wife can then will her 5/12th share (It is suggested that there is not need to wait the three years) to her son and this in turn will avoid Inheritance Tax. The son will ultimately have to pay Inheritance Tax on the remaining 2/12ths share, assuming this is willed or transferred to him at approximately the same level as in example 4 — say about £25,000.00. Before this happens, however, there is the hope that thresholds may be increased and conversely the risk that inflation may increase the liability.

If the wife acquires the property under her husband's will she can make an inter vivos gift to her son and this will not, even if it is made immediately, be treated either as a gift or an inheritance from the father. The "three-year rule" whereby a gift from B to C, if made within three years of a gift from A to B is treated as a gift from A to C only applies where both transactions are gifts. If one is an inheritance the rule does not apply.

It will be observed that there is one common denominator in these examples and that is that it is essential to pass a share up to the threshold of £250,000.00 through the wife. This obviously makes it desirable to ensure that the wife gets her share — a certainty that can only be achieved by a transfer because under a will there is always the risk that she will predecease.

It may well look very simple from these examples but there are some dangers, risks and pitfalls that have to be watched.

The Wife or Surviving Spouse

1. The first danger is contained in the anti-avoidance provisions of the Act. These are designed to prevent tax avoidance by gift splitting.

For a period of three years after a wife receives a gift from her husband any inter vivos transfer or gift of the property to a child is deemed to be a gift to that child from his father and will therefore be aggregated with any benefit that that child has already received. Effectively, therefore, a wife must survive three years from the date of a gift before she can dispose of it by gift to a child in such a way that he will enjoy the full threshold both from his father and mother.

It is obviously important that as soon as a wife receives a gift she must make a suitable will. Otherwise two-thirds of her property would revert on her death to her husband on intestacy or might go in an unintended direction under an earlier will. In the circumstances that we are considering she will, if she has not already made an inter vivos gift to her son, obviously devise her share in the farm to the son intended to receive same. But it remains certain that there is no chance of achieving the double threshold for a child, unless the husband vests portion of the property in his wife, even if some risks have to be run for the three year period. Incidentally, any risk arising for such a short period might be economic to insure in the case of younger couples.

(2) Capital Gains Tax

This does not arise in the case of wills or inheritances because a person acquiring the assets of a deceased person is deemed to acquire them for a consideration equal to their market value at the date of death. A transfer or settlement of land, however, does constitute a disposal of assets for the purpose of Capital Gains Tax — even a transfer to a wife or son. In most cases liability is not likely to arise because relief will be enjoyed under one or other of the following provisions:

(a) If the property has been in the ownership of the person making the gift or of the spouse of the owner for a period of 21 years there is not tax (assuming the lands have no development value).

(b) A person aged 55 years may dispose of all or any of his qualifying business assets such as farmland stock and equipment to a child without liability for Capital Gains Tax. This only applies to qualifying assets, however, i.e. assets owned for a period of not less than 10 years.

(c) A transfer by a husband to a wife or a wife to a husband is treated as a disposal for a consideration of such an amount as secures neither a gain or a loss. (Section 13 (5).)

This Section does not apply to an asset that forms part of trading stock of a trade carried on by the person making the disposal or if the asset is acquired as a trading stock for the purpose of a trade carried on by the person acquiring the asset. For definitions of trade and trading stock see Section 52 of the Income Tax Act 1967.

It would seem to follow that where a person inherits property say, on the death of his father, and settles it without delay thereafter there would be no material liability to Capital Gains Tax because he would be deemed to have acquired it for market value at the date of death.

Despite the foregoing and other reliefs there are cases where Capital Gains Tax could apply and bite fairly heavily.

(3) Stamp Duty and Other Expenses of Transfer

It is only right to point out that normal family transfer during the donor's lifetime, however, will involve Stamp Duty at 1% on the property transferred together with other expenses. In examples taken — a farm worth £500,000 or more, Stamp Duty alone can be about £5,000 on top of which there are other expenses. The stakes are so big, however, that an expenditure of £5,000 or more is obviously well worth while to secure a saving of £50,000 or £100,000.

Conclusion

Each case must be examined individually, because obviously the circumstances will differ according to the family circumstances, the value of the assets and the extent to which the spouse and each child is being benefited.

If we move away from the immediate family circle out to brothers and sisters or nephews and nieces we are faced with much smaller thresholds and consequentially heavier liabilities. Even in these cases, however, it may be possible to achieve material savings. There is one case that in particularly worth mentioning. A nephew or niece working substantially wholetime with an uncle or aunt for a period of five years is entitled to the same thresholds as a child but only in respect of business assets or shares in a trading company. Accordingly, if anyone wishes to benefit a nephew or niece rather than the Revenue Commissioners it is important to try and secure the position that he or she is working substantially wholetime for this period.

The subject given to me for this address included Companies and Partnerships. Companies would obviously provide a very convenient method for co-ownership in different shares and for the transfer and disposal of property. They present great practical difficulties, however, because Land Commission consent has to be obtained to vesting land in a Company and the transfer of any land into a Company's name will involve Stamp Duty at the appropriate rate to the value and could also give rise to problems of Capital Gains Tax , Gift Tax and Capital Acquisitions e.g. the agricultural relief for Capital Acquisitions Tax will be lost. Partnerships are, however, a more practical proposition — in fact they are almost an inherent or implied consequence of any form of joint or co-ownership. The subject, however, is really one which would need a separate paper.

I would like to conclude with my original emphasis that any person with property should make a will even if that property comprises only a Labourers' cottage and plot. Better to make a will and dispose of the property as you want even where there are no tax liabilities than to have the ownership arbitrarily divided by the laws of intestate succession. Even in smaller estates serious injustices can arise by the absence of a will — the child who has stayed at home may find it impossible to deal with his brothers or sisters for their shares, if there is no will — even one brother or sister insisting on the full value of his or her share on an intestacy may create an impossible position. The same principles apply, of course, to the man with a bigger estate except that the problems may be compounded and aggravated by unnecessary liability to heavy taxation. It can only be described as an inexcusable folly for a man with substantial assets irrespective of his age not to look closely at his affairs, to be fully advised and to make such will, settlement or arrangement that will give the Revenue the smallest possible slice of the family cake.

SOCIETY OF YOUNG SOLICITORS SECTION

DID YOU KNOW?

Did you know that a convenant is a promise under Seal? You should not give a covenant in a document therefore unless the document is executed under Seal.

Did you know that by virtue of Section 6 (i) of the *Conveyancing Act 1881* a conveyance of land shall be deemed to include and shall operate to convey with the land "all the buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights and advantages whatsoever appertaining or reputed to appertain to the lands or any part thereof or at the time of the conveyance demised, occupied or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof". Furthermore by virtue of Section 2 (v) of the said Act a conveyance includes inter alia an assignment and a lease.

Accordingly even if one omits to include in a Deed an assignment of a right of way which is appurtenant to the land being conveyed, that right will nonetheless pass to the Purchaser of the lands.

Did you know that the *Statute of Frauds* was enacted "for securing purchasers, preventing forgeries and fraudulent gifts and conveyances of lands, tenements and hereditaments, which have been frequently practised in this Kingdom, especially by Papists, to the great prejudice of the Protestant interest thereof, and for settling and establishing a certain method, with proper rules and directions for registering a memorial of all deeds and conveyances, which from and after the 25th day of March in the year of Our Lord One thousand seven hundred and eight shall be made and executed".

Does the knowledge that the Vendor is a "Papist" therefore put the Solicitor for the Purchaser under obligation to raise further requisitions in this respect?

Report on a Lecture given to the Society of Young Solicitors in Wexford at the 1978 Autumn Seminar

The Erosion of the Statute of Frauds by the Doctrine of Part Performance

By Peter Sutherland, B.L.

The Paper presented by Peter Sutherland, B.L. to the Society examined the extent to which the requirement of the Statute of Frauds (Ireland) Act, 1695 relative to the provision of a written contract for the sale of land or any interest in land had been modified.

The Statute itself provides, in relation to contracts referable to lands, that no action shall be brought against any person upon any contract or sale of lands . . . or any interest in or concerning them . . . "unless the agreement upon which such action shall be brought, or some Memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised".

Apart from the modification made by Section 4 of the Landlord and Tenant (Ireland) Act, 1860 relating to certain Tenancy Agreements the principal erosion of the Statute of Frauds has developed through the Doctrine of Part Performance.

The Doctrine of Part Performance was an interference prompted by the concern of the Courts of Equity with the principles of fairness and justice and was recognised from the very earliest times following the passing of the Act into law. Nevertheless, notwithstanding the antiquity of the Doctrine, the Courts are still far from being in agreement as to the circumstances under which it is operative.

Chitty (24th 3dition paragraph 251) refers to the Doctrine as follows:— "Where the Plaintiff has partly performed an oral Contract required by the Statute to be evidenced in writing, in the expectation that the Defendant would perform the rest of the Contract, the Court will not allow the Defendant to escape from his Contract upon the strength of the Statute but may order specific performance of the oral contract".

The Rationale for the intervention of the Courts of Equity was to preclude the Courts being used as an instrument of fraud.

The purpose for the passing of the State of Frauds was to ensure, in so far as it was possible to do so, that there would be strong evidence of the transaction alleged to have taken place. The Courts of Equity wanted to provide fairness in accordance with equitable principles but as against this felt it incumbent upon them to support the intent of the Statute by allowing reliance to be placed only upon acts of part performance which themselves indicated the existence of the Contract which it was sought to have performed. The acts relied upon, if they were to constitute Part Performance, had to corroborate the contract and therefore the Doctrine would not frustrate legislation beyond what was necessary to give effect to the equitable principals of fairness and justice.

The authorilative source of the law on Part Performance is the case of *Maddison v. Alderson* [1883] C.A. 467 where it was held that taking the facts alleged to constitute Part Performance in isolation they were not necessarily referable to the alleged contract. This case is to be compared with *Wakeham v. MacKenzie* [1968] 2 AER 783 where Stamp J. concluded that the true rule was that the operation of the acts of Part Performance required only that the acts in question be such as must be referred to some contract and may be referred to the alleged one. The situation in England was that after the hearing of *Wakeham v. MacKenzie* there was considerable doubt in the minds of practitioners as to whether the acts relied upon would have to be prima facie referable simply to the existence of a Contract or alternatively whether they would have to be such as to point to a Contract relating to land. The matter was considered in the context of a case largely concerned with the question as to whether the making of a payment of money could be considered as an act sufficiently unequivocal as to constitute Part Performance of an alleged contract relating to land. Snell (26th edition page 653) says "Payment of a part or even apparently the whole, of the purchase money is not sufficient part performance of a contract for the sale of land". The view when expressed was in accord with numerous statements to the same effect in various judgments and the reasoning behind these statements would appear to be based on the fact that a payment of money is considered

of its nature to be an equivocal act.

The matter was finally put beyond doubt in the case of *Steadman v. Steadman [1974] 2 AER 977* where the majority of the Judges rejected the proposition, long believed, that a payment can never constitute an act because it is impossible to deduce from the payment the nature of the contract in respect of which the payment is made. The majority finding was to the effect that the surrounding circumstances excluding evidence of the oral contract itself could be examined and should be examined in determining whether a payment was an act of Part Performance.

The arguments put forward in the *Steadman Case* were referred to in the Irish case of *Philip M. Howlin v. Thomas F. Power (Dublin) Limited* (unreported Case 1977 No. 736P) in which MacWilliam J. delivered Judgment on 5th May 1978 and, although on the facts, deciding against the Plaintiff, expressed his agreement with the reasoning of the majority of the Judges in the *Steadman Case*. (This case was at the time of Mr. Sutherlands lecture on appeal to the Supreme Court).

Whilst one matter was clarified in relation to the Doctrine of Part Performance in the *Steadman Case* the Court was not in agreement on another. The question on which the Court was divided was as to whether the acts of Part Performance had to be such as to indicate the nature of the Contract and in particular to indicate that it was a Contract for Sale or other disposition of land or an interest in land. Successive Judgments clearly point to the fact that it is the duty of the Plaintiff to establish on the balance of probabilities and no more, that the acts were referable to a contract. While the matter is not free from doubt it would appear that the better view is that the act relied upon as acts of Part Performance should not alone point to a contract but on the balance of probabilities should point to a contract relating to land. It is a matter of conjecture however as to which approach would be adopted by the Irish Courts.

Mr. Sutherland has made a thorough examination of the Doctrine of Part Performance and his Paper is very deserving of careful study.

SOCIETY OF YOUNG SOLICITORS TRANSCRIPT SERVICE

The Spring Seminar 1979 Scripts are now available from 94 Grafton Street, Dublin 2.

They are:—

No. 113 Effecting proper and adequate Insurance Cover on Leasehold Property Interests. By Denis Bergin, £1.60 by post £1.80 (includes flat insurance problems).

No. 114 Drafting Insurance and Rent Review Clauses in Leases (with precedents). By Anthony Dudley £2.75, by post £3.05.

No. 115 Tax Implications with special reference to VAT arising on the creation of Leases. By Charles Dowling. (Essential reading when 10 year or longer Leases are involved). £1.20, by post £1.40.

No. 116 Recent Case Law relating to Landlord and Tenant. By T. C. Smyth, S.C. £2.20, by post £2.45.

Up to date lists available on request.

EEC Rules on Legal Practice

European Communities (Freedom to provide services) (Lawyers) Regulations 1979, S.I. No 58 of 1979.

Regulations made by the Minister for Justice, Mr. Gerard Collins, T.D., giving effect to the EEC Directive of 22 March, 1977, to facilitate the effective exercise by lawyers of freedom to provide services (OJ L 78/17 26/3/77) enable lawyers from other EEC countries to provide services here as from 1 March. Similar facilities will be accorded to Irish lawyers in those countries in pursuance of the Directive.

Under the Regulations, a visiting lawyer will be able to provide professional services in this country, with the exception of certain matters concerned with the administration of estates and title to land which are reserved to Irish lawyers. The visiting lawyer will be required to use the professional title which he uses in his home country and, when representing a client in legal proceedings, to work in conjunction with an Irish lawyer.

The Regulations, and the Directive to which they give effect, are concerned only with the provision of services i.e. activities of an occasional or temporary nature by persons whose permanent establishment remains in another Member State.

When is a Contract?

JOHN F. BUCKLEY, Solicitor

The recent decisions of the Supreme Court in the cases of *Patrick Kelly v. Park Hall School Limited* and *Patrick Casey v. The Irish Intercontinental Bank Limited & Others* have caused great ripples of concern to run through the ranks of Conveyancing Practitioners. As is so often the case a consideration of the text of the judgments in the two cases reveals that there is little that is revolutionary about the two decisions, following, as they do the path of similar decisions both in English and Irish Courts, though there are aspects of them which certainly may cause concern to Auctioneers or others directly engaged in the sale of land on behalf of the owners. It is significant that in each of the two cases the Note or Memorandum in writing, which the Supreme Court held to be sufficient evidence of a previously concluded oral agreement, so as to entitle the Plaintiff in each case to an order for specific performance, originated with the Auctioneer.

It may be helpful if a brief resume of the facts in each of the cases is given, when it will appear that there were unusual circumstances in each of the two cases which helped the Court to come to the conclusion that there was a clear agreement reached between the parties of which the Note or Memorandum in writing was evidence. In the *Park Hall* case the Defendants were in severe financial difficulties and their Bankers were pressing them to reduce their overdraft and while they had applied for planning permission for a 5½ acre plot of land they were under such pressure that they decided to sell the property without waiting for a decision on the Application for Planning Permission. Patrick Kelly was a Builder who had bought adjoining lands, held under the same title, from the Defendants at an earlier stage and he was anxious to acquire the rest of the land. He made an offer of £175,000.00 to the Estate Agents who had been instructed to find a buyer and the Agents reached an oral agreement with Mr. Kelly for the sale of the lands to him. Subsequently the Agents wrote to a Financial Adviser to the Defendants setting out the principal terms to be included in the contract, referring to the lands, to the Purchaser, to the proposed price and setting out particular terms relating to the deposit. There was a delay in getting a suitable map prepared and it was almost a month later before the Defendants' Solicitors sent out a letter with a draft Contract to the Plaintiff's Solicitors which attempted to impose a condition that the "offer" had to be accepted by the Plaintiff within seven days, which "offer" in the event did not reach Mr. Kelly in time for him to accept it. The Supreme Court held that although the letter from the Agent to the Financial Adviser indicated that the sale had been agreed "subject to contract", the Trial Judge having held that the oral agreement recorded in the letter was a completed agreement in the sense that nothing further was left to be negotiated, the words "we have agreed, subject to contract" in the letter had to taken to mean that a contract had been made subject to its being formalised in writing.

In the *Casey and Irish Intercontinental Bank* case, the owners were again in financial difficulties having given an equitable mortgage of their lands to the Northern Bank and subsequently given a legal mortgage and a power of attorney to Irish Intercontinental Bank under which Irish Intercontinental could sell the lands. Once again the Defendants were being pressed by their Creditors and they decided to sell the lands by Auction. The Auction was held but the highest bid was £86,000.00 and the owners would not accept this but the Plaintiff who had attended the Auction, sometime afterwards contacted the Auctioneer and indicated that he was still interested in buying the lands. The Auctioneer asked him for £150,000.00 but the Plaintiff would not go beyond £110,000.00 which the Auctioneer agreed on Friday, 30th January to put to the owners and if they accepted it they would get authority to sign a Contract. So the next day (Saturday) he telephoned the Plaintiff and said "You are the owner of Park House. The farm is yours", and it was arranged the Plaintiff would come into the Auctioneer the following Monday to sign the Contract and pay the deposit. When the Plaintiff came in, the Auctioneer decided to get a form of Contract signed by the Plaintiff and he directed his Typist to type it on the Firm's headed paper and the material terms of it were:

O'KEEFFE & O'SULLIVAN LIMITED
Auctioneers, Valuers & Estate Agents

1, Patrick Casey, Gurrane House, Dunoughmore agree to purchase Park House and lands for £110,000.00 subject to contract and title. I agree to pay £25,250.00 as deposit.

Patrick Casey.

Director: A. B. O'Keeffe
J. L. O'Sullivan

the names of the two Directors and the heading being printed and the typed agreement was then signed by Mr. Casey. The words "subject to contract and title" had not been used during the meeting on Friday or the telephone conversation on Saturday between the Plaintiff and the Auctioneer. The Supreme Court held that the conversations between the Auctioneer and the Plaintiff on Friday, 30th and Saturday, 31st January constituted a contract by the Plaintiff to buy and by the Owners to sell the property to the Plaintiff for £110,000.00 and that the words "subject to contract and title" were not introduced until the 2nd February when an oral contract had already been made. The Court also held that when the Party to be charged has written or dictated a document on paper which has his name printed on it he should be regarded as having adopted the printed name as his signature and so shall be regarded as having signed the document.

In fact, in this case, it was also held that a second oral contract in favour of the Plaintiff also existed because in April 1976 the owners not being willing to complete the sale with the Plaintiff, the Banking Manager of Irish

Intercontinental ascertained that the Plaintiff was still willing to buy the lands for £110,000.00 and authorised a local Manager of the Northern Bank to make an offer of the lands to the Plaintiff for £110,000.00 which the Plaintiff accepted, a letter was dictated by the Bank Manager addressed to the Manager of Irish Intercontinental Bank Limited which read:

"I hereby accept the offer to purchase the property known as Park House and lands at Mallow, Co. Cork containing 120 acrea 1 rood 30.7 perches for consideration of £110,000.00 (One Hundred and Ten Thousand Pounds)".

This was signed by the Plaintiff and his signature witnessed by the Northern Bank Manager who telephoned the Banking Manager of Irish Intercontinental who expressed approval of what the Northern Bank Manager had done and of the letter. Subsequently Irish Intercontinental Bank's Solicitors sent out a letter, the first two paragraphy of which read:

"We are instructed by our clients, Irish Intercontinental Bank Limited, 91 Merrion Square, Dublin 2, that they have accepted an offer of £110,000.00 from your client Patrick Casey .....

Our clients are selling as Mortgagees pursuant to the powers in that behalf contained in an Indenture of Mortgage made the 14th day of November 1975 and the power of Attorney dated 11th February 1975".

Although, curiously enough, the judgment of the Supreme Court does not say so in so many words, it is clear that the letter from Messrs. Cox & Co., was deemed to be a Note or Memorandum in writing evidencing the previous oral agreement made between the Plaintiff and Irish Intercontinental Bank. As both the leading Irish and English text books on conveyancing agree the "essential elements" which have to be included for the Note or Memorandum in writing to be effective are what are referred to as the four "P's". The Parties, The Property, The Price and any other essential Provisions. Now in the *Park Hall* case the detailed letter sent by the Agents to the Financial Adviser clearly met all these requirements, the Courts having held in a number of earlier cases that various provisions which Defendants' Counsel had urged were essential though omitted were not in fact essential and could be implied, including such things as the time within which the Contract would be signed. the payment of a deposit or its amount or the date for completing the sale. In the *Casey and Intercontinental* Bank case again the note in writing clearly sets out the essential elements. Although it is clear from the authorities that the nature of the title to the property does not have to be spelled out, it is surely significant that in each of these two recent cases, the Purchaser was aware of the title, in the *Park Hall* case because he had bought adjoining lands held under the same title from the Defendants earlier and in the *Casey* case because the Plaintiff had been to the abortive auction where presumably he had read the conditions of sale and was thus aware of the title being offered. Perhaps the most curious feature of the *Park Hall* case is that when the proceedings were issued the Plaintiff was relying on the letter of the Vendors Solicitor which sent out the contract in January 1978 and it was only when discovery of documents was ordered in the case that the communication between the Defendants Agents and their Financial Adviser became available to the Plaintiff. As however the Supreme Court did indicate that the Defendants were not entitled to require compliance by the Purchaser with an arbitrarily imposed and unreasonably short period for signing and returning the formal Contract, it might not be unreasonable to assume that the Supreme Court would have held the Solicitors letter and the enclosed Contract to be together a Note or Memorandum in writing sufficient to satisfy the statute.

What then is the significance of these two recent decisions for Solicitors? The significance for Auctioneers is clear, that if they have, on behalf of a Vendor, reached an oral agreement with a Purchaser as to the terms of a proposed sale, then almost any letter which they write, whether to their client or to the Purchaser, unless it be totally inadequate as to its recital of the agreed terms, will, no matter what attempt is made to qualify, almost certainly be a sufficient note or memorandum in writing to satisfy the statute. As far as Solicitors are concerned it may well be that by the time they get any instructions "the pass will have been sold" and it is perhaps only in those cases in which the Solicitor is directly involved in the negotiations himself that he, if he has appropriate authority, may be found to have bound his client firstly to the oral agreement and secondly to have provided the necessary evidence thereof by writing an opening letter, whether enclosing a draft Contract or not, either to the prospective Purchaser or to his Solicitors. It is understood that one firm of Solicitors has already taken up the suggestion contained on Page 365 of Wylie's Irish Conveyancing Law that a statement that the Solicitor is not to be taken as the agent of his client for the purposes of Section 2 of the Statute of Frauds (Ireland) 1695 by having a statement to this effect printed on the firm's notepaper. Apart from wondering whether the firm in question has read the footnote on Page 365 which raises the possibility that the Solicitor may be an express agent in a particular case, the writer wonders whether in all cases clients would necessarily be thankful to find that they had not been committed by their Solicitor to a sale or perhaps more likely to a purchase. It has often seemed strange to the writer that although most practitioners must on average act for Purchasers as often as they act for Vendors, conversations about this particular topic always seem to centre around how to avoid binding a Vendor from whom the Solicitor is acting as if Vendors always wished to resile from their bargains. Rarely does a Solicitor seem to consider that a Vendor might want to get both parties bound as soon as possible.

The inescapable conclusion to come from these cases is that much greater care must be exercised in negotiating oral agreements on behalf of Vendors and Purchasers and ensuring that whoever is involved in the negotiations be they Auctioneer or Solicitor has firm authority from his client either to conclude an oral agreement or that he has the clients firm instructions to provide at the time of the making of any oral agreement that it is to be subject to subsequent conclusion of a written contract or to the approval of title by both parties or to a subsequent formal exchange of contracts or some other provision which will clearly show that no completed oral agreement has been reached. It now appears that any subsequent attempt in writing to suggest that the parties are not already bound may merely provide the evidence necessary to prove that they are so bound.

RADICAL CHANGES PROPOSED BY NEW SALE OF GOODS BILL

by Robert Flanagan

The Sale of Goods and Supply of Services Bill 1978 now before the Oireachtas contains many sweeping changes in what has become known recently as Consumer Law. Following on the Consumer Information Act 1978 whose full implementation has been delayed pending the entry into office of the recently appointed Director of Consumer Affairs, the second piece of legislation (as initiated), provides for the following major changes:—

1. A buyer will no longer have to reject defective goods at the time the property in them passes or is deemed to pass to him.
2. Contracts for Sale will contain implied conditions and warranties as to the title of the vendor to sell the goods.
3. Goods selected by a buyer from a display, e.g. in a self-service shop or supermarket may be "goods sold by description".
4. The implied conditions or warranties as to the merchantable quality (now defined for the first time) of goods shall only apply where the seller sells in the course of business.
5. Such a seller may not use notices or exclusion clauses that would restrict a buyer's rights under Sections 12 to 15 of the Sale of Goods Act 1893 (as amended by the proposed bill).
6. All sales of motor vehicles, except to a buyer in the trade will have an implied condition that the vehicle is free from any defect which would render it a danger to the public. Such a condition may only be excluded by an agreement that the vehicle is not intended for use in its then condition, and only in the circumstances where such an agreement is reasonable.
7. Finance Houses are to be made parties to any contract between a seller and a consumer where there is a contract whereby the Finance House finances the consumer.
9. Guarantees can no longer exclude statutory or common law rights and the benefits of guarantees can pass to all persons who acquire title to the goods during the guarantee period e.g. persons who receive the goods as gifts.
9. A purchaser is not deemed to have accepted goods until he has had an opportunity of examining them.
10. The rights of hirers under Hire Purchase Agreements are strengthened and brought generally into line with buyers rights under contracts for the sale of goods.
11. Suppliers of services (a phrase not comprehensively defined in the Bill) are deemed to imply in all contracts which they make for those services that they have the necessary skill to render the service, that they will supply the service with due skill, care and integrity and that all materials used will be sound and reasonably fit for the purpose required.
12. The law in misrepresentation has been altered in favour of the person to whom the representation is made in so far as the remedies for misrepresentation is concerned.
13. Unsolicited goods may after notice to the sender, be retained by the recipient.
14. Charges for directory entries can only be levied where there is an agreement for such entry and orders for such entries must be on the customers notepaper or order forms.

The above does not purport to be a comprehensive list of all the amendments to the Sale of Goods Act and new Sale of Goods Act and new law introduced by the Bill. One of the over riding provisions in the Bill which will govern both it and the 1893 Act introduced the concept of a "consumer" for the first time a consumer being a person who does not make a contract in the course of a business transaction but the other party to the contract does make it in such capacity and the goods or services are of a type ordinary supplied by private use or consumption.

There is no reason to believe that there will be substantial substance of amendments accepted to this legislation. Nor indeed are they likely to be put forward by the major opposition party because the Bill is very similar to one which is understood to have been drafted during the tenure of office of the previous government and which was in fact introduced as a Private Members Bill by front bench members of the opposition in late 1978. It therefore seems very important for solicitors to brief themselves on the terms and effects of the new legislation, which are likely to be pervasive and far ranging.

DUBLIN SOLICITORS' BAR ASSOCIATION

Report of a lecture on TITLE INSURANCE given by Paul McNamara of the firm of Czaplar & Bok, Attorneys at Law, Boston, Massachussetts.

Mr. McNamara recently gave a short lecture to the Dublin Solicitors' Bar Association in Blackhall Place.

The main points of his lecture were:—

1. Lawyers in Boston, Massachssetts and generally in New England have a monopoly on conveyancing as in Ireland. This does not apply to Lawyers in other newer areas such as California and the Mid-West where the work is done by non-qualified persons and it was in these areas that the idea of Title Insurance first came up.
   The spread of Title Insurance came to Boston around the 1960's as a result of an inflow of money from the West into the East. The financial institutions insisted on also getting Title Insurance.
2. The Title Insurance is an *extra*. It is not a substitute for Lawyers and Lawyers are still liable under the Negligence Policy. Title Insurance only covers defects on Title which would not have appeared to the Lawyer. It can cover delays in completion or claims being made against the property for Planning breaches or liens. In Boston they have the situation that when a person carries out work to a property he may get a lien against the property for his fees involved, and these give rise to a number of problems.
3. It appears that their search of Title does not have any Statutory protection as given to Lawyers in Ireland under the 1881 Act. Accoringly they have to search back 50 to 60 years to get a good root of Title. They do not have our Statutory period of 40 years. Similarly for adverse possession the period is around 20 years unlike our 12 year period.
   The important point is that the Indemnity is in addition to the normal cover. It is the Lawyer who negotiates this cover and it is in addition to his own Negligence Policy. The Insurance Cover is given on the basis of the Lawyer's Certificate of Title. He negotiates the terms with the Insurance Company and he determines what cover is taken out.
   The cost in the United States at the moment runs at around 3 dollars per 1,000 dollars cover effected and in the U.K. it is around £2.50 per £1,000.00 cover effected.
4. The similarity between the registration of Title in Boston and Dublin is remarkable in that they have both registered and un-registered Title and that Lawyers have a monopoly on conveyancing. Title Insurance is now common in Boston expecially in commercial transactions and it enables the Lawyer for the Purchaser or Borrower also to act for the Lending Institution upon him producing the Title Indemnity Policy. The terms of the Policy whilst they are negotiated by the Lawyer are effective only during the currency of the particular ownership, that is they do not run with the Title but as soon as the insured has passed on his Title the Policy lapses, or ends.

It would seem that due to the more complicated nature of conveyancing in the States and the lack of Statutory Protection as to periods of Title that the Title Indemnity is more appropriate in the States than it could be here.

DUBLIN SOLICITORS BAR ASSOCIATION

CORRECT FEE ON RESIDENTIAL LETTING AGREEMENTS

The Association recently submitted to the Law Society a query as to the correct basis of charging fees for residential flat and house letting agreements.

The Professional Purposes Committee of the Law Society has pointed out that the proper charge is the scale fee appropriate to the rent under the Solicitors Remuneration Act as set out in the Society's Handbook.

The Committee indicated that the Society did not object to the continuation of the tradition of charging only nominal fees when acting for a tenant taking a short term letting of residential property either furnished or unfurnished.

The Obligations of Apprenticeship

The attention of practitioners and apprentices is brought to the provisions of Section 38 of the Solicitors Act 1954. The Section reads as follows:—

"38 — (1) An apprentice shall not hold any office or engage in any employment other than employment under his apprenticeship unless, before doing so, he obtains the consent in writing of the Solicitor to whom he is bound and the consent of the Society.

(2) The following provisions shall have effect with respect to a consent by the Society for the purposes of this section.

(a) the consent shall be by order of the Society,

(b) before making the order, the Society shall be satisfied that the holding of the office or the engagement in the employment will not prejudice the applicant's work as an apprentice,

(c) the order may impose on the applicant such terms and conditions regarding the office or employment and the applicant's service as an apprentice as the Society think fit.

(d) where terms or conditions are so imposed, the applicant shall, before being admitted as a solicitor, satisfy the Society that he has fulfilled those terms or conditions".

Because apprentices under the Old Regulations are so frequently absent from the offices of their masters in order to attend lectures and examinations, regular attendance by the apprentice in the offices of their masters became the exception rather than the rule. While such absences from the office are clearly necessary, authorised apprentices may not absent themselves from the office of their masters in order to engage themselves in whole time employment. If an apprentice wishes to engage in full-time employment he must first obtain the written consent of his master and then the consent of the Society. In a recent case it was brought to the notice of the Society by a Vocational Education Committee that a teacher on their full-time staff was a solicitors apprentice. As no prior consent had been obtained the Society has ruled that (this employment as a vocational teacher having ceased) the apprentice would have to serve an extra year's service under indentures.

Promoting Good Relations

Building good relations between the profession and the young married members of the community is essential. More often than not the purchase of a house is their first contact with solicitors. The impression created at this point is vital to their future relationship with members of the profession.

Delays are sometines unavoidable, but solicitors should endeavour to avoid delays so far as they are concerned and to explain any delays which might arise. Delays often cause the first-time house buyers to seek expensive bridging loans, causing considerable problems for them. Solicitors who demonstrably appreciate these difficulties of new clients will build confidence in the profession and contribute to its image with the public.

The High Court

In the matter of the Solicitors' Acts, 1954 and 1960

The Society had occasion recently to initiate proceedings against a solicitor in regard to serious complaints received from his clients which might be fairly summarised as follows:-

(1) Failure to carry out his instructions at all.

(2) Failure to carry out his instructions satisfactorily in probate and conveyancing matters.

(3) Failure to communicate with his client and to reply to letters of enquiry.

(4) Failure to reply to communications from the Society.

(5) Failure to attend at meetings of the Society when called upon to do so. Failure to attend before the Disciplinary Committee.

The above listed faults covered a number of complaints against the solicitor in respect of different matters.

The Disciplinary Committee referred the matter to the High Court and after several adjournments the solicitor was given one final adjournment of approximately five weeks within which to clear up the outstanding matters. This he did with the exception of one which is now virtually completed and will be dealt with by the President as a separate issue. The President found misconduct proved and said that he would have struck the solicitor off the Rolls without hesitation had he not in the last instance made an honest endeavour to co-operate with the Society and to carry out the instructions of his client. He said however, that he could not overlook the fact that these fairly text book offences had been committed by the solicitor who could not be allowed to go without the President showing the High Court's disapproval of his conduct.

He ordered by agreement with the Society that the Solicitor concerned should contribute the sum of £1,000 towards the costs of the Society's proceedings. This Order applied to and covered all the cases disposed of up to date. to date.

Such other costs as may be due and those due in other cases in which a finding of misconduct was made against the solicitor will be dealt with when the occasion arose.

National House Building Guarantee Scheme

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The first issue of the National House Building Guarantee Scheme's Register of Builders who work within the N.H.B.G. Scheme has been received by the Society and is available for inspection in the Library.

Copies of the Register may be obtained from

THE NATIONAL HOUSE BUILDING GUARANTEE SCHEME, 9, LEESON PARK, DUBLIN 6. Tel. 977487.

Price 47p.

PRESENTATION OF PARCHMENTS

The following newly qualified Solicitors were presented with their parchments by the President, Mr. Joseph L. Dundon, on 7th December, 1978.

1. Aitken, James, 28 Claremont Park, Sandymount, Dublin.
2. Archibald, Valerie Florence, Largy, Drumconrath, Navan, Co. Meath.
3. Arigho, Henry Joseph, 23 Dartry Park, Dublin.
4. Barrett, Mary, 53 Donnybrook Road, Donnybrook, Dublin.
5. Beausang, Hilary, Poulavone, Ballincollig, Co. Cork.
6. Bennett, Richard, 55 Llewellyn Grove, Ballinteer, Dublin.
7. Bowe, Helena Marie, B.C.L., 51 The Glen, Waterford.
8. Brady, Brid, 488 Collins Avenue, Whitehall, Dublin.
9. Brady, Padraic, 488 Collins Avenue, Whitehall, Dublin.
10. Brady, Philomena, "Waterville", Dunboyne, Co. Meath.
11. Breslin, Clare, 12 Leopardstown Grove, Blackrock, Co. Dublin.
12. Burke, Margaret Mary Hilary, LL.B. 3 Robinhood Park, Clondalkin, Co. Dublin.
13. Butler, Gerard William, 51 Cherrington Road, Shankill, Co. Dublin.
14. Cahill, Bernadette, 67 The Sycamores, Kilkenny.
15. Carroll, Michael, 3 Ardnaree, Athlone, Co. Westmeath.
16. Carter, Michael Joseph, B.C.L., Knappaghmore, Strandhill Road, Sligo.
17. Casey, Katherine E., Ardfallen House, Douglas Road, Cork.
18. Casey, Niall Gerard, Cusack Road, Ennis, Co. Clare.
19. Clarke, Geraldine, Keash Corann, Ballymote, Co. Sligo.
20. Coghlan, Michael, 3 Argyle Road, Ballsbridge, Dublin.
21. Coleman, Therese A. M., "Les Sapins", 283 Harolds Cross, Grange Road, Dublin.
22. Colfer, Niall P., "Fairways", Carrickbrack Road, Sutton, Dublin.
23. Collins, Thomas D. 45 Whitehall Road, Churchtown, Dublin.
24. Cronin, Mary Lou, "Rosmini", Leslie Avenue, Dalkey, Co. Dublin.
25. Daly, Stephen, Church Street, Abbeyfeale, Co. Limerick.
26. Davies, Joseph Patrick, "Glandore", 13 North Avenue, Mount Merrion, Co. Dublin.
27. Dawson, Patrick, Grange, Tullow, Co. Carlow.
28. Deacy, John Pius, Mayville, Ardnasilla, Oughterard, Co. Galway.
30. Dillon, David William, Belgrove Park, Chapelizod, Co. Dublin.
31. Dillon, Mary, 36 Lower Trees Road, Mount Merrion, Dublin.
32. Dobbyn, Paul Robert, B.C.L., 11 Cabinteely Close, Cabinteely, Co. Dublin.
33. Drumgoole, Patricia, 212 Philipsburgh Avenue, Fairview, Dublin.
34. Dunne, Daniel William, Cloncullen, Mountrath, Laois.
35. Eagar, Robert John, B.C.L., 63 Dartmouth Square, Dublin.
36. Egan, Eanya, Mountain View, Castlebar, Co. Mayo.
37. Ellis, Gerard J., "Ard Mhuire", Somerton Road, Chapelizod, Co. Dublin.
38. Flanagan, Clare, B.C.L., Ballaghderreen, Co. Roscommon.
39. Fleming, William Patrick, B.C.L., "Idlewild", Farnham Road, Cavan.
40. Flynn, James, New Inn, Ballinasloe, Co. Galway.
41. Geraghty, Donal, "Galmon", Taylor's Hill, Galway.
42. Gibbons, Conal, Keadue, Boyle, Co. Roscommon.
43. Gillece, Geraldine, St. Joseph's Road, Naas, Co. Kildare.
44. Griffin, Gerard Francis, 24 St. Kevin's Park, Dartry, Dublin.
45. Griffin, Joseph, 20 Lower Gerald Griffin Street, Limerick.
46. Hanahoe, Anthony Thomas, 3 Ashfield Park, Naas, Co. Kildare.
47. Harvey, Martin A., "Lacaduv", Lee Road, Cork.
48. Healy, Jeremiah F., Castlelyons, Fermoy, Co. Cork.
49. Henry, Mary E., 86 Kincora Road, Clontarf, Dublin.
50. Hickey, Desmond Gerard, 66 Silchester Park, Glenageary, Dun Laoghaire, Co. Dublin.
51. Higgins, Michael, Oughterard House Hotel, Oughterard, Co. Galway.
52. Hollwey, Caroline Jane, "Dunstaffnage", Stillorgan, Co. Dublin.
53. Johnson, Brendan Louis, Ballymote, Co. Sligo.
54. Jones, Peter H., B.C.L., Abbey Street, Roscommon.
55. Kean, John P., Mount Street, Claremorris, Co. Mayo.
56. Keane, Miriam R., Brookhill, Claremorris, Co. Mayo.
57. Keller, Mark, 7 Gladstone Street, Waterford.
58. Kelly, Michael Kieran, Bredon, Wilton Avenue, Bishopstown, Cork.
59. Kennedy, Patrick, 127 Ranelagh, Dublin.
60. Lavelle, John David, 35 Ballymany Park, Newbridge, Co. Kildare.
61. Lee, Michael, B.C.L., Newtown, Waterford.
62. Lindsay, John B. K., 17 The Rise, Mount Merrion, Co. Dublin.
63. Lynskey, John Edward, B.C.L. Elphin Street, Strokestown, Co. Roscommon.
64. Maguire, Joseph F., "Ard Mhuire" Cuala Road, Bray, Co. Wicklow.
65. Maguire, Richard William, 18 Blackheath Drive,

Clontarf, Dublin.
66. Mahon, Raymond, Clonminch House, Tullamore, Offaly.
67. Marren, Thomas Gerard, B.C.L., D'Alton Street, Claremorris, Co. Clare.
68. Martin, David, Cintra Cottage, Malahide, Co. Dublin.
69. Mathews, Raphael Mary, 124 Stillorgan Road, Donnybrook, Dublin.
70. Meagher, Mary, B.C.L., 41 Newpark, Portlaoise, Laois.
71. Moran, Charles, 87 Orwell Park, Willington Road, Templeogue, Dublin.
72. Mulryan, Patrick, Kilgrave, Ballinasloe, Co. Galway.
73. Murphy, Kate Ann, Harbour View, Schull, Co. Cork. Cork.
74. MacMahon, Brian Harold, B.C.L., Villa Marie, Blessington, Co. Wicklow.
75. McAllister, Rowena, M., 30 Castlepark, Sandycove, Co. Dublin.
76. McBride, John Gerard, St. Paul's, 17 Raheen Park, Bray, Co. Wicklow.
77. McCarthy, Mary, Grange, Ovens, Co. Cork.
78. McCarthy, Philomena, Grange, Ovens, Co. Cork.
79. McDermott, Patrick, Turloughmore, Athenry, Co. Galway.
80. McDonnell, Patrick, B.C.L., 43 Waltham Terrace, Blackrock, Co. Dublin.
81. McEvoy, Keyna, 3 Northbrook Road, Leeson Park, Dublin.
82. McGuinn, Hilary Marie, B.C.L., 70 Woodlands, Naas, Co. Kildare.
83. McMahon, Patrick J., 25 Ardpatrick Road, Navan Road, Dublin.
84. McNally, Paul, "Lake Cottage", Menlo, Co. Galway.
85. McSweeney, Denis, 53 Knockashee, Goatstown, Dublin.
86. Noonan, Joseph, 4 Inniscarrig, Western Road, Cork.
87. Nyhan, Francis Gerard, 5 Davis Avenue, Clonmel, Co. Tipperary.
88. O Boyle, Helen Mary, B.A., 4 Barnhill Grove, Dalkey, Co. Dublin.
89. O Brien, Ronan, "Merlin", Portland Road, Greystones, Co. Wicklow
90. O Brien, William Mark, Castle View, Killincarrig, Delgany, Co. Wicklow.
91. O Connell, Owen Francis, 25 Ulverton Road, Dalkey, Co. Dublin.
92. O Connell, Patrick, 37 Park Road, Castleisland, Co. Kerry.
93. O Connor, John B., Main Street, Dormod, Co. Leitrim.
94. O Connor, John Gerard, 59 Marymount, Ferrybank, Waterford.
95. O Donoghue, John Anthony, 3 West Main Street, Cahirciveen, Co. Kerry.
96. O Duffy, Kiran, 35 Throncliffe Road, Rathgar, Dublin.
95. O Farrell, Orlagh, "Dornton", 11 Brewery Road, Stillorgan, Co. Dublin.
98. O Grady, William Francis, "Kenley", Granville Road, Newtownpark Avenue, Blackrock, Co. Dublin.
99. O Herlihy, Gerard, St. Brandon's, Montenotte, Cork.
100. O Keeffe, Peter J., 23 Park Road, Muskerry Estate, Ballincollig, Co. Cork.
101. O Kelly, Seamus, 9 Grosvenor Road, Rathmines, Dublin.
102. O Leary, Cornelius, 19 The Court, Woodpark, Ballinteer, Dublin.
103. O Leary, John, "Greenville", Gorey, Co. Wexford.
104. O Reilly, William, Kilcash, Kilsheelan, Clonmel, Co. Tipperary.
105. Parkinson, Kenneth, 39 Hollywood Drive, Goatstown, Dublin.
106. Power, Patrick, 27 Beechpark Avenue, Castleknock, Co. Dublin.
107. Quinlan, Barbara, "Kilrogan", South Circular Road, Limerick.
108. Quinlan, Mary C., B.C.L., 16 Landscape Gardens, Churchtown, Dublin.
109. Raftery, Winifred A., Alloon Bawn, Ballymacward, Ballinasloe, Co. Galway.
110. Rooney, Fergal, 36 Eyre Street, Galway.
111. Ryan, Margaret Veronica, 30 Palmerstown Road, Dublin.
112. Ryan, Michael Joseph, 45 Woodlands Park, Blackrock, Co. Dublin.
113. Sanfey, David, B.B.S., LL.B., 45 Llewellyn Grove, Grange Valley, Dublin.
114. Schütte, John, 124 Foxrock Park, Foxrock, Co. Dublin.
115. Scott, Mary, 12 Myrtle Park, DunLaoghaire, Co. Dublin.
116. Sherlock, Declan, 6 Esker Road, Lucan, Co. Dublin.
117. Sowman, Jenniver, Hazel, 30 Avondale Crescent, Killiney, Co. Dublin.
118. Spillane, Maurice Timothy, Newgarden House, Lisnagry, Co. Limerick.
119. Sweeney, James M., 14 Cabra Road, Phibsborough, Dublin.
120. Sweeney, Mary, The Crescent, Dundalk, Co. Louth.
121. Synnott, David, 35 Landscape Crescent, Churchtown, Dublin.
122. Tighe, Miriam, 37 St. Mary's Drive, Dublin.
123. Twomey, Brendan Joseph, B.C.L., 139 Grange Road, Rathfarnham, Dublin.
124. Vahey, Valerie, B.A., 19 Villarea Park, Glenageary, Co. Dublin.
125. Walker, Andrew Philip, Balgara, Sandyford, Co. Dublin.
126. Walley, William David, B.C.L., 11 Villa Park Gardens, Navan Road, Dublin.
127. Walsh, John G., B.C.L., 1 Templevilla Drive, Terenure, Dublin.
128. Walsh, Roiisin, "Wyndsway", Thornmanby Road, Howth, Co. Dublin.
129. Walsh, Rosamond Theresa-Marie, B.C.L., "Hazel Croft", Hillcrest Road, Sandyford, Co. Dublin.
130. Whelan, James C. "Arthur", Douglas Road, Cork.
131. White, John William, Polesbridge, Stradbally, Laois.
132. Wilson, Owen Gerard, Headfort Park, Kells, Co. Meath.
133. Wiseman, Anne P., 1 Ard-na-Greine, St. Luke's, Cork.

The Register

REGISTRATION OF TITLE ACT, 1964

Issue of New Land Certificate

An application has been received from the registered owners mentioned in the Schedule hereto for the issue of a Land Certificate in substitution for the original Land Certificate issued in respect of the lands specified in the Schedule which original Land Certificate is stated to have been lost or inadvertently destroyed. A new Certificate will be issued unless notification is received in the Registry within twenty-eight days from the date of publication of this notice that the original Certificate is in existence and in the custody of some person other than the registered owner. Any such notification should state the grounds on which the Certificate is being held.

Dated this 30th day of April, 1979.

W. T. MORAN (Registrar of Titles)

Central Office, Land Registry, Chancery Street, Dublin 7

Schedule

(1) Registered Owner: Thomas Kiernan and Patrick Harte; Folio No.: 15822; Lands: Porterstown; Area: 0a. 0r. 16p.; County: Dublin.

(2) Registered Owner: Patrick McGrath and Anne McGrath; Folio No. 21939; Lands: (1) Carrowcardin; (2) Carrowcardin; Area (1) 22a. 1r. 30p.; (2) 5a. 0r. 30p.; County: Sligo.

(3) Registered Owner: Michael Turner and Catherine Turner: Folio No. 45779; Lands: Illaun; Area: 6a. 3r. 3p.; 6a. 0r. 13p.; 1a. 1r. 7p.; 1a. 3r. 16p. County: Galway.

(4) Registered Owner: Patrick Joseph Tierney; Folio No: 8661; Lands: Pickardstown and Kingstown; Area: 81a. 0r. 30p. and 5a. 0r. 0p.; County: Dublin.

(5) Registered Owner: Patrick Tully; Folio No: 2073 (This folio is closed and now forms the property Nos. 1, 2 and 3 comprised in Folio 1807F); Lands: (1) Owenbeg, (2) Owenbeg and (3) Owenbeg; Area: (1) 12a. 3r. 20p.; (2) 16a. 3r. 34p., (3) 25a. 0r. 33p.; County: Sligo.

(6) Registered Owner: James Quinn; Folio No.: 1997F; Lands: Oldkilcullen; Area: 1a. 0r. 0p.; County: Kildare.

(7) Registered Limited Owner: Catherine Hughes; Folio No.: 2455; Lands: (1) Calverstown Little, (2) Calverstown; Area: 17a. 3r. 35p.; (2) 31a. 1r. 29p.; County: Kildare.

(8) Registered Owner: Eithne Mary Phelan; Folio No.: 22L; Lands: The Leasehold interest in the Lands of Newcourt with the dwellinghouse and premises thereon known as St. Bernards situate on the east side of Newcourt Road in the Urban District of Bray Parish of Bray, Barony of Rathdown and County of Wicklow; County: Wicklow.

Young Barrister wishes to purchase law books, preferably Law Reports, either Irish or English. Odd volumes acceptable. Hopefully cheap. Will collect. Box No. 183.

Wanted: Legal Typist (with at least three years experience) for Naas Solicitor. Good salary. Phone (045) 97853.

LOST WILLS

The Very Reverend James Joseph Alston, deceased, late of the Parochial House, Swords, in the County of Dublin, formerly of 44 Nutley Park, Dublin 4, and 61 Clontarf Road, Dublin 3. Will any person having knowledge of a Will of the above named deceased who died on the 3rd January 1979 please communicate with Messrs. Patrick F. O'Reilly & Company, Solicitors, 8 George's Street, Dublin 2.

Reverend George Bell — Will any person who possesses an original or copy Will of the above deceased, who was awarded a Doctorate of Music in Trinity College in 1888, please contact Messrs. Maxwell, Weldon & Darley, Solicitors, 19/20 Lower Baggot Street, Dublin 2, quoting their reference PDG.

Winifred Lawlor, deceased, late of Flat 22 Adair, Sandymount Avenue, Dublin 4, died on the 5th April 1979. Will any person knowing the whereabouts of a Will of the above-named deceased please get in touch with Messrs. Hayes & Sons, 15, St. Stephen's Green, Dublin 2, Ref. TM.

THE INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

APRIL 1979 VOL. 73 NO. 3

At the Law Society's Council Dinner on 22 March were: From left—Mr. G. P. Dempsey, President of the Institute of Chartered Accountants, Mr. Gerald Hickey, President of the Society, and Mr. Desmond O'Malley, T.D., Minister for Industry, Commerce and Energy.

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Client Account-Deposits

Mercantile Credit Company of Ireland Limited is included in the list of Banks approved by the Incorporated Law Society of Ireland, and offers a first class Deposit service to suit the needs of solicitors and their clients.
Incorporated in 1946 we are a wholly owned subsidiary of Mercantile Credit Company Ltd, which became a member of the Barclays Bank Group in 1976. Licensed as a bank in 1961, Trustee status was granted in 1977.

FINANCIAL STATEMENT
30th September 1978

	1978 £	1977 £
Funds Employed		
Issued Share Capital	3,000,000	1,600,000
Revenue Reserves	938,917	677,962
Shareholders Funds	3,938,917	2,277,962
Loan Stock	1,000,000	—
Deferred and Future Taxation	477,912	168,040
Deposit and Other Accounts	26,215,176	19,0088,030
	31,632,005	21,454,032
Use of Funds		
Cash, Balances with Bankers etc.	2,970,528	2,036,233
Investments in Government Securities	2,715,219	1,828,193
Loans, Advances, Leasing and Other Accounts	25,748,317	17,437,697
Properties and Equipment	197,941	151,909
	31,632,005	21,454,032

ATTRACTIVE INTEREST RATES AVAILABLE

For information contact:— J. P. O'Carroll

Mercantile Credit Company of Ireland Limited.

Head Office: Burton Chambers,
19-22 Dame Street, Dublin 2.
Telephone: (01) 756781. Telex: 4526
Branches throughout the country.

A MEMBER OF THE BARCLAYS BANK GROUP

The Effect of Capital Taxation Legislation on the Drawing of Wills and Administration of Estates

The revised text of a lecture given by E.M.A. CUMMINS, Chief Trustee Manager, Bank of Ireland, to the Dublin Solicitors' Bar Association on 28th February 1979.

INTRODUCTION

The package of Capital Taxation introduced in 1975 as a replacement for Estate Duty has now been in operation for almost five years – a very short period by any standards, yet long enough to see substantial changes in the system to the point of complete abolition of Wealth Tax and a major revision of the Capital Gains Tax proposals as originally introduced.

The one Tax that has remained virtually intact is Capital Acquisition Tax and it is with this Tax that this commentary is concerned particularly in its practical implications on the administration of Estates, the drawing of Wills and in the context of mitigating the incidence of the Tax.

However, before proceeding, it is appropriate to comment briefly on Capital Gains Tax as presently constituted with particular reference to its relevance "on death" and also to consider what implications, if any, U.K. Capital Transfer Tax may have on U.K. assets passing on the death of persons normally resident and domiciled in Ireland.

CAPITAL GAINS TAX

As a result of the Capital Gains Tax (Amendment) Act 1978 effective from 6th April 1978, a disposal of assets passing on death is deemed to arise at the date of death but there is an exemption from a charge to Tax. This provision applies to all deaths occurring on or after 6th Apirl 1978 and also relates to disposals made after that date even though the death may have occurred before the date. (If the death occurred before 6th April 1974 the Market value at that date would replace the Market value at the date of death). Therefore, Executors and Administrators are deemed to acquire the deceased's assets at their Market value at the date of death and this is the acquisition cost for subsequent disposals.

Further, it should be noted that where Executors pass assets on to the Legatees/Beneficiaries, the Market value at the date of death will pass through. However, assets, sold in the course of administration may give rise to a Capital Gains Tax liability as between the date of death and the date of sale.

The extent of the liability will, as already stated, be on the basis of date of death value being acquisition cost, with tapering rate relief for period of ownership and inflation relief applying as appropriate. It should be noted, however, that the personal exemption of the first £500 of capital gains does not apply insofar as Executors and Administrators are concerned.

From the foregoing, it will be appreciated that if the time factor between the date of death and the date of sale of assets in the course of administration is significant, a C.G.T. liability can arise.

In summary, the computations and administrative provisions relative to C.G.T. are such as to urge all legitimate means of avoiding them – hence expeditious distributions, with caution, to beneficiaries and successors are, to say the least, desirable.

CAPITAL TRANSFER TAX

Capital Transfer Tax as a replacement for Estate Duty in the U.K. was introduced as of 26th March 1974 in the Finance Act of that year. Voluminous amendments to the initial legislation were added in 1975 and subsequently, all of which point to the horrific complexities of this Tax which in the context of Irish domiciliaries is best avoided if at all possible.

The subject matter of this paper is not directly concerned with Capital Transfer Tax, nevertheless, it is opportune to comment briefly on the broad outline of the Tax since it has relevance in many Irish Estates particularly where the value of the U.K. assets exceeds £25,000 – that is the sole threshold above which C.T.T. is payable at varying rates on life time gifts and inheritances on death – with one major exception, transfers between spouses.

The method of assessing the Tax is similar to the old Estate Duty system with an appropriate table of Rates – one for lifetime gifts and another for inheritances on death. There is, however, one significant difference in determining the incidence of the liability. The donee is liable for the Tax, a fact which gives rise to the "grossing up" provisions – one of the infamous features of C.T.T.

A further significant difference between Capital Transfer Tax and the old Estate Duty code concerns the question of domicile. C.T.T. effectively establishes a deemed domicile concept on a residence basis. Specifically, 17 years residence in the U.K. out of twenty year period is deemed to establish U.K. domicile irrespective of the old Domicile of Origin and Domicile of Choice concepts. It follows, therefore, that many Irish persons who have been living and working in the U.K. have well established deemed U.K. domicile and hence a potential liability to C.T.T. – notwithstanding their definite intention of returning to Ireland permanently. A further consequence of the definition is that following a lengthy period of residence in the U.K. it takes three years residence outside the U.K. before the deemed domicile provisions cease to apply.

If the U.K. domicile is deemed, then the World Assets of the individual come within the C.T.T. net. Even if U.K.

domicile is not deemed, U.K. assets will, as was in the case of Estate Duty law, come within the ambit of the Tax.

These brief comments on this complex piece of legislation will tend to illustrate certain practical points to be dealt with later.

CAPITAL ACQUISITION TAX

The most relevant Tax insofar as the subject matter of this paper is concerned is Capital Acquisition Tax. On the basis that the Tax has been in operation for five years with little change in that period, it is assumed that the basic principles are known and understood. Consequently, it is appropriate to concentrate on aspects of practical administration of this new concept in Tax law in relation to deceased Estates.

Accountability and Payment

One of the significant changes following the introduction of C.A.T. relates to the question of accountability and attendant consequences – when payable, by whom, assets chargeable, Certificates of Discharge etc. The due date for payment of C.A.T. is directly related to the Valuation date which is not necessarily the date of death as was the case in the context of Estate Duty. In general the valuation date is the date on which the Executor/Administrator assents to the bequest which in practical terms is usually some little time after the date of issue of the Grant of Probate. The relevant date would be when the Executor has title to the assets in question and is satisfied that the Estate is adequately in funds to the point of being capable of fulfilling the relevant bequest. In the circumstances, it will be appreciated that, generally speaking, the date on which the Tax becomes payable would be at least several months after the date of death. To be precise, this is normally within three months of the date of inheritance i.e. the date of assent or transfer.

The consequences of this in the majority of cases is that no longer is the Tax payable before the Grant issues with the result of less delay in awaiting an assessed Inaland Revenue Affidavit (Form CA24), agreeing values etc. and arranging finance to discharge the liability pending sale of assets. One now simply requests the Revenue to "note" the completed I.R.A. containing details of the assets and liabilities and this, duly marked, is then presented to the Probate Office together with the other relevant documents – Will, Oath of Executor etc. – to enable the Grant to issue withour undue delay.

Following the issue of the Grant, this will be noted in the usual way thus putting the assets of the Estate into the name or control of the Executor who should then be in a position to discharge the Funeral Expenses, Debts and other Testamentary Expenses in the first instance. When these have been discharged, or at least quantified, the Executor is then in a position to contemplate distributions in favour of the beneficiaries at which point the implications of Capital Acquisitions Tax have to be carefully considered.

Generally speaking, not only has the due date for the payment of the Tax changed, the incidence has also in that the beneficiary is liable for the Tax and is primarily accountable therefor – the Executor is in fact a secondary accountable person. Notwithstanding this, Executors are well advised to take steps to ensure that the Tax is paid to the point of lodging appropriate Forms IT3 with the Capital Taxes Branch of the Revenue and in certain cases withholding the amount of the Tax from funds to be handed over to beneficiaries.

Having regard to the fact that C.A.T. is a cumulative Tax, it is appropriate to suggest that the Form IT3 be signed by the beneficiary particularly in the context that the Form contains statements regarding previous gifts etc. received by the beneficiary from the Testator which fact has, of course, a direct bearing on the rate of Tax applicable.

Arising from their preliminary examination prior to marking the Affidavit, the Revenue are entitled where they consider it appropriate to request a payment on account of the Tax at that point i.e. before the issue of the Grant of Probate.

This they would do in cases particularly where the Executor and/or the Beneficiary are resident outside the jurisdiction. This is an extreme example but it should be noted from the wording of Section 60 (3) that the Revenue have powers to demand payment of Tax in certain situations as would particularly be the case where an "external" dimension arises i.e. Executor, Beneficiary or property is not within the jurisdiction.

Regarding the actual payment of the Tax, consideration should be given to the manner in which payment might be made in certain instances for example by the surrender at par of Government securities standing at a discount – this is a carry forward from the old Estate Duty legislation but relates only to taxable inheritances – and by the instalments as provided for in Section 43 of the Act. This essentially arises in relation to property and while it does not provide any relief in interest terms, it does assist cash flow in the context that Tax can be spread out and paid over five years, the first instalment falling due one year subsequent to valuation date.

Finally, in relation to the discharge of the Tax liability, the Executor is obliged to advise the Revenue of any significant changes in the composition of the Estate by lodging a Corrective Account on Form B3 and further the Executor must take care ultimately to ensure that appropriate Certificates of Discharge from C.A.T. are available. All such Certificates are conditional and are generally issued on the basis of the "facts disclosed" which means that the Revenue can subsequently reopen the case as they would, of course, do in the event of new facts coming to light. Nevertheless, particularly in the matter of determining values etc., the Certificates of Discharge can have relevance. It should be noted, however, that notwithstanding previously accepted values, a sale of property within three years and agricultural land within six years of death will normally reopen the valuation question and could consequently give rise to an additional Tax liability.

From the brief reference earlier to Capital Transfer Tax, it will be appreciated that a liability to this Tax will arise in relation to Irish Estates where the value of U.K. assets is in excess of £25,000 and these assets are bequeathed other than to the surviving spouse.

In relation to the extraction of a Grant of Probate in England in the first instance, details of the U.K. assets must be submitted on Inland Revenue Account Form 201 for assessment of C.T.T. This Tax is payable on assessment of this Form as was the case in relation to Estate Duty. Hence, the system is different when compared with the Irish system for payment of C.A.T.

Distributions-Appropriation

When it is appropriate to consider distributions to beneficiaries, the manner in which these are made does have a direct bearing on the incidence of the new Capital Taxes – a few practical examples relative to the various Taxes will illustrate the points at issue.

(a) In relation to Capital Acquisition Tax, the availability of Government Stocks to surrender at par in discharge of this Tax is allowable only where the Stock in question forms part of the beneficiary's entitlement from the Estate and was held by the Testator for a minimum period of three months prior to death. Hence, the Executor should consider appropriating such a holding in satisfaction of the beneficiary's entitlement. Care must be taken, however, to ensure that the powers of appropriation are exercised equitably and the one beneficiary is not favoured as against another. A further example of achieving an effective saving of Tax would be to appropriate such Government Stocks to a beneficiary who is normally resident and domiciled abroad since such holdings are effectively exempt from C.A.T. if held by the deceased as at 14th April 1978 or for a minimum period of three years.

(b) Having regard to the surviving spouse exemption in relation to C.T.T., U.K. assets should be appropriated in satisfaction of bequests to the surviving spouse under the Succession Act 1965 – a matter which should not be overlooked in the context of the spouse's right of election. Further, certain U.K. Government Stocks are exempt from C.T.T. in the hands of a non-resident domiciliary and care should be taken to appropriate these Stocks to a beneficiary who is resident and domiciled outside the U.K.

(c) In the context of Capital Gains Tax, the concept of appropriation is certainly relevent in considering avoidance of this Tax insofar as it might apply since assets transferred directly by the Executor to a beneficiary are deemed to have been acquired by the beneficiary at the date of death value of the said asset thus not giving rise to a C.G.T. liability in the hands of the Executor which would be the case if the Executor sold the assets in question and transferred the proceeds to the beneficiary.The incidence of C.G.T. may not be of great import having regard to the tapering rate and indexation reliefs – except as pointed out earlier where there is an undue delay between the date of death and the date of disposal of the relevant assets by the Executor.

Limited Interests

The reference to "beneficiaries" has been intentional in the context that it was not appropriate up to this point at least to distinguish between Legatees, Specific Devisees, Life Tenants, Residuary Legatees etc. In broad terms, the differentiation where the Estate is being distributed outright is not of significance from a C.A.T. point of view. However, in relation to limited interests arising in an Estate, the implications of the Tax assessments can be quite different and complicated depending on the nature of the said interests. For example, in relation to a life interest situation, the Tax is assessed having regard to the age and sex of the life tenant and the value of the property in which the life interest subsists. However, it must be remembered that the life tenant is liable and primarily accountable for the Tax, though having regard to the provisions of Section 35 (8) of the Act, the person so accountable shall have power to raise the amount of such Tax by the sale or mortgage of or a terminal charge on "the property" in which the life interest subsists. It is suggested that the power to sell or mortgage for payment of Tax given by Section 35 (8) is in the case of the life tenant restricted to selling or mortgaging the life interest and does not extend to the capital in which the life interest subsists.

The implications are such as to prevent an Executor/Trustee from discharging the C.A.T. liability out of the capital of the Funds in which the life interest subsists since to do so would be to the detriment of the remaindermen. On the other hand, it seems extremely onerous on the life tenant that he or she has to find a substantial sum to discharge the Tax on the commencement of the life interest.

A brief example will best illustrate this point.

'A' leaves a life interest in a sum of £100,000 to Ms. Smith aged 63 years at the date of 'A's death. The taxable value of the life interest having regard to Table A in Part II of the First Schedule of the Act would be 60% or £60,000. Assuming no prior usage of threshold, the Tax applicable is £15,600.

The liability has to be met by the life tenant and is due in practice shortly after the date of 'A's' death, almost before an income flow has commenced. Any delay in discharging the liability will give rise to an interest charge, the rate of interest 1¼% per month is equivalent to 15% per annum and the interest is not an allowable deduction for Income Tax purposes, hence when grossed up for a 60% Tax payer is equivalent to 37½% per annum.

A further relevant point – there is no provision in the C.A.T. legislation for Quick Succession Relief. Consequently, if the life tenant died shortly after succeeding to the life interest, in theory at least, she could have paid more in C.A.T. than her income entitlement. However, where the Tax is paid by instalments, Section 43 (5) of the Act provides that where the donee or successor who has taken a life interest dies before all the instalments have become due, these instalments due after the date of death will not be payable or if paid will be refunded. Further it will be noted that Section 44 of the Act empowers the Revenue to agree to a postponement remission or compounding of the Tax in certain circumstances.

If the liability to Tax is intolerable, of course, one has the ultimate option of disclaiming the bequest or legacy as provided for in Section 13 of the Act but before considering such action, careful thought must be given to the consequences. There may perhaps be other ways of achieving a Tax saving as indeed there are, some of which require pre death planning, others can be achieved in the post death situation.

WILLS

In addition to pre death planning, the key to Tax saving lies in the manner in which the Will is drafted, coupled with consideration of making lifetime gifts. Obviously, care will be taken to ensure maximum usage of thresholds in line with the Tastator's wishes and further the possibility of avoiding a liability to C.A.T. by dividing out the assets likely to be subject to the Tax between a number of beneficiaries should be considered. However,

to carry this form of "asset splitting" to extremes could result in impractical and unworkable solutions. This would certainly be the case if for example a business or farm were divided out between, say, three or four children of a Testator, one or two of whom were interested and actively involved in the enterprise while the others had separate and perhaps well established vocations in life. The ensuing difficulties in such a situation might not only lead to family friction but could also necessitate a sale of the property sooner or later to satisfy the individual rights and expectations.

Conversely, a division of property equally or partially between husband and wife can prove to be particularly beneficial in the case of a "single family unit" where each spouse has separate thresholds in favour of their children thus facilitating in due course dispositions from each with effectively double Tax exempt thresholds. It should be noted, however, that in the matter of "passing on" property in such an instance to the children, the anti avoidance provisions of Section 8 of the Act inhibit this for a three year period subsequent to the first disposition.

Where circumstances permit, exempted or relieved assets should be appropriately bequeathed e.g. Irish Government Stocks to beneficiaries normally resident and domiciled abroad and in the case of Irish residents receiving such a bequest, the Stocks in question subject to certain conditions, if standing at a discount at the date of death can be surrendered at par in discharge of the Tax liability.

Considerable reliefs are afforded in cases where the subject matter of the inheritance is agricultural land provided the successor is deemed to be a farmer within the meaning of the Act, i.e. that 75% of his total wealth comprises agricultural assets subsequent to receiving the gift or inheritance. Notwithstanding these concessions, the manner in which the value of agricultural land in particular has appreciated in recent years clearly indicates that even in an immediate family context, the level of thresholds and the reliefs available in effect mean that on average perhaps less than 100 acres of land can be bequeathed to an individual beneficiary effectively free of Tax so that bequests in excess of that figure or to be precise with a total "agricultural" value of £250,000 will attract Tax at varying rates from 25% upwards. As previously mentioned, there is a provision in the legislation whereby the Tax due can be paid in relation to such bequests by five annual instalments. To consider payment of the Tax by instalments is essentially a post death decision but with a view to considering some mitigation of the Tax liability in a pre death situation, consideration might be given to devaluing such high value bequests by either splitting the assets in question or placing certain encumbrances thereon.

A typical example is as follows:-

'B' transfers his farm of, say 200 acres to his son absolutely – value £500,000.

An outright gift of that nature after appropriate agricultural relief will attract a C.A.T. liability of £65,625.

If 'B's gift to his son were charged with the payment of, say, £50,000 to a daughter at a commercial rate of interest (who had not received any previous gift), then the taxable value of the gift would be abated by a proportion of that sum, and, as the charge is below the tax threshold of the daughter, the actual C.A.T. liability would reduce as follows:-

Market Value		£500,000
Less Agricultural Relief		100,000
Agricultural Value		£400,000
Charge £50,000; proportion 4/5		40,000
		£360,000
Tax	£69,500	
Less 25% for "Gift"	£17,375	
	£52,125	

A saving of £13,500 as compared with £65,625.

It could be left to the son and daughter to make their own arrangements as to the payment of the sum of £50,000 (e.g. yearly instalments) subject, of course, to a commercial rate of interest.

If the daughter were willing to postpone claiming the charge for a sufficiently lengthy period, it might be worthwhile for the son to finance the charge by means of an Insurance Policy.

A reservation of an annuity is not recommended as it only postpones payment of part of the tax and can create difficulties not only for the interested beneficiary but also in the work of administration.

However, the principle of transferring the valuable and appreciating asset to the donee is the prime consideration coupled with the concept of introducing an acceptable means of reducing the value of the said asset at the time of the disposition by way of encumbrance or the like.

In commenting previously on the significance of Capital Transfer Tax in relation to U.K. assets, reference was made to the principal exemption in relation to that Tax in the context of transfers between spouses. Consequently it follows that bequests to spouses in Wills should in the first instance be charged against U.K. assets. Further, where exempt U.K. Stocks are comprised in an Estate, they should be bequeathed to non-resident beneficiaries of the U.K.

In relation to this Tax, as stated, subject to certain exemptions, a liability will arise in relation to any U.K. assets exceeding £25,000 in value, thus for example, if a father bequeathed £100,000 to his son, half of which is represented by U.K. assets, no Irish C.A.T. liability will arise but a C.T.T. liability of £4,700 would be payable against which there is no availability of relief notwithstanding the terms of the recent Double Taxation Agreement since, of course, no C.A.T. is payable to offset the U.K. Tax liability.

The "grossing up" provisions of C.T.T. as previously referred to have a parallel in the context of Capital Acquisition Tax and the point at issue is a very important one which keeps recurring even in modern Wills.

It was more or less standard practice in an Estate Duty context to leave legacies and bequests under a Will "free of Duty". Section 65 of the C.A.T. Act provides for the continuation of that "freedom" in the context of all Wills in relation to deaths occurring on or after 1st April 1975. In the brief commentary on the Tax earlier, attention was drawn to one of the significant differences between C.A.T. and Estate Duty in that in the former the donee is liable for the Tax whereas in the latter Estate Duty was chargeable against the residue of the Estate. Consequently, if a legacy or bequest is given "free of Tax" this means in effect that there is a double legacy (a) the specified amount and (b) the freedom from Tax. It follows, therefore, that Tax is not only payable on the

amount of the legacy but also on the freedom from Tax bequest thus giving the "grossing up" effect.

A factual example of a specific situation was precisely as follows:-

> 'C' left a legacy of £60,000 to Ms. Jones absolutely free of all Taxes. There were no previous bequests and consequently on the basis of Table IV of Part II of the Second Schedule of the Act, a Tax liability of £15,600 arose. The total of legacy and Tax, therefore, was £75,600. In the circumstances, the Tax liability was payable out of the Estate thus giving rise to a further liability to Tax on the Tax, on the Tax and so on with the result that the actual cost of the legacy and Tax to the Estate amounted in all to £91,222.

(The Tax charge in relation to a Tax free legacy of £100,000 in such an instance would be £90,370).

DISCLAIMER

This is probably an appropriate point to move on to post death action in the matter of Tax saving since the example just given begs the question – is there anything that can be done in such a situation to mitigate the Tax liability? The brief answer is 'yes' – subject to the co-operation of the Legatee and/or the other beneficiaries particularly the Residuary Legatees.

At the risk of repeating some points already made, it will be noted that in the example in question there are two separate legacies – (a) the sum of £60,000 and (b) the "freedom" from Tax. It will be noted that Section 13 of the Act effectively permits a beneficiary to disclaim a benefit under a Will or Intestacy and further sub section 3 of that Section facilitates the substitution of consideration in money or money's worth received in lieu of the bequest disclaimed. Consequently, the beneficiary in the case stated could accept her cash bequest of £60,000 and agree with the Executor to accept a specified amount in lieu of the "freedom" from Tax legacy. The amount in question might be to the order of £20,000/£25,000 on which Tax would have to be borne by the Legatee thus leaving the net value of the two legacies under £60,000 which would appear to be inequitable having regard to the Testator's wishes that the lady should have effectively £60,000 free of Tax. This difference might be made up in a number of ways for example by funding the Tax where possible by surrendering at par Government Stock standing at a discount.

The main area of achieving Tax saving in a post death situation as already stated is by the judicious use of the "disclaimer" provisions of the Act. However, care must be taken to ensure that the desired results ensue and the following comments are relevant in any considerations of this nature:-

1. In disclaiming a benefit, one cannot determine to whom the benefit subsequently accrues.
2. In effect a legacy or bequest disclaimed falls into the residue of the Estate.
3. If the Residuary Legatees, or any one of them, disclaim benefit, then that property falls to be divided in accordance with the rules on intestacy.
4. Once accepted a benefit cannot be subsequently disclaimed.
5. An interest in the Residuary Estate cannot be partially disclaimed.
6. One legacy can be disclaimed while a second legacy is accepted.
7. One of several joint legatees cannot disclaim although he can release to the others. Only a disclaimer by all can be effective although the required result can be achieved by means of a severance of the joint interest followed by a disclaimer.
8. "Freedom from Tax" is deemed to be a separate legacy.

These points are very much generalisations and must not be taken as definitive in the context of C.A.T. legislation and indeed more particularly having regard to the Law of Succession.

Further, it is important to draw attention to a variation between the disclaimer provisions of the C.A.T. Act and the somewhat similar provisions of Section 14 (6) of the Capital Gains Tax Act which permits exemption from C.G.T. in the event of bequests being varied under a Will in accordance with the provisions of a Deed of Family Arrangement. Such an arrangement is not possible in the context of Capital Acquisition Tax legislation.

This is undoubtedly an area of confusion which is understandable when one looks at the two Sections of the different Acts referred to which do, of course, relate to two different Taxes. Nevertheless, the provisions of the Capital Gains Tax legislation do permit relief from that Tax in the event of disclaimers being exercised but the relevance of C.G.T. may currently be of little consequence except where there is considerable delay in making distributions.

To illustrate the points referred to in relation to the disclaimer provisions, a factual case is as follows:-

> 'D' bequeathed his Estate, value £360,000 to his widow absolutely. Consequently the C.A.T. liability would be £69,500. In that instance, the widow renounced her interest under the Will and her Legal Right under the Succession Act on which basis an Intestacy arose and the widow became absolutely entitled to two-thirds of the Estate, i.e. £240,000 on which a C.A.T. liability of £24,500 arose and each of the deceased's three children became entitled to the remaining one-third or a sum of £40,000 in each case which did not attract a C.A.T. liability as it was well below the exemption threshold. Consequently, a saving of £45,000 in Tax arose.

In that particular case the widow had the option of taking her Legal Right which would have given her one-third of the Estate i.e. £120,000 leaving the remaining two thirds to devolve on a partial Intestacy. It is suggested that because of the provisions of Section 115 of the Succession Act, the widow may be excluded from further benefit in which would be payable. If, however, the widow was not excluded, in accordance with the provisions of the C.A.T. Act, she could disclaim her further benefit on the Intestacy. However, there is a danger that either the provisions of Section 115 or a disclaimer could give rise to "bona vacantia".

In relation to post death action, one can appropriate assets to avail of certain exemptions and reliefs relative to the Tax. It may also be possible where certain discretions as distinct from powers of appropriation are given to Executors and Trustees to defer distributions with a view to deferring the Tax without interest charge which particularly in times of inflation can constitute a real saving, though care must be taken to ensure that assets do not become inflated in value thus increasing the Tax

liability at the date of distribution and further incurring a potential Capital Gains Tax liability in these circumstances. Nevertheless, if Executors have discretion, particularly where for example the deceased's Will leaves the residue on Discretionary Trust for the benefit of a class of beneficiaries, the Trustees could in that situation subsequent to the date of death acquire Irish Government Stocks which could be appointed out to non resident beneficiaries, free of Tax after a three year period. This type of saving may, of course, have a limited effect only and care must be taken in such instances to exercise the discretion in an overall sense equitably since to do so otherwise would probably not be in accord with the Testator's wishes and could cause family friction. Nevertheless, where the Trustees have discretion, it can be a means of at least providing time to think and to consider what savings might be achieved or indeed in the context of further reliefs being provided by amendments to the legislation at a later date, it is possible that these could be availed of.

CONCLUSION

Having gone through the process of administering the Estate and discharging a minimum Tax liability i.e. all aspects of the administration fully completed, it is appropriate to comment on some aspects of Capital Acquisition Tax law as will arise in matters other than Estate administration – quite specifically in relation to conveyancing and the transfer of property.

Section 47 of the Act gives the Revenue the right to charge the Tax against the relevant property to supplement the right against the accountable persons. The charge affects all property other than money or negotiable instruments and attaches to the property at the valuation date i.e. the date of transfer. Thus, sales in the course of administration are not inhibited by the charge which would attach to the proceeds of sale which form part of the inheritance at the date of rétainer (valuation date).

It will be noted, therefore, that where death appears on a title, this is no longer indicative that a charge to Tax has arisen. However, if there is an Assent or assignment of the property to a person who is clearly a beneficiary under the Will, then a Clearance Certificate should be obtained.

On the other hand, if the property was sold by the Executor in the course of administration, then the property did not form part of the inheritance since the proceeds effectively comprised the inheritance and not the property itself. This is perhaps somewhat of a technicality on which one should not rely, the practitioner would be well advised to seek a Certificate.

Finally, insofar as the overall subject matter is concerned, it must be remembered that in a paper of this nature, one cannot spell out effusively all the detailed provisions for practical application, and further, that at this early date practice is only beginning to evolve and that it will take many years before a volume of experience or case law emerges in the light of which there will be much greater wisdom than this.

In the meantime, this commentary on certain aspects of C.A.T. will, it is hoped, act as a reminder in avoiding pitfalls on the one hand and provide Tax saving opportunities on the other to those concerned with all aspects of asset preservation and succession, whether that be in a pre death situation when discussing Wills or post death in the course of administering Estates.

Illegitimate Children and Succession

A BRIEF CONSTITUTIONAL ANALYSIS

By TOM O'CONNOR, Solicitor

In an earlier article in this series[1] the succession issue in relation to illegitimate children and particularly their very limited rights on an intestacy were discussed. It was also seen how those limited rights contrasted sharply with the succession rights of legitimate children. Such a distinction can undoubtedly be termed discriminatory, but the relevant question to pose and that which will be examined in this article is whether the discrimination can be justified under Article 40.1 of the Constitution which provides that:

> "All citizens shall as human persons be held equal before the law".

This article therefore deals with discrimination between legitimate and illegitimate children viewed from the point of view of the illegitimate child's limited rights to inherit on the intestacy of a deceased parent.

Ryan v. A.G.

In the past ten to fifteen years our members of the legal profession, both practitioners and judiciary alike, have shown a far keener interest than was heretofore apparent in examining both the various defined and undefined constitutional rights and guarantees. The decision of Kenny J. in *Ryan v. A.G.*[2] must be an acknowledged landmark in the field of constitutional law as it opened up or more correctly revealed new horizons and provided the much needed catalyst to examine further those constitutional rights and guarantees. However, the prompting and encouragement to be drawn from the decision of Kenny J. has not always been as apparent as many would have liked in our developing constitutional law and this has led to criticisms of the legal profession even by some of its own members. When one considers the lack of constitutional cases in the area of illegitimacy alone, the criticism is justified.

No case has as yet appeared before the Courts to test the validity of the discrimination levied upon illegitimate children in the law of succession; a somewhat surprising factor particularly when one has regard to recent developments by the U.S. Supreme Court (whose decisions are being increasingly referred to by our Judiciary) of its "Equal Protection Clause"[3] in relation to the numerous cases which have appeared before it on this topic.

Our Supreme Court's decision in the *Nicolaou* case[4] may have contributed somewhat to this inactivity but whilst the judgement in that case (which related not to the rights of an illegitimate child but rather to the rights or, as it transpired, the "non-rights" of a natural father to his illegitimate child) has not been specifically overruled, subsequent decisions by the same Court and by Walsh J. himself, who gave the Supreme Court's judgement in that case, have in the writer's opinion, shown a more liberal approach to the question of discrimination under Article 40.1.

Article 40.1

Under Article 40.1 all citizens as human persons are to be held equal before the law. However, the section contains an important proviso which limits the generality of the foregoing.

> "This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function".

In the *Nicolaou* case[5] Walsh J. held that the first statement in Article 40 was "not to be read as a guarantee or undertaking that all citizens shall be treated by the law as equal for all purposes, but rather as an acknowledgement of the human equality of all citizens and that such equality will be recognised in the laws of the State".[6]

It would be ridiculous to think that the law should provide equal measure under all circumstances to every person and the proviso therefore to Article 40.1 is, as Walsh J. correctly pointed out in the *Nicolaou* case[7] "a recognition that inequality may or must result from some deficiency or from some special need".

However, whilst there may be no diffificulty in agreeing with such statements in general, the problem arises when they are sought to be adpated to specific aspects of our law, such as our law in relation to illegitimate children.

At the outset it must be pointed out that in any society one is bound to have permissible levels of legal and social distinctions or discriminations between various members of that society. The point was made by the late Chief Justice, Cearbhall O'Dalaigh, in *O'Brien v. Keogh and O'Brien*[8] when (referring to the judgement of Walsh J. in the *Nicolaou* case) he said that "Article 40 does not require identical treatment of all persons without recognition of differences in relevant circumstances. It only forbids invidious discrimination."

Invidious or Arbitrary Discrimination

For the purposes of the present article we must consider whether the discrimination which exists between the rights of legitimate and illegitimate children on an intestacy is "of a kind which can fairly be described as being invidious[9] or arbitrary."[10] We must also consider whether the provisio to Article 40.1 justifies this discrimination. The latter consideration will be dealt with first.

Proviso to Article 40.1

The proviso to Article 40.1 undoubtedly acknowledges that there are levels of justifiable discrimination but it will be noted that it does not state that enactments by

the State are to have regard to differences of birth. It refers solely to physical and moral capacity and social function.

"Social Function"

The meaning of the term "social function" was discussed by Walsh J. in the *de Burca* case.[11]

> "To be of either sex, without more, is not per se to have a social function within the meaning ot Art. 40 of the Constitution. To be an architect or a doctor for example is to have a social function, but the function does not depend upon the sex of the person exercising the profession."

Clearly therefore the term "social function" is not applicable to distinctions drawn between children purely because of their birth.

"Physical and Moral Capacity"

The term "physical and moral capacity" is twofold in that one must examine on the one hand what is meant by an individual's physical capacity and on the other hand by his moral capacity.

Presumably one's "physical capacity" would refer to, for example, elements of employment peculiar to an individual. It could also be of relevance, as was pointed out by Walsh J. in the *McGee* case[12] to the question of discrimination where contraceptives were made available to a married woman whose life was endangered by conception but were not made available to a married woman who was not likely to incur such danger. However, it could not refer to a child's birth per se as there is nothing in the factor of birth itself to distinguish it from any other child since it has no control whatsoever over the birth nor the circumstances surrounding it. "It was acknowledged by Mr. Justice Henchy in the recent adoption case[13] that "all children, whether legitimate or illegitimate share the common characteristic that they enter life without any responsibility for their status and with an equal claim to what the Constitution expressly or impliedly postulates as the fundamental rights of children."

The words "moral capacity" imply a somewhat vague or obscure term although they could perhaps be of relevance in a Hart-Devlin type debate on the distinction between and justifications for a private and public morality. They could also be of relevance for example, in an argument to justify the availability of contraceptives to married couples as opposed to unmarried couples living together. However, it is impossible to see how they can be adopted to justify distinctions between legitimate and illegitimate children on the grounds of their birth, for their moral capacity, whatever it may appear to be, cannot no more than their "physical capacity", be related to their circumstances of birth when they themselves have no control over their birth nor their parents' "morality" which gave rise to the birth.

Accordingly, we are now left with the question whether the discrimination in our succession law relating to illegitimate children can be deemed "invidious" or "arbitrary".

Neither of these terms have been examined to any degree by the Courts although O'Higgins C. J. in the *de Burca* case[14] seemed to equate the word "invidious" with the words "unjust" and "unfair". In the *East Donegal Livestock Mart* case[15] O'Keeffe J. held in the High Court (overruled to a large extent on appeal) that where a Minister can grant or refuse to revoke a particular licence "in his uncontrolled discretion and on purely arbitrary grounds" the relevant legislation must be invalid having regard to the provision of Article 40.1. Again the word "arbitrary" was not examined in itself but rather in context.

In fairness it would not be possible to delimit the extent to which any act may amount to invidious or arbitrary discrimination under Article 40.1 without it being independently examined and consequently each case must depend, as is apparent from the case law to date upon its merits.

Fundamental Distinctions

In determining whether any particular act is to be deemed invidious or arbitrary it is felt that the issue will not so much depend upon the meaning attached to those two words but rather to one's own primarily subjective views as to what constitutes discrimination in this context of illegitimacy. There are obviously objective views to be taken into consideration (e.g. the reasons for an already existant state of discrimination, the objects of a society in perpetuating same) but essentially it is the Judge's own personal views on the topic grounded upon solid legal argument which will determine the issue. In the ensuing pages the writer will examine some of the earlier decisions dealing with the question of discrimination and will argue that, in his opinion, those various judgements do indeed provide a solid legal framework upon which our existing law of succession in relation to illegitimate children can be declared invalid having regard to the provision of Article 40.1. However one must first of all recall that there are certain distinctions which can be drawn between various members of our society without interfering with the essential concept that "all citizens shall as human persons be held equal before the law". What is being argued here is that fundamental distinctions which go to the root of the concepts of the equality of man cannot be justified.

Kenny J. examined this concept of equality in the *Quinn Supermarket* case:[16]

> "This guarantee *(in Art. 40.1)* ... is one of equality before the law in so far as the characteristics inherent in the idea of human personality are involved: it does not relate to trading activities or to the hours during which persons may carry on business for neither of these is connected with the essentials of the concept of personality. The qualifying clause in the Article which provides that the State may in its enactments have regard to differences of capacity and social functions shows that the Article is not a guarantee of equality before the law in all matters: see the decision of this Court in *The State (Nicolaou) v. An Bord Uchtala* 81966] IR 567, 639."

Unfortunately Mr. Justice Kenny did not define what was meant by "the essentials of the concept of personality" nor "the characteristics inherent in the idea of human personality." However at the same time it could be argued that the principle he was enunciating in his judgement referred to the equality of man as a being who is born in a resemblance, both physical and mental to every other being. Therefore it is upon the birth of man

that the principle of equality begins and yet our distinctions between legitimate and illegitimate children stem from that very root. In effect by trying to justify the distinction between legitimate and illegitimate children we are doing so under an argument not at all related to the subject matter itself, namely illegitimate children who as human beings cannot through character, appearance or physical being be deemed different to legitimate children.

Walsh J. in the same case was more precise in his examination of Article 40.1 and his judgement could well be deemed to be the pinpoint upon which an argument against essential discrimination between legitimate and illegitimate children will be based on the grounds that it infringes the Constitution.

> "... this provision is not a guarantee of absolute equality for all citizens in all circumstances but it is a guarantee of equality as human persons and (as the Irish text of the Constitution makes clear) is a guarantee related to their dignity as human beings and a guarantee against any inequalities grounded upon an assumption, or indeed a belief, that some individual or individuals or classes of individuals, by reason of their human attributes or their ethnic or racial, social or religious background, are to be treated as the inferior or superior of other individuals in the community. This text does not pretend to be complete but it is merely intended to illustrate the view that the guarantee refers to human persons for what they are in themselves rather than to any lawful activities, trades or pursuits which they may engage in or follow."[17]

Preamble

In referring to "their dignity as human beings" one must have regard to the wording of the Preamble because as Walsh J. stated in the *McGee* Case:[18]

> "According to the Preamble, the people gave themselves the Constitution to promote the common good with due observance of prudence, justice and charity so that the dignity of the individual might be assured."[19]

It is submitted that the dignity of the individual cannot be assured by blatant discrimination in our succession laws between legitimate and illegitimate children solely on the grounds of their birth and consequently such distinctions cannot be "validly the subject of legislation by the Oireachtas."[20]

In the *de Burca* case,[21] the Supreme Court declared unconstitutional that section of the Juries Act 1927 which imposed a property qualification on those members of the community who would otherwise have been eligible for jury service. One of the points made by the Court was that a property qualification was totally unrelated to a person's mental capabilities. The relevant or what ought to have been the relevant consideration was a person's own individual ability to serve on a jury. The amending legislation[22] which was introduced as a result of the decision in that case abolished the property qualification entirely and so the present position, subject to certain exceptions,[23] is that once a person has reached the qualifying age of 18 years and is entered on the local register of electors he/she is eligible for jury service. As Walsh J. pointed out[24] a property owner may be illiterate or insane whilst a non property owner may be highly intelligent.

A parallel form of argument could be used against the existing discrimination of illegitimate children on an intestacy,[25] but the one essential difference and drawback is that the State could have a legitimate legislative aim[26] under Article 41 of the Constitution in that it must abide by its guarantee to protect the Family in its constitution and authority.[27] It has already been established that "the Family" in this case is one founded upon the institution of marriage[28] and consequently unsolemnised unions are not included.

Following on from this is the point made by Walsh J. in the *Nicolaou* case[29] that:

> "An illegitimate child has the same natural rights as a legitimate child though not necessarily the same legal rights. Legal rights as distinct from natural rights are determined by the Court for the time being in force in the State."[30]

However, despite this statement by Walsh J. it must be remembered that legal rights as enacted by the State are still subject to the Constitution and the constitutionality of a discriminatory legal right which is sought to be justified under Article 40, should depend upon "The character of the discrimination and its relation to legitimate legislative aims."[31]

Obviously there must come a point beyond which the State cannot uphold its action in favour of the members of a lawful family to the detriment of other members not deemed to be part of that family. Article 41 cannot be used to override the essential concept of the equality of man as guaranteed by Article 40.1. To determine the limits of Article 41 in relation to the present subject matter, it is submitted that the Courts should adopt the test used by the U.S. Supreme Court when it held that a Federal State's Succession Act, which allowed illegitimate children to inherit by intestate succession from their mothers estate only, violated the Equal Protection clause of the 14th Amendment[32] of the American Constitution; namely that a constitutional analysis of this nature is incomplete unless the Court addresses itself to the relation between Article 40.1 and the promotion of legitimate family relationships.[33]

Trimble v. Gordon

In *Trimble v. Gordon*,[34] the U.S. Supreme Court held that the lower Court gave inadequate consideration to the relation between that particular section of the Statute under consideration and "the State's proper objective of assuring accuracy and efficiency in the disposition of property at death. The Court failed to consider the possibility of a middle ground between the extreme of complete exclusion and case-by-case determination of paternity. For at least some significant categories of illegitimate children of intestate men, inheritance rights can be recognised without jeopardizing the orderly settlement of estates on the dependability of titles to property passing under intestacy law. Because it excludes those categories of illegitimate children unnecessarily, Section 12 is constitutionally flawed."[35]

The problem arising from a distinction between Article 40.1 and Article 41 cannot as was held by the Court in that case,[36] "be lightly brushed aside *(nor)* be made into an

impenetrable barrier that works to shield otherwise invidious discrimination."[37]

The succession issue which has heretofore validly distinguished the illegitimate child from the legitimate child should now be viewed further in the light of prevailing concepts and ideas.[38] The developments by our fellow member countries within the Council of Europe is adequate proof of a changing attitude in this sphere.[39] Further proof is apparent from the "European Convention on the Legal Status of Children Born out of Wedlock."[40] Although this convention has only been ratified by two Member Countries,[41] most of the other Member Countries are gradually moulding their laws into conformity with its various provisions which aim to abolish may of the existing distinctions between such children.[42]

Under the Preamble to the Constitution, we are bound, as O'Higgins C. J. pointed out in the *Healy and Foran* case,[43] to consider rights "in accordance with concepts of Prudence, Justice and Charity which may gradually change or develop as society changes and develops, and which fall to be interpreted from time to time in accordance with prevailing ideas. The Preamble envisages a Constitution which can absorb or be adapted to such changes."

Similar sentiments were echoed by Walsh J. in the *McGee* case[44] when he said "It is but natural that from time to time the prevailing idea of these virtues may be conditioned by the passage of time; no interpretation of the Constitution is intended to be final for all time. It is given in the light of prevailing ideas and concepts."

It is submitted that if the succession issue in relation to illegitimate children is examined by our Courts regard must be had to the prevailing views of those member countries within the Council of Europe which have promoted greater change in their existing laws dealing with illegitimate children – laws that already exceed our present law in this sphere.

Article 45

Under Article 45 of the Constitution, the provisions of which "are intended for the general guidance of the Oireachtas," it is stated that "The State shall strive to promote the welfare of the whole people by securing and protecting as effectively as it may a social order in which Justice and Charity shall inform all the institutions of the national life."[45]

Kenny J. has held that the Courts may take this Article into consideration "when deciding whether a claimed constitutional right exists.[46]

Therefore in any legal discussion on the status of illegitimate children, we should ask whether justice and charity is apparent in our treatment of such children. Again it is submitted that under existing legislation, it is not nor could it be when a child is prevented purely because of the circumstances surrounding its birth from inheriting in the entire intestate estate of its father and in practically all of the mother's estate save as is provided by Section 9 of the Legitimacy Act 1931.

There have been assurances that further legislation will be introduced to improve the existing legal status of the illegitimate child (including the area of succession)[47] but both the scope of this legislation and the time when it will be introduced are not known. There certainly would not appear to be any likelihood at present of immediate reform and consequently the illegitimate child's only remedy in the meantime rests with the Courts.

However, it must be acknowledged that the Courts can only go so far within any legal framework towards improving existing laws. It has been remarked by one writer[48] that if the problem is left solely to the Courts the solution will be a prolonged and patchwork process. The major step in reforming any piece of legislation must be taken by the legislature itself. Hopefully some of the issues raised in this article will be clarified by the Oireachtas before the Courts are called upon to do so.

1. Gazette June 1978.
2. [1965] IR 294.
3. "... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the Laws" [Art. 14 U.S. Constitution].
4. *The State (Nicolaou) v. An Bord Uchtala* [1966] IR 567.
5. ibid.
6. P. 639. See also judgement of Kenny J. in *Murtagh Properties Ltd. v. Cleary* [1972] IR 330 at 335.
7. See footnote (4).
8. 1972 IR 144 at 156.
9. O'Higgins C. J. in *de Burca and Anderson v. A.G.* [1976] IR 38 at 59.
10. Walsh J. in *de Burca and Anderson v. A.G.* ibid at p. 68.
11. See footnote (9) p. 72. In the recent case *G. v. An Bord Uchtala* [Unreported Supreme Court 19/12/1978] Mr. Justice Henchy at page 9 of his judgement states that "The moral capacity and social function of parents are, in constitutional terms, not alone distinguishable but necessarily distinguishable depending on whether the children are legitimate or illegitimate ..." Unfortunately he does not elaborate on the meaning of those two phrases.
12. *McGee v. A.G.* [1974] IR 284 at 315.
13. *G. v. An Bord Uchtala* (see 11 above).
14. See footnote (9) p. 59.
15. *East Donegal Co-Operative Livestock Mart Ltd. and Ors. v. A.G.* [1970] IR 317 at 333.
16. *Quinn's Supermarket Ltd. v. A.G.* [1972] IR 1 at 31.
17. ibid at p. 14.
18. See footnote (12) p. 319.
19. See also the judgment of O'Higgins C. J. in the *The State (Healy and Foran) v. Governor of St. Patrick's Institution and Ors.* 112 ILTR 37 at 40.
20. Walsh J. in the *de Burca* case, see footnote (9) p. 69 (quotation adapted here to a slightly different context of discrimination).
21. See footnote (9) p. 27.
22. Juries Act 1976.
23. Sections 7, 8 and 9 of the Juries Act 1976 deal respectively with those persons who are ineligible or are disqualified from jury service or who may be excused from service.
24. In the *de Burca* case at page 68.
25. When a child is born there is nothing in the child itself to categorise it as legitimate or illegitimate. Status of birth is a creation of man for his own purpose.
26. See decision of U.S. Supreme Court in *Mathews v. Lucas* 2 FLR 3074 29th June, 1976.
27. Art. 41.1.2°.
28. See the judgements of Henchy J. *In re J. an Infant* [1966] IR 295 and Walsh J. in *The State (Nicolaou) v. An Bord Uchtala* [1966] IR 567.
29. See footnote (4) p. 642. Note also the comments of O'Dalaigh C. J. in *O'Brien v. Keogh and O'Brien* [1972] IR 144 where he limited somewhat the generality of this statement ... "legal rights are the same in the same circumstances." Also O'Higgins C. J. in the *de Burca* case at p. 62. "This *(Jury)* law must conform to the general principles of the Constitution."
30. ibid.
31. See footnote (26) p. 3076.
32. See footnote (3).
33. *Trimble v. Gordon* 3 FLR 3081 at 3083.
34. ibid.

35. Ibid. pp. 3083-3084.
36. At p. 3084 – quoting from its earlier discussion in *Gomez v. Peres* 409 U.S. 535 [1973] at 538.
37. See judgments of Walsh J. in *O'Brien v. Manufacturing Engineering Co. Ltd. [1973] IR 334. O'Higgins C.J. in de Burca and Anderson v. A.G.* [1976] IR 38 and O'Dalaigh C. J. in *O'Brien v. Keogh and O'Brien* [1972] IR 144.
38. *The State (Healy and Foran) v. Gov. of St. Patrick's Institution and Others*, see footnote (19) at p. 40. Judgment of O'Higgins C. J. Also *McGee v. A.G.* see footnote (12) p. 319.
39. See article entitled "Illegitimacy and the European Convention on Human Rights" by the author 112 I.L.T. and S.J. 167.
40. Art. 9 of this Convention provides that "A child born out of wedlock shall have the same right of succession in the estate of its father and its mother and of a member of its father's or mother's family, as if it had been born in wedlock."
41. Norway and Sweden.
42. The Preamble to the Convention contains the following statement:-

    "Noting that in a great number of member states efforts have been, or are being, made to improve the legal status of children born out of wedlock by reducing the differences between their legal status and that of children born in wedlock which are to the legal or social disadvantages of the former.

    Recognising that wide disparities in the laws of member states in this field still exist.

    Believing that the situation of children born out of wedlock should be improved and that the formulation of certain common rules concerning their legal status would assist this objective and at the same time would contribute to a harmonization of the laws of the member states in this field."
43. See footnote (19) p. 40.
44. See footnote (12) p. 319.
45. Art. 45.1.
46. *Murtagh Properties Ltd. v. Cleary* [1972] IR 330 at 336.
47. See speech of Mr. Patrick Cooney, then Minister for Justice, to the Dail; Dail Debates Vol. 284 No. 1 page 162.
48. Prof. Harry D. Krause "Illegitimacy, Law and Social Policy."

The author acknowledges that most of the material for this article was obtained during the preparation of a paper in pursuance of a Council of Europe Fellowship for Legal Studies and Research.

In the Matter of
MYLES P. SHEVLIN
A Solicitor
and
In the Matter of The Solicitors' Acts, 1954 and 1960

TAKE NOTICE that by Order of the High Court dated the 14th day of May, 1979, it was ordered that the name of the above solicitor, Myles P. Shevlin of Glenburnie, Knockmaroon, Chapelizod, Co. Dublin, be struck off the Roll of Solicitors.

JAMES J. IVERS,
Director General.

West Cork Bar Association

ANNUAL GENERAL MEETING

The Annual General Meeting of the West Cork Bar Association was held at the Parkway Hotel, Dunmanway, on Monday the 19th February, 1979. The officers for the coming year are President, Mr. Edward O'Driscoll, Vice-President, Mr. Hugh Ludlow, Secretary/Treasurer, Mr. Michael Pattwell.

While the Agenda was long with many and varied topics for discussion most of them were of local nature and probably of little interest to readers of the Gazette. However, the subject of Law Clerks remuneration was discussed at length and the circular from the President of the Incorporated Law Society dated the 19th January and his follow up letter dated 24th January were read and discussed. There was general agreement at the Meeting that the following message should be communicated immediately to the Director General of the Incorporated Law Society: that our Assoication considered the new rates as proposed – particularly the starting rate – a deterrent to solicitors expanding their employment. These rates will have the effect generally of reducing employment in solicitors' offices. That we objected to the large increase of 33½% when our own rates had not increased even by the amount proposed by the National Prices Commission and despite the fact that our claim was lodged in 1975.

It is also to be suggested that it is not proper that the same rates should apply to employees outside Dublin as to those living and working in Dublin.

A general dissatisfaction with the delay in the Department of Justice resulting in the non-implementation of increased costs was expressed.

A sub-committee of the Association, formed recently to examine new legislation, are to report to the next meeting on the Sale of Goods and the Supply of Services Bill, 1978.

MICHAEL PATTWELL
Hon. Secretary.

County Galway Solicitors Bar Association

Officers and Committee for the year 1979-80

President: Brian Claffey.
Vice-President: Miss Vivian Emerson.
Hon. Secretary: Ciaran Keys.
Treasurer: Brian Brophy.

Committee: Mrs. Judith O'Loughlin, Miss Finnuala Murphy, Michael Molloy, Frank Callinan, Justin Sadlier, and Allan King.

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Activities of the Council January-February, 1979

Law Clerks Remuneration:
In light of the reaction received from Bar Associations, the Council decided that it would not oppose the adoption of the revised rates of remuneration. These have since been adopted by the Joint Labour Committee and a notice to that effect will appear in the public press shortly. If possible, the Labour Court will forward copies of the proposed revised rates to solicitors' offices.

Restrictive Practices Commission Inquiry into the Conveyancing Monopoly and Advertising by Solicitors:
The Public Relations Committee and the Conveyancing Committee have been reviewing the position so as to advise the Council on how it might handle the inquiry. The matter will be fully discussed at the March meeting.

Professional Indemnity Insurance:
The operation of the existing scheme was reviewed recently with the Society's brokers, J. H. Minet (Ireland) Ltd. The claims experience since the scheme was launched has been heavy and shows no indication of an improvement. In the circumstances, the underwriter has stated that the rates quoted for the coming year will show a substantial increase over those in operation at present. The matter is still under negotiation.

Solicitors' Remuneration:
Following strong representations by the President to the Minister for Justice, the solicitor members of the Statutory Rules Committee are now in direct discussion with officers of the Department of Justice on the revision of the existing fee scales.

Public Relations:
Seminars: The Committee reported on the Seminar held in Blackhall Place on 14th February, 1979, for members of the I.F.A. There was an attendance of 208. In April/May the Committee proposes organising an Industrial Relations/Labour Law Seminar to be held in four centres. In September it proposes holding a seminar on Conveyancing under the direction of Mr. John Wylie. This will be held in three centres.

The Committee reported that complaints were lodged with the R.T.E. authorities on two occasions following what was regarded as biased coverage.

A new leaflet entitled *"Where There Is A Will"* is now available. Copies can be had on application to the Society.

Finance:
The Fund Raising campaign for the Blackhall Place premises is being re-activated after the Christmas recess. Commitments received at the time of going to press amounted to £431,000, of which £235,000 had already been received — £70,000 being in the Bond Scheme. It will be necessary to raise a further £250,000.

At this time, when renewals fall due, particular attention is directed to the Society's Retirement Annuity Fund and associated schemes for life assurance and permanent health insurances. Interested members should contact Mr. J. Power, Trustee Department, Bank of Ireland, Baggot Street, Dublin 2. (Tel. 785933).

Solicitors' Affairs
The Registrars Committee has drawn the attention of the Council to the many firms which are in arrears with their Accountants' Certificates. The Committee is making a particular effort to bring the position up to date. Where satisfaction cannot be obtained quickly, the Committee has directed that disciplinary measures should be instituted against the firm concerned. Pressure of work on the part of the Auditors office will not be accepted as a reason for the non presentation of Certificates at the due time.

The Council has approved of prosecution in the case of one unqualified person who purported to practise as a solicitor.

The Professional Purposes Committee has had meetings with the medical organisations and the Federation of Insurers on the question of charges in respect of medical reports and the contents of such reports. It is hoped to issue further advice to members in the near future.

Education:
Highlight of the period under review was the official opening of the Society's Law School, representing the culmination of many years of work. The function is reported on separately. For the first course, five apprentices were awarded bursaries by the Society. In all, 73 apprentices are participating.

The second course will commence in November 1979. Two candidates sat for the first sitting of the Final Examination — First Part, and one passed. A catering service is now available at lunch time for apprentices in Blackhall Place.

Legislation:
The Parliamentary Committee is currently examining the following Bills:—

Sale of Goods and Supply of Services Bill, 1978.
National Council for Educational Awards Bill, 1978.
Landlord & Tenant (Amendment) Bill, 1979.

It welcomes the comments of members on these and any other Bills introduced in the Oireachtas.

The Committee is also examining recent reports of the Law Reform Commission. Views have been submitted to the Committee on Court Practice and Procedure and to the Minister for Justice regarding the jurisdiction of the District Court in family matters.

E.E.C. & International Affairs:
The Society is now participating on an experimental basis in the deliberations of the Company Law Committee of the Commission Consultative des Barreaux de la Communaute Européenne.

Following on the implementation of the Directive on the Right to give occasional services, the C.C.B.E. is now reactivating the question of the right of establishment.

The Society's representatives are adopting a conservative approach towards the development.

Appointments
The Council has recommended to the President of the High Court that Mr. P. F. O'Donnell and Mr. B. Russell be appointed to fill the vacancies on the Disciplinary Committee following the resignation of Mr. F. Lanigan and Mr. T. Jackson. Mr. F. Armstrong has been nominated as one of the Society's representatives on the Incorporated Council for Law Reporting.

March Council

Commissioners for Oaths
The Minister for Justice has been requested to make statutory provision whereby all solicitors in practice would become Commissioners for Oaths.

Solicitors' Remuneration
Discussions took place between the Solicitor members on the Statutory Rules Committee and officers of the Department of Justice, with a view to finding a solution to the present difficulties regarding the revision of the statutory instruments on solicitors' remuneration.

Restrictive Practices Inquiry
A Committee comprising Messrs. Curran, O'Donnell, O'Mahony, Daly, McEvoy and Osborne was appointed to deal with the presentation of the Society's viewpoint. No date yet has been fixed for the inquiry. It was appreciated by the Council that the cost of representing the Society would be substantial.

Law Clerks Joint Labour Committee
Steps to implement agreed new scales have been suspended pending the determination of the postal strike.

April Council

The Council learned with deep regret of the death of a Past President, Desmond J. Collins. His son, Anthony, serves on the Council.

Solicitors' Accounts Regulations
On the recommendation of the Finance Committee the Council has approved of all Licensed Banks enjoying Trustee Status for the purpose of the Regulations. The practical effect of the decision is that in addition to the Banks already approved, the following Licensed Banks have now been approved as repositories of clients funds: Allied Irish Finance Company Limited, Bank of Ireland Finance Limited, Bowmaker (Ireland) Limited, Forward Trust (Ireland) Limited, Hill Samuel & Company (Ireland) Limited, Lombard & Ulster Banking (Ireland) Limited, Mercantile Credit Company of Ireland Limited and United Dominions Trust (Ireland) Limited.

Section 174 of the Finance Act, 1967
The Council requests that in the event of a member being requested to furnish information under the above authority to the Revenue Commissioners, he should in the first instance inform the Society.

Post Office Strike
At the request of the Council, the President Mr. G. Hickey released the following Press statement:

COURTS HAMPERED BY POST STRIKE

Prolongation of the postal dispute will seriously interfere with the administration of justice, said Mr. Gerald Hickey, President of the Incorporated Law Society of Ireland, in a statement issued this morning. He warned that major problems have already been created for litigants, particularly those in difficult financial ircumstances, as well as for the business sector of the ommunity, and for the other professions who require legal services.

Mr. Hickey continued: "The High Court's civil litigation programme has virtually collapsed in the past week. The Law Society is seriously concerned that the continuance of the dispute will make it impossible to provide for the pressing legal needs of the community."

Mr. Hickey said that, in common with others concerned in the well-being of the community, he appealed to the Post Office staffs in the dispute to meet again and consider an early return to work.

Paying a tribute to the Irish Congress of Trade Unions and its officers for making "tremendous efforts to resolve the dispute" he urged the Post Office workers to be guided by them. "Further prolongation of the dispute will only serve to leave a feeling of bitterness which will take years to overcome. An early resumption of work will not only enable the provision of essential legal services to be resumed but will allow the country to recover some of the revenue and international prestige it has lost during the dispute.

Bank of Ireland Finance Limited

Bank of Ireland Finance Limited is a licensed Bank under the Central Bank Act, 1971 and is wholly owned by Bank of Ireland. It has full Trustee status under the Trustee (Authorised Investments) Act 1893.

Bank of Ireland Finance is included in the list of approved Banks within the meaning of the Solicitors Accounts Regulations.

A leading Irish Finance House, it provides a wide range of financial services, including the provision of instalment credit to the commercial, industrial, agricultural and private sectors. A comprehensive range of leasing facilities and of short and medium term loans is also provided.

In addition domestic and export factoring facilities are made available through International Factors (Ireland) Limited.

Bank of Ireland Finance offer an attractive range of rates for Deposits and quotations are available daily for amounts of £500 and upwards.

Information on the Bank's full range of services is available from any Bank of Ireland Finance Branch or any Bank of Ireland Branch.

Bank of Ireland Finance

Bank of Ireland Finance Head Office, 6 Burlington Road, Dublin 4 (785122) and branches in Dublin at Blackrock (885221), Fairview (331816) and Merrion Square (689555) and throughout Ireland at Athlone (2234), Belfast (27521), Cork (507044), Derry (61424), Dundalk (31131), Galway (65101), Kilkenny (22270), Limerick (47766), Sligo (5207), Tralee (22377) and Waterford (3591).

CORRESPONDENCE

Office of the Revenue Commissioners,
Dublin Castle,
Dublin 2.

J. J. Ivers, Esq.,
Director General,
The Law Society,
Blackhall Place,
Dublin 7.

Dear Mr. Ivers,

Although the former death duties have now been abolished for almost four years, claims remain unsatisfied in a considerable number of cases. The Revenue Commissioners must continue to press for the delivery of outstanding accounts and for the payment of the relevant duties, interest on which continues to accrue at 9% per annum.

It is in the interests both of the taxpayer and the Revenue that these cases should be settled with the minimum delay. I know that this problem is causing concern to many Solicitors.

Direct discussion of outstanding issues with the officials of the Capital Taxes would probably be more fruitful than protracted correspondence in bringing old cases to finality in the majority of instances.

I would like, therefore, through the Gazette, to suggest that your members would find it profitable to arrange appointments with the staff of the Capital Taxes Branch to discuss outstanding claims in order that the process of clearing off what is now an old arrear may be speeded up to everyone's satisfaction. I need scarcely add that they will receive every cooperation and assistance from the officials concerned.

Yours sincerely,
M. K. O'Connor,
Commissioner.

The High Court,
Probate Office,
Four Courts,
Dublin 7.

Re: Affidavits of Market Value

Dear Sir,

The Probate Judge has ruled that where affidavits of Market Value are required for probate purposes, they may, in future be sworn by Chartered Surveyors. Such affidavits, when sworn by Auctioneers, Valuers and practical farmers will, of course, continue to be accepted.

You may wish to draw this ruling to the attention of your members through your Gazette.

Yours truly,
Eamonn G. Mongey,
Assistant Probate Officer.

20 Uper Merrion Street,
Dublin 2

Dear Editor,

I refer to my recent article and wish to refer to a printing error on Page 184 of the November, 1978, Gazette under the Paragraph heading "Option Theory Abandoned".

In the second last line of the first paragraph on the second half of page 184, it states as follows "... henceforth both types of clauses, subject to what has been said before were *not* to be deemed as not involving time as being of the essence for their exercise". This statement involves the double negative which if interpreted strictly reverses the interpretation of the decisions of the House of Lords and should read "... henceforth both types of clauses, subject to what has ben said before were *now* to be deemed as not involving times as being of the essence for their exercise".

I merely wish to bring this to your attention in the unlikely event of any misunderstanding by readers.

Yours faithfully,
Michael W. Tyrrell

The Incorporated Law Society of Ireland,
Solicitors' Buildings,
Four Courts,
Dublin 7, Ireland.

Dear Sir or Madam:

As part of our post-Juris Doctor program we annually place recent law graduates — most of them American — in two-month training posts throughout Europe.

More than 60 private law firms, agencies such as the EEC, Amnesty International, International Atomic Energy Agency, and UNIDO, and corporations such as IBM, TOTAL Petroleum Company, and The East Asiatic Company Ltd. have cooperated in the program.

These are not paid positions, but it is usual for the host to contribute some symbolic stipend for each of the two months of work. These have been in cash — generally in the range of $250 to $300 per month — or in kind, such as the provision of housing for two months.

Bar organizations in Denmark, Germany and Italy now help us to find training posts in their countries. However, we urgently need more positions in Ireland. Will you aid us by asking your members if they will take one of our lawyers next October-November?

We will greatly appreciate it if you will publicize our request to your members. Thank you for your assistance. I hope I may hear from you.

Cordially,

Dennis Campbell, Director
University of the Pacific
McGeorge School of Law
European Programs
5033 Salzburg, Postfach 59, Austria.

BOOK REVIEWS

Brighouse, Short Forms of Wills. 10th Edition by Edward F. George and Arthur George, 1978. Sweet & Maxwell, 232 p. £8.75 net.

The task of drafting a will is rarely an easy one. It cannot be thought of as an isolated matter because taxation is also an important factor. "Tax planning" has to be considered and this makes the task more difficult as the draftsman must keep up to date with tax legislation. He must, of course, be fully conversant with the Law of Succession in order to be able to illustrate the restrictions placed on a testator's freedom of testamentary disposition and to ensure that the formalities required for making a will are observed. In that way can the 10th Edition of *Brighouse* make the task easier for Irish lawyers?

There is a helpful introduction of approximately 30 pages (15 pages longer than the introduction in the 9th Edition) which gives a summary of legislation (including tax legislation) which must be considered when drafting a will. The remainder of the book follows what is now the familiar pattern in *Brighouse:* a variety of clauses and precedents of wills with the minimum of explanatory notes and the traditional sections on Wills of Traders and Wills of Farmers. There is in this edition a new section entitled "Disclaimers and Deeds of Family Arrangement".

In the U.K. Finance Act 1978 it is provided that where within two years after a person's death any of the dispositions (whether by will, under intestacy or otherwise) of the property comprised in his estate immediately before his death are varied by an instrument in writing made by the persons (or any of them) who benefit or would benefit under the dispositions, the variation is not a transfer of value and takes effect as if the variation had been effected by the deceased. The parties must within six months of the instrument elect by written notice (which must also be signed by the personal representatives) to the U.K. Capital Taxes Office that the variation shall take effect. The editors, having explained the effect of these provisions in the introduction, comment that "for the purpose of Capital Transfer Tax the notion of a 'family arrangement' has been abandoned. If a will gives peoperty to the deceased's son he can vary the will and direct it to his mistress, a trade union or any other person or institution". A variation must, therefore, be contrasted with a disclaimer whereby a legatee refuses a benefit and does nothing more. The legatee cannot by his disclaimer direct the benefit elsewhere. What happens to the benefit is determined by law. Section 13 of our Capital Acquisitions Tax Act 1976 relates to disclaimers and provides that the interest disclaimed in accordance with the terms of the Section does not give rise to any liability to Capital Acquisition Tax. Section 14 (6) of our Capital Gains Tax Act 1975 contains a relieving provision from Capital Gains Tax concerning deeds of family arrangement or similar instruments but there is no corresponding relief in the Capital Acquisitions Tax Act 1976. The U.K. Capital Transfer Tax provisions (summarised above) according to the editors give "an opportunity to beneficiaries to correct the mistakes or overcaution of testators or, if we dare say so, their legal advisers". A beneficiary can, therefore, re-write the testator's will and, by doing so, save tax. A beneficiary in Ireland (or a lawyer advising him) is in a less fortunate position. A testator here should review his will periodically to enable his legal advisers to take into account amendments to finance legislation and changes in the testator's personal circumstances. If this is not done the consequences could be costly for the beneficiaries. This is one disadvantage which Irish Lawyers have to face concerning the drafting of wills vis-a-vis their English counterparts. Another is that they do not have an up-to-date precedent book of Irish wills to work with which is comparable to *Brighouse*.

Because of the differences in legislation in the two countries the most that Irish lawyers can expect to get from a modern English book of will precedents like *Brighouse* is a set of clauses or precedents which in most cases will have to be carefully adapted. This is not meant to suggest, however, that there is any lack of merit in their book for English lawyers for whom it clearly is primarily intended.

Hugh M. Fitzpatrick

Textbook of Criminal Law by Glanville Williams. Stevens & Sons, 1978. 973 pages. Paperback £10.00 net but available in hardback £16.00 net.

We have here something new in the criminal law textbook scene. To start with, it is fresh ground for Professor Glanville Williams of Cambridge and is quite a compendium in 973 pages. Its most interesting feature, and one which is immediately apparent, is the question and answer motif throughout the work. The problems posed by the questions make for compulsive reading for the dedicated inquirer. One wonders if there is not a subtle rationale in this – by being posed questions which one hasn't actually thought of, one is subsconsciously made to feel "why didn't I think of that intelligent question?" and so is impelled onwards. At the end of each chapter is a summary which is concise and to the point – for a student the value of such is obvious. That the book is "unusual in its layout", as the author avers in the preface, is thus no idle boast.

To quote the end-note of the book – "a notable feature is the attention paid to the social, philosophical and psychological considerations that underlie the law." This constitutes another unusual feature and something which adds considerably to the readibility. Typical is the insertion in the chapter on involuntary manslaughter of an interesting expose on "killing and the prolongation of life" (p. 233) which concludes with two questions and answers which invoke some relevant social philosophy.

Also notable is the critique devoted to many topics – thus for example in the chapter on rape there is a small-print section about different procedures in different jurisdictions and one notes how many of these represent what the Council for the Status of Women are presently demanding. Incidentally there are many of these small-print sections and it is suggested that they can be ignored in the interest of skip-reading. Be that as it may, not a few pertinent matters are to be found there.

In the preface the author remarks he has had to omit dealing with offences such as prostitution, possession of drugs, offences against the government, and some others. It is suggested a comprehensive textbook cannot do that. It is interesting to contrast the section on "the justification of punishment" with its equivalent in O'Siochain's

book the treatment in the latter is obviously more relevant to a practitioner. The chapter on traffic offences seemed short when compared with the Smith and Hogan text; individual cases are quoted more liberally and receive more analysis in Smith and Hogan. However, Glanville Williams does mention cases – he gives references at the bottom of the page but does not go in so much for quoting from them in the body of the text.

There remain two items to mention. There are over 200 pages devoted to defences – this is surely longer than in most texts. Each defence receives generous treatment and not least the section on "discipline and authority". The logical expose here is rewarding a perfect example of the question and answer motif with its questions so often prefaced by the word "suppose". The second item to mention is the complete lack of procedural matters. Thus there is nothing on summary hearings, preliminary examinations, appeals, state side applications or bail.

To summarise therefore, this Textbook of Criminal Law is excellent for an in-depth analysis of this field of law as it applies to the human condition. It opens the mind by its criticism and its presentation of alternatives. It falls short in that in some respects it fails to dissect cases enough. It is not strong on procedure and omits treatment of some offences. It is not so much a practitioners books perhaps, though it will be useful for references. However it will be of great value to legislators, social workers, students, etc. in fact to anyone interested in rationale behind the criminal law.

Brendan Garvan

Legal Services through Irish

The Tanaiste, Mr. Colley, members of the judiciary and of both branches of the legal profession, were among the attendance at the headquarters of the Incorporated Law Society at Blackhall Place in Dublin on Monday, February 26, 1979 at a reception to mark the launching of FASACH, an association designed to develop a range of legal services for those wishing to conduct such business through the medium of Irish.

Under the patronage of Mr. Justice Brian Walsh, member of the Supreme Court, FASACH is initially concerned with assembling a panel of lawyers willing to provide services in Irish, and with determining those areas in which the availability of basic documentation in Irish would facilitate the provision of a fuller service to companies, organisations and the general public. Such areas include commercial and company law, conveyancing, and court work, and it is also intended to work towards the provision of as comprehensive a service as possible in Gaeltacht areas.

Speaking at the opening reception Mr. Colley said that in tracing the economic and social factors which worked against the language in the 19th century, it was clear that the fact that Irish had no legal standing weakened the confidence of the people and made them feel that it could not be used to assert or protect their rights.

"It gives me particular pleasure to find members of the legal profession taking such a keen interest in promoting the use of the Irish language in our Courts and among practitioners in their private capacity. The fact that you have decided to set up an organisation with the specific aim of making use of the Irish language in one aspect of everyday business life will be a source of great satisfaction to those of us who, over the years, have striven to promote the use of the Irish language.

"The list of objectives which FASACH has set itself is a formidable one and illustrates the difficulties which beset those persons who wish to transact legal business through Irish. I myself, have had personal experience of these difficulties as a practising Solicitor and I know therefore how helpful and effective FASACH could be".

The President of the Law Society, Mr. Gerald Hickey, said that the society welcomed the emergence of FASACH and was prepared to give every support to its effective development.

Mr. Lochlainn Ó Cathain, a member of the steering committee of FASACH, acknowledged the encouragement of the Law Society and also paid tribute to Bord na Gaeilge for its assistance and support.

Family Law and the Work of A.I.M. Group

By DEIRDRE McDEVITT, A.I.M. Group

The objectives of AIM Group ("A.I.M."– Action, Interest, Motivation) are to highlight the areas of Irish life where women are discriminated against, show attitudes of politicians and political parties against, show attitudes of politicians and political parties towards reforms we know are necessary to improve their position under Irish Law and to educate women as to their rights under present law in such areas as separation, maintenance, custody, property and social welfare benefits. At the present time we have branches in Athlone, Clonmel, Dundalk, Galway and Limerick.

We began in 1971 doing research into the position of Irishwomen within marriage and published our first report on "The Need for Family Maintenance Legislation in Ireland" in 1972. This was followed in 1975 by another report based on a study we completed on "Legal Separations in Ireland." After the enactment of the Family Law (Maintenance of Spouses & Children) Act 1976 and the Family Home Protection Act 1976 we published four leaflets explaining how these two Acts operate, including one on Church and Civil Annulments and one explaining the difference between a separation agreement and a deed of separation.

Members of AIM have spoken on numerous platforms throughout the country on the subject of family law reform, and each year we organise a public meeting in Dublin on topics which, in our opinion, need airing (e.g. this year, International Year of the Child, our theme was "Education – Possibilities for Personal Development"). Our branches also hold public meetings, though perhaps not as frequently. A very important aspect of our work, and one which we take seriously as a pressure group, is meetings with Government Ministers and all members of the Oireachtas and with such bodies as the Law Reform Commission.

Just recently we published our first magazine called "Women's AIM" which is being distributed nationally; we plan to publish three annually. When AIM Group began in 1971, I personally saw our work partly as an academic exercise investigating family law in other countries and pinpointing faults in our own legal system and never visualised that four years later we would be forced to open a Women's Centre to cope with legal and social advice which women seemed to need. Those of us who emerged with the Group averaged about three telephone calls daily to our homes at this time and as publicity for the organisation grew so the number who needed help grew. It seemed that nobody cared about marital problems before then, if you had them you learned to live with them.

Our centre, which is now at 14 Upr. Leeson Street, Dublin 4 (Telephone No. 763587) is open five mornings a week for anyone who cares to call. Our committee of twenty take turns in operating the Centre. We have all taken a course in counselling and are familiar with all aspects of family law. The cases we hear today are not as horrific as they were even three years ago; family homes can no longer be sold without the consent of both spouses; wives and children have a right to decent maintenance, and barring orders (though not working to everyone's satisfaction) are at least a deterrent.

That is not to say that anyone who has a marital problem finds it easy. Coming to terms with the fact that a problem exists is difficult, doing something about it is not easy either but this is where we hope we can help, by weighing up the situation and deciding with the person whether legal action is realistic and what steps are necessary from then on. Common problems are finance, alcoholism, violence and infidelity, which is on the increase. An example of the type of case we handle is the young married mother of two children forced to leave the marital home with the children because of her husband's mental cruelty and who has been served with a maintenance and barring order summons and notified of custody proceedings. She did not understand the meaning of the summons, particularly in view of the fact that she was not earning, she had no solicitor to whom she could go to get advice and also did not have the means to employ one. We were able to explain to her what was involved and put her in touch with a sympathetic solicitor who took counter proceedings. However, the number of solicitors handling this type of work is limited and those that do are very overworked.

Due to the lack of civil legal aid, though we may advise our clients to take legal action, this is not always within their reach. The majority of women in this country give up their jobs on marriage to rear their families and are, therefore, dependent on their husbands. This leaves them in a very vulnerable position when a problem arises within the marriage. Though they may have a few pounds stored away for a rainy day they know it will not be sufficient for a court hearing and rely on husbands to pay the costs. Any woman calling on a solicitor to take a case to court, because of her position, demands a great deal of understanding. As often as not it is her first dealing with the law, she may have guilt feelings for her failure in marriage and her decision to take legal action, particularly where separation is involved, is not taken lightly. She is split between anxiety for her future and that of her children's welfare.

We know that family problems can often be difficult and long-drawn out and we are often confronted with women who have already been through the courts and are not happy with the results, such as Mrs. B., a farmer's wife with two children. She was advised by her solicitor to leave her husband. Knowing the man, Mrs. B. wanted a lump sum payment so that she could finish with the marriage and concentrate on rearing her children and perhaps later return to work herself, but her solicitor felt it would be wiser to accept weekly payments. These are only coming intermittently and Mrs. B. has to keep returning to court to remind her husband of his

responsibilities. As he is self-employed there is no attachment of earnings.

Because of the costs involved in judicial separation, this form of action is out of reach of many of our clients where there is disagreement between the parties on the form of settlement. We feel that in these cases clients need help in two ways, particularly until such time as civil legal aid is introduced in this country. First, solicitors might feel it possible to undertake and work very occasionally in special circumstances at a reduced fee. Secondly, we would ask solicitors if they could give that little extra consideration which might save the client from feeling in any way pressurised into signing an agreement which does not in her view represent her best interests, a situation to which those seeking help from AIM sometimes draw attention.

AIM has been greatly heartened at the positive response of those members of the profession who are on the panel of solicitors listed as available to give advice on family matters to the Catholic Marriage Advisory Council of Ireland. This panel was canvassed as to their availability to take on family law work and 20 of those circularised agreed to be so listed. It may be that there are others who would be willing to contribute to this important work, even if only in a strictly limited number of cases. Would any interested solicitor not already canvassed for either panel please contact Mr. J. J. Ivers, the Director General, the Incorporated Law Society of Ireland.

Solicitors have a grave responsibility when taking on family cases because the outcome will decide the future lifestyle of that family. However, if every solicitor in the country was to take on even one family case annually it would ease the burden of those who become known for handling such cases and could add a new dimension to family law because then each solicitor could see at first hand the anomalies and complexities of family law and could define to the Government, in a professional manner, what we have been trying to do for years in our own amateur style!

FOOTNOTE

Six full days of the new Professional Training Course which commenced on 19th February this year are devoted to Family Law. This compares with, for example, seven for Criminal Law and fifteen for Conveyancing. Contributors to the Family Law Course include Michael O'Mahony (Chairman of the Planning Sub-Committee for Family Law), Alan Shatter (author of *Family Law in Ireland)* and Raymond Downey (Dublin Registrar of Marriages).

A speaker for AIM will also contribute to the apprentices' understanding of the practical aspects of this field of law and this session will provide a vehicle for dialogue between AIM and the next generation of practitioners.

The Register

REGISTRATION OF TITLE ACT, 1964

Issue of New Land Certificate

An application has been received from the registered owners mentioned in the Schedule hereto for the issue of a Land Certificate in substitution for the original Land Certificate issued in respect of the lands specified in the Schedule which original Land Certificate is stated to have been lost or inadvertently destroyed. A new Certificate will be issued unless notification is received in the Registry within twenty-eight days from the date of publication of this notice that the original Certificate is in existence and in the custody of some person other than the registered owner. Any such notification should state the grounds on which the Certificate is being held.

Dated this 31st day of May, 1979.

W. T. MORAN (Registrar of Titles)

Central Office, Land Registry, Chancery Street, Dublin 7

Schedule

(1) Registered Owner: Nora Hill; Folio No.: 1150; Lands: Stragelliff (Parts); Area: 15a. 0r. 16p.; County: Cavan.

(2) Registered Owner: Thomas Fleming; Folio No. 2241 (This folio is closed and now forms the property No. 1 comprised in folio 51755); Lands: Cloonaweena; Area: 20a. 0r. 31p.; County: Mayo.

(3) Registered Owner: Malackey Maher; Folio No.: 9859; Lands: Blean; Area: 54a. 3r. 37p.; County: Tipperary.

(4) Registered Owner: Laurence Kane; Folio No.: 3456L; Lands: 37 Donard Road, Crumlin, City of Dublin; County: Dublin.

(5) Registered Owner: The Errigal Co-Operative Society Limited; Folio No.: 38607; Lands: Meenaneary; Area: 7a. 0r. 4p.; County: Donegal.

(6) Registered Owner: William Swift; Folio No.: (a) 9671, (b) 14577; Lands: (i) Cullane South, (ii) Cullane South; Area: (i) 38a. 1r. 23p., (ii) 4a. 0r. 5p. county: Limerick.

(7) Registered Owner: Thomas Furlong; Folio No.: 540 (This folio is closed and now forms the property No. 1 comprised in Folio 2837); Lands: Oldcourt; Area: 10a. 2r. 14p.; County: Wexford.

(8) Registered Owner: Patrick Hogan; Folio No.: 1108; Lands: Kilcornan; Area: 26a. 0r. 9p.; County: Clare.

(9) Registered Owner: John Walsh; Folio No.: 7541; Lands: Gaggin (E.D. Ballymodan); Area: 52a. 1r. 25p.; County: Cork.

(10) Registered Owner: Timothy Vincent Twomey; Folio No.: 13325; Lands: Ballywilliam; Area: 19a. 3r. 14p.; County: Cork.

(11) Registered Owner: Thomas Casey; Folio No.: 8703; Lands: (1) Claregalway, (2) Curraghmore; Area: (1) 21a. 0r. 38p., (2) 3a. 0r. 24p.; County: Galway.

(12) Registered Owner: William George Lundy; Folio No.: 5191; Lands: Tirnadrola; Area: 12a. 2r. 10p.; County: Monaghan.

(13) Registered Owner: Thomas Kernan and Patrick Harte; Folio No.: 301F; Lands: Porterstown; Area: 0a. 1r. 34p.; County: Dublin.

(14) Registered Owner: Alice Callaghan; Folio No.: 5636; Lands: A plot of ground situate in Elphin Street, in the town of Boyle with houses and shop thereon (being portion of the lands of Termon); Area: 0a. 0r. 20¼p. County: Roscommon.

(15) Registered Owner: Denis O'Callaghan; Folio No.: 4369; Lands: Ballysimon; Area: 29a. 3r. 26p.; County: Cork.

(16) Registered Owner: Mary Hurley; Folio No.: 4493; Lands: Mapestown (Part); Area: 76a. 1r. 14p; County: Waterford.

LOST WILLS

Patrick Cusack, deceased – Will any Solicitor having a Will for Patrick Cusack, deceased, of 67 Ennafort Park, Raheny, Dublin 5, who died on 27 December, 1977, please get in touch with Jermyn & Moloney, Trinity House, 7 George's Quay, Cork. Telephone (021) 25261.

Martin O'Donnell, deceased – Will any person having knowledge of a Will made by the above-named deceased having an address at 59 Leinster Avenue, North Strand, Dublin, who died on the 26th day of March 1979 at the same place, please contact MacHales, Solicitors, Ballina, Co. Mayo.

Estate of William O'Toole, deceased, late of 5 Lavarna Road, Terenure, Dublin 6, and 50 Newmarket, Dublin 8. Anyone having knowledge of any Will of the above-mentioned deceased who died on 17th March, 1979, please contact Barbara Hussey & Co., Solicitors, 31 Dame Street, Dublin 2. Tel. 716587.

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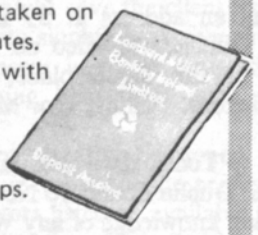

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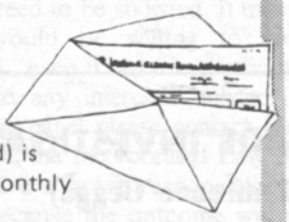

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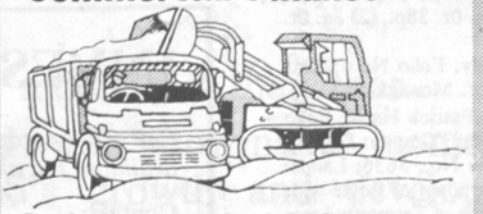

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THE INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

MAY 1979 VOL. 73 NO. 4

The President of the Society, Mr. Gerald Hickey, with, from left: Mr. Sydney Lomas, Secretary of the Incorporated Law Society of Northern Ireland, Mr. Dominick Kearns, Portumna, and Mr. Brian Claffey, President of the Galway Solicitors' Bar Association, at the Society's Annual Conference in Galway, 3-6 May.

[Photo by courtesy of the *Irish Independent*]

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Client Account-Deposits

Mercantile Credit Company of Ireland Limited is included in the list of Banks approved by the Incorporated Law Society of Ireland, and offers a first class Deposit service to suit the needs of solicitors and their clients. Incorporated in 1946 we are a wholly owned subsidiary of Mercantile Credit Company Ltd, which became a member of the Barclays Bank Group in 1976. Licensed as a bank in 1961, Trustee status was granted in 1977.

FINANCIAL STATEMENT
30th September 1978

	1978 £	1977 £
Funds Employed		
Issued Share Capital	3,000,000	1,600,000
Revenue Reserves	938,917	677,962
Shareholders Funds	3,938,917	2,277,962
Loan Stock	1,000,000	—
Deferred and Future Taxation	477,912	168,040
Deposit and Other Accounts	26,215,176	19,0088,030
	31,632,005	21,454,032
Use of Funds		
Cash, Balances with Bankers etc.	2,970,528	2,036,233
Investments in Government Securities	2,715,219	1,828,193
Loans, Advances, Leasing and Other Accounts	25,748,317	17,137,697
Properties and Equipment	197,941	151,909
	31,632,005	21,454,032

ATTRACTIVE INTEREST RATES AVAILABLE

For information contact:— J. P. O'Carroll

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A MEMBER OF THE BARCLAYS BANK GROUP

Merger of Medium Sized Practices

V. J. D. Kirwan, Solicitor

(Text of Lecture to Dublin Solicitors' Bar Association Seminar on "The Realities of Practice", 9th March 1979)

I start, I think, with some advantage in that it is unlikely that my listeners will themselves have experience of more than one merger and some may indeed have escaped the trauma. I have been involved in one merger only, but it was unusual and possibly ambitious, involving a merger of three medium sized firms.

WHY MERGE FIRMS?

It is fundamental that there should be a sound reason for any merger that is contemplated. Any Solicitor who harbours the notion that he will, by merging, end up in a cosy position free from work and responsibility, is sadly mistaken. Nothing could be further from the truth. The work involved in organising a successful merger is immense, and unless it is carried out thoroughly the resulting shambles is likely to produce heart attacks in the participants and an unsatisfactory service to clients.

WHY THEN MERGE?

A merger will usually take place for one or more of three reasons.

(1) PERSONNEL.
(2) BUSINESS.
(3) TO PROVIDE A BETTER AND MORE SPECIALISED SERVICE TO CLIENTS.

(1) PERSONNEL

There are cases where one firm may have a surplus of partners or staff and not enough work and another firm may have too much business to handle and not be able to recruit sufficient staff. In such a case a merger may be beneficial to both.

Similarly an elderly Practitioner with a good business who wants to take matters a little easier may want to join forces with a younger solicitor who is starting practice, the younger Solicitor providing the energy and consolidating the firm for the future and the elder practitioner providing the established business.

Sharing responsibility

Under the heading PERSONNEL there is I think another reason for merger and that is the possibility of responsibility. In a small or medium sized firm a Practitioner may find himself overburdened with work and in difficulties in going away on holidays and in general constantly under pressure. A merger may enable responsibility to be shared and create a situation that back up staff can be trained and financial and administrative staff can be afforded to enable the Solicitor to have the financial and administrative sides of the practice run efficiently leaving him free to concentrate on his own work for clients.

Colleagues who have tried to recruit competent staff, qualified or unqualified, will know how difficult this is; apart from very exceptional cases good staff are firmly secured by good positions in other firms. It is well known that in times of intense competition for good young Solicitors, firms must promote them and put them on the notepaper at an early stage if they are to hold them These people will mostly have been apprenticed and trained and then retained in that same office.

So, to recruit good staff it will probably be necessary to train them yourself and to retain them. This is often easier to do in a larger practice than a small one.

In a larger practice it is possible to have several apprentices at one time and to retain only the best.

(2) BUSINESS

Another reason for merging firms may be to extend the categories of business carried out by the firm and hopefully get into more profitable areas. It is well known that the larger commercial firms and institutions rarely give their business to small or medium sized practices. A larger firm will tend to attract a better type of commercial business.

This does not always mean profitability as with lower overheads and other advantages, not possible in a larger firm, the small practitioner will often take home far more than the Partner in a medium or large practice.

(3) BETTER SERVICE TO CLIENTS

The previous two categories of reasons for merging might be considered as promoting only self interest. A further motive for merging will be to provide a more specialised and professional service to their clients. In a larger firm it should be possible to specialise and to departmentalise and this should lead to a better service to clients. I will come back to this later.

WHO DO YOU MERGE WITH

Having decided that you see advantages in a merger for one of the reasons indicated above, who then do you merge with?

Clearly the other firm must complement yours either from a business point of view or from a staff point of view. There may be an advantage in merging with a firm with a different profile to yours.

It should be possible to be less emotional about choosing new partners than choosing a marriage partner!

Nevertheless it is fundamental that you should like and get on well with your prospective partners. You should try to make sure you know them reasonably well not only in business but also socially, before you agree to merge. It is also, I think, important that your prospective partners should not be small minded people. There are so

many factors involved in a merger and indeed in general practice with your future partners where an attitude that each person's contribution or share must be measured exactly will be disastrous and a recipe for failure. There must be a sense of giving and sharing in the fullest sense if the new firm is to succeed. Ideally, the partners' shares in the new practice should be equal but this is not always possible.

EXPLORATORY TALKS

Having decided that you wish to merge and having selected the other firm, exploratory talks with the partners in the other firm must then begin and assuming that they are attracted by the reasons for merger and wish to proceed a wide range of topics will need to be covered before a decision can be made to merge.

Having decided that you wish to merge and having selected the other firm, exploratory talks with the partners in the other firm must then begin and assuming that they are attracted by the reasons for merger and wish to proceed, a wide range of topics will need to be covered before a decision can be made to merge.

(a) Type of Business

It will be necessary for the prospective partners to make a fairly full and complete disclosure of their major clients and also of their accounts for a number of years past. This is of course to see whether or not the businesses are likely to be complementary and whether the levels of profitability are similar or whether they vary. This will have a crucial bearing on whether the prospective partners will agree to share equally or not.

(b) Staff

It would be a mistake to take the attitude that the only persons concerned in the proposed merger are the principals. The Assistants, Secretarial Staff, etc. in the two firms should also be considered. Are they likely to get on with each other. In relation to the choice of new premises it is alos necessary to consider staff and whether the location is likely to cause difficulties for staff. It may be necessary to arrange a function to enable the senior staff in each office to meet to see that they are likely to get on with each other.

(c) Sharing Proportions

The proportions in which the new partners will share profits and losses will have to be agreed. I have already indicated that in my opinion equality of shares is the ideal arrangement. This however is not always possible due to some prospective partners being very much more senior than others or having much better business connection than others. This aspect is one of the most delicate topics on which to reach agreement and is likely to be an early test of the open mindedness or otherwise of the prospective partners!

(d) Name for the Partnership

This is one of the most difficult aspects of all. It is very difficult to get agreement on a name that does not involve a combination of the names of the respective firms. Ideally, I feel it is desirable to have a single name not connected with either firm but for emotional and sometimes good business reasons it is usually desired to retain something of the existing names.

(e) Taxation Implications

It will be important to consider the taxation implications of a proposed merger.

(1) *Cessation:* The old partnership will be treated on a cessation basis. The tax assessment for the tax year in which the old partnership ceased will be based on the actual profits earned between the 6th April in that year and the date of cessation. There may also be a revision of the tax assessments for the two previous years. If actual profits for the two tax years exceed the profits on which the assessments for those two years were based, the assessment for each of those years will be adjusted to the actual profit for the year. In a period of rising profits, this is likely to result in additional assessments for each of the two income tax years prior to that in which the partnership ceased.

(2) *Assessment of New Partnership:* The new partnership will be assessed on a commencement basis. The profits for the first year will form the basis on which tax is assessed for either two or three income tax years depending on the date of commencement and the date to which accounts are made up. The profit in the first year will probably be reduced due to the disruptive effect of amalgamation. It is inevitable with the loss of time spent in arranging the merger, the loss of time in changing offices and bringing in new systems, etc., that profitability over that period will be reduced. If the profits in the first year are low, this is very advantageous as these form the tax basis for assessment to tax in the first two years and in some cases for a third year also.

For example: if the partnership commences on the 1st May 1978 and prepares annual accounts to the 30th April 1979, the profit for the year to the 30th April 1979 will form the basis of assessment for the tax years ending 5th April 1979 (11/12ths will be assessed) and the years ending 5th April 1980 and the 5th April 1981.

If the partnership commenced on the 1st April 1978 and prepares accounts to the 31st March, 1979, the profits of the year to the 31st March 1979 will form the basis of assessment for the tax years ending the 5th April 1979 and the 5th April 1980.

For the year ended the 5th April 1981 tax will be assessed on the profits for the year to the 31st March 1980. It can be seen therefore that the choice of dates for ending the financial year of the new partnership can materially affect the tax that will be payable.

(3) *Transitional Tax Arrangements:* It is normally advisable to agree these in advance with the tax inspector. He is entitled to look for an assessment of work in progress up to the date of cessation of partnership. In practice, provided he receives co-operation he will normally not insist on this, provided the new firm agrees to be assessed on a fees furnished basis rather than a fees received basis and provided he receives appropriate undertakings that work in progress will be brought into the accounts of the new firm.

I do not propose to go into the taxation details, partly because I am not competent to do so. It is I think sufficient to draw your attention to the fact that it is extremely important to get the best taxation advice before making a decision to merge.

It is not unknown for prospective mergers to be called off on account of the taxation advice.

DECISION TO MERGE

Having considered the factors to which I have referred, the decision to merge is made. A number of matters immediately arise. Probably the best way of dealing with these matters are for the prospective partners to arrange sub committees to deal with various aspects and to put a particular person in charge of each sub committee.

(1) Premises

A merger will usually involve a move by both parties and this I think is an advantage. It is new for both sides and removes any sense of one party moving in on the other party's ground. It is I think better to rent the new offices than to purchase them. A purchase by one or more of the new partners can cause problems in the future. Renting premises also makes for greater efficiency as the partnership has to bear full commercial overheads. The location of the new offices will obviously be important. In a city the main factors that are likely to apply are the desire to be near to other Solicitors' offices and also if possible to be near the Courts and the various Governmental and other offices with which Solicitors have to deal. Car parking is also a factor.

New premises will give an opportunity to plan the new offices for maximum efficiency with as much horizontal space as possible. A much better use of space than may have existed in old premises, should be possible.

The work on the premises is likely to be very substantial. In order to ascertain the size of the premises that will be required it is necessary to make a detailed list of the staff employed by each of the two firms and from this to make some assessment of the space requirements of the new firm. Allowance must also be made for expansion as there is no point in moving into new premises and then finding that after a few years the premises are too small. In assessing space requirements, you will probably need to give consideration to some features which you may not have had in your existing offices. These may include the provision of a strong room, the provision of a simple canteen, the provision of plenty of storage space.

Whether the premises are bought or rented, there will be a lot of work required in planning the details of the lay-out and finish of the office and also built in furniture. Whether you buy or rent, it will also be necessary to agree the financial arrangements with your other partners. Prior to the move, careful study must be given to the allocation of rooms. This is not as simple as it sounds. Firstly, there is the problem of seniority not only between the partners but also between the staff. You must be able to allocate rooms in such a way as will not cause offence. In allocating rooms also it is desirable to give thought to the degree that you intend to departmentalise so as to put persons who will be working in a particular line in rooms that are close to each other.

One point that may not seem obvious is that there is no reason why the date for moving into the new premises must coincide with the date of the merger and for the commencement of the new partnership. Indeed, it seems to me that there are advantages in moving into the new premises a couple of months earlier than the merger because this gives time to settle down and time for the staff to integrate before the critical date.

(2) Accountants/Consultants

At an early date, the new partners must choose which accountants will be acting for the new firm. The accountants will be able to advise on the Taxation aspects and also on whether or not a Service Company should be employed. Apart from the accountancy advice and work for the new firm, there is another aspect. This is the employment of outside Consultants to advise and carry out much of the work in preparing for the merger. The accountants for the new firm may or may not be the best persons for this consultancy work. The advantage of bringing in Consultants in my view is overwhelming. The existing partners will already have a lot of extra work by reason of the merger and the very heavy and detailed thought and work necessary in planning the merger has a much better chance of being done successfully if Consultants are employed. This does not mean that the partners can leave everything to the Consultants. The sort of details that will need to be worked out are:-

(a) *The filing system:* A new code will need to be worked out to fit in with the Accountancy system and the ledger card system chosen. All existing files in the two offices will be renumbered so that the files in the existing firms will be part of the one new system BEFORE the merger takes place. A lot of work will also be needed in destroying old files and papers so as not to clog up the new premises unnecessarily.

(b) *Accountancy system:* The accountants will need to advise on what accountancy machines and systems will best suit the new firm. Nowadays, consideration must also be given as to whether to use a computer and if so whether to buy or rent a computer.

(c) *Office equipment and furnishings:* These will need careful study. It will be necessary to standardise on the types of dictating and other machines used in the new firm. A suitable telephone system for the new firm will also need to be arranged.

(d) *Stationery/Notepaper:* Notepaper for the new firm will have to be designed and in addition thought will need to be given to providing various other types of firms stationery including all the various forms frequently in use in solicitors' offices.

(e) *The physical problem of moving:* This will require careful planning and coordination. The furniture will need to be labelled and all files will need to be marked so that when the big day comes the firm carrying out the moving will know exactly where the furniture is to go and where the files are to go so that the move can be carried out with the least possible confusion.

(f) *Preparation of Notice to the Press, Notice to clients, etc.:* A notice to clients will need to be drafted. Each firm will need to list its clients. It will also need to list the solicitors and the accountants with whom it deals outside Ireland because these also should be circularised. The Law Society will facilitate merging firms in circularising solicitors in Ireland.

(3) Integration of Staff

In any merger, there should be some saving by integration of staff. Each of the two firms will have Receptionists and their own accounts department. In the new firm, it may be that only one Receptionist will be required and that the number to be employed in the new accounts department may be less than the combined total of the persons previously employed. A choice may have

to be made as to who will continue to be a Receptionist and who will be offered a job in another area.

The integration of staff salaries and staff pensions will also have to be considered. It is desirable that the level of salaries and pensions in the two firms be streamlined so that persons of similar status receive similar salaries.

The working hours for the new firm will also need to be agreed. I am afraid that in matters of streamlining of salaries, pensions and working hours, the new firm is likely to come off worst because it is the law of human nature that no one will agree to a reduction in salary or to an extension of working hours!

(4) Partnership Agreements

It will probably be wise prior to the merger to give some consideration to the drafting of a partnership agreement. It may not always be possible or even advisable to attempt to complete a partnership agreement before the merger. Consideration of a partnership agreement will however highlight various matters and make sure that the parties are not in conflict. The most important factor in any partnership agreement is of course whether there is to be any restriction on the partners practising locally in the event of the partnership splitting up. My view is that there should not be any such restriction but it is of course important that this should be agreed with the other partners. It is I think also desirable to create a situation that on retiral or death the retiring partner or his dependants should not be entitled to any payment for goodwill. It is also I think wise to agree in principle that partners will retire at a specified age.

Consideration must also be given to what pension arrangements exist in the two firms both for partners and for staff and to consider what further pension arrangements need to be made and what the cost will be.

GENERAL

It is not hard to see that not only is an immense amount of work and planning necessary for the successful merger but there is also a lot of expense. The reality is likely to be that the new firm will have new equipment furnishings and systems. The burden of the capital expense of this may be lessened by renting or leasing.

I would hazard a guess that in most cases, far from there being a saving in overheads by a merger, that there is an increase in overheads. This is because so much new equipment and furniture is involved and the rent on the new premises is likely to be heavy. The merger will hopefully produce greater efficiency and lead to cost saving ultimately. In the short term however the expenses will be much higher than the previous firms have been used to.

MERGE IN HASTE ... LONG TIME DESIRABLE

There is so much work to be done in organising a merger that it is desirable to leave plenty of time and not to attempt to rush a merger through in a period of a few months. I would feel that a one year period is a minimum and the time taken may well exceed two years.

SPECIALISATION

The law is now complex and covers such a vast field that it is impossible for any one Solicitor to hope to be able to cope adequately in all these fields. This is the reason for specialisation. This will probably be one of the objectives of the new firm. It may not however be immediately achieveable due to the necessity of not interfering with the client relationship. The non commercial client is likely to resent the merger and to be ready to suspect that it will interfere with the personal service he has had before. He will not want to be told you must go and see Mr. So and so. It will be necessary to introduce the specialist in the other department slowly and let the client get to know him and get confidence in him over a period.

Specialisation in a particular field is undoubtedly helpful to efficiency in that field. There are however disadvantages. The specialist if he has not already had a very wide grounding in the other fields of practice can become very narrow in his outlook and restrict very much his value as a general advisor particularly to a non commercial client.

It can also be very aggravating when dealing with a firm which is departmentalised to find that you have to deal with two or three different persons, none of whom appears to have an overall grasp of the case. Specialisation seems to me to be most worthwhile in the commerical field.

A merger does however enable specialists to be recruited. This is not only in the specialist fields of law such as taxation, company law and commercial law, litigation, probate and conveyancing, but also in the field of office administration. It is possible in a merged firm to afford specialists in the accounts department. Indeed in my opinion, a good Financial Controller is a necessity in a firm of any size.

DO MERGERS WORK?

It must be clear from what I have said so far that the merger of two firms highlights and confronts the merging firms with many important decisions that should indeed face existing firms. These include improved accountancy systems, use of computers, time costing, whether or not to employ an Office Manager, whether or not to have a Managing Partner, or the extent to which specialisation and departmentalisation is desirable, the improvement and standardisation of documentation, the organisation of proper library facilities within the firm and of course the ongoing recruitment of staff. The new firm will create the opportunity and the structure on which to build. In a smaller firm many of the matters to which I have just referred may not be possible. In a larger firm not only are these matters also possible but also it is important that these matters should be actively considered and implemented where desirable. It is not my intention to go into detail on each of these matters. It is my experience that there is a reluctance in the early stages of the new firm to make more drastic changes than are immediately necessary. The more partners there are in the new firm, the more difficult it may be to get agreement on changes.

The answer then to the question, do mergers work, is that they do work if the necessary thought and planning are done prior to the merger and if this work is continued after the merger. If it is not done then the larger firm is likely to be chaotic and the end result will be a much less efficient firm than the two former firms. If the work is

done, however, there can be great advantages. A new structure is created, giving opportunities for better office administration, better business, more specialisation, better service to clients and hopefully greater profitability with less strain to the partners.

It is, I think, in the field of office administration that a merger offers the greatest advantages. It is extremely important that the office administration and general backup to partners are such that the partners themselves are not submerged with administrative work and are free to give their services to their clients and are free to spend sufficient time on matters of partnership policy and the future development of the partnership.

Capital Gains Tax (Amendment) Act 1978

SOCIETY'S REPRESENTATION AND MINISTER'S REPLY

The Society through its Parliamentary Committee made representations to the Minister for Finance on a number of matters arising out of the provisions of the Capital Gains Tax (Amendment) Bill 1978. The reply of the Minister to one of the submissions made may be of interest to practitioners and accordingly the submission and the Minister's reply are set out below verbatim.

Society's submission

6. (finally) It is suggested that where a personal representative disposes of property in the course of administration, the relief to which the beneficiaries would have been entitled (had the property been first vested in them and then sold by them) should be allowed. This should not result in any loss of Revenue to the State because obviously if the Personal Representative and beneficiaries are properly advised they will first vest the property in the beneficiaries and allow them to sell. Such an amendment, however, would make for greater convenience and efficiency in the administration of estates, as well as a saving in legal expenses.

Minister's reply

6. Where assets that have been vested in a beneficiary are disposed of by him he will obviously be entitled to claim whatever reliefs are appropriate, for example, the £500 exemption to which an individual is entitled under Section 16 of the Capital Gains Tax Act, 1975. You suggest that such reliefs should be granted even where the personal representatives make the disposal. Under the legislation as it stands these reliefs are in fact granted to personal representatives where, in disposing of an asset, it is clear that they are acting as "bare" trustee for the beneficiary (Section 8 (3) of the 1975 Act). Generally speaking, where there is evidence that the administration of the estate has been completed in accordance with the terms of the Will or the law relating to the intestacy and that the assets remaining in the hands of the personal representatives are assets in relation to which the beneficiary could give a direction satisfying Section 15 (10) of the 1975 Act, any reliefs to which the beneficiary would be entitled are granted to the personal representatives where the asset is disposed of by them without being first vested in the beneficiary. It appears, therefore, that no amendment is necessary, as the position is substantially as your Society suggests it should be.

European Law Conference

A Joint Conference of the Scottish Lawyers' European Group with the Solicitors' European Group (Northern Ireland Branch) and the Incorporated Law Society of Ireland was held on 2nd and 3rd March 1979 in Edinburgh. The Council of the Incorporated Law Society of Ireland was represented by Messrs. Robert Flynn, Frank O'Donnell, Michael O'Mahony and Brian Russell. Frank O'Donnell also spoke on behalf of participants from the Republic of Ireland at a dinner in the George Hotel Edinburgh on Friday 2nd March. Other solicitors from the Republic who were also present were F. X. Burke, Rory F. Conway and John Fish.

The purpose of the Conference was that representatives from all three bodies should meet together to consider the effect of the Common Agricultural Policy of the E.E.C. and to discuss how the practising solicitor can best equip himself to provide specialist and informal advice on problems of agriculture, fishing and funding.

Among the several lectures that were delivered perhaps three stood out. One of these was an excellent lecture which discussed the case of the Ministry of Fisheries v. Schonenberg and was delivered by Rory F. Conway. The other two were lectures entitled "Agriculture and E.E.C. policy as it affects the practising solicitor" (delivered by J. H. Bourgeois and "Funding – Aspects of prime relevance to farmers and business and professional men" (delivered by Gregg Myles).

In addition, C.C.B.E. Identity cards were presented to Rory Conway and Michael O'Mahony by John Smith M.P. at a Reception on 2nd March.

Throughout the whole conference excellent hospitality was given to all visiting participants and it was unanimously agreed that efforts should be made to continue such joint conferences on a yearly basis. It is likely that a second conference will be held in the Republic some time early in 1980.

SOLICITORS' REMUNERATION GENERAL ORDER 1978

S.I. No. 329 of 1978

We, the body in that behalf authorised by the Solicitors' Remuneration Act, 1881, as adapted by the Solicitors' Remuneration Act, 1881, (Adaptation) Order, 1946 (S.R. and O. 1946 No. 208) made pursuant to the Adaptation of Enactments Act, 1922, do hereby, in pursuance and execution of the powers given to us by the said Statute as so adapted, and after due compliance with Section 3 of the Solicitors' Remuneration Act, 1881, make the following General Order.

1. This Order may be cited as the Solicitors' Remuneration General Order, 1978 and this order and the Solicitors' Remuneration General Order, 1884, the Solicitors' Remuneration General Order (No. 1) 1920, the Solicitors' Remuneration General Order, 1947, the Solicitors' Remuneration General Order, 1951, the Solicitors' Remuneration General Order, 1960, the Solicitors' Remuneration General Order, 1964, the Solicitors' Remuneration General Order, 1970 and the Solicitors' Remuneration General Order 1972, shall be read together and may be cited as the Solicitors' Remuneration General Orders, 1884 to 1978.
2. The following fees chargeable under Schedule II of the said General Order of 1972 shall be increased as follows:

Item	2	£0.41 shall be increased to	£0.58
	3	£0.17 shall be increased to	£0.24
	4	£0.13 shall be increased to	£0.19
	5	£0.07 shall be increased to	£0.10
	6	£0.04 shall be increased to	£0.06
	7	£0.20 shall be increased to	£0.28
	8	£1.34 shall be increased to	£1.88
	9	£0.04 shall be increased to	£0.06
		£0.47 shall be increased to	£0.66
	10	£0.04 shall be increased to	£0.06
	11	£0.50 shall be increased to	£0.70
	12	£1.34 shall be increased to	£1.88
	13	£1.01 shall be increased to	£1.42
	14	£1.34 shall be increased to	£1.88
	15	£25.40 shall be increased to	£35.56
	16	£4.03 shall be increased to	£5.65
		£25.40 shall be increased to	£35.56
	17	£0.50 shall be increased to	£0.70
		£0.67 shall be increased to	£0.94
	18	£0.41 shall be increased to	£0.58
		£0.13 shall be increased to	£0.19
	19	£0.17 shall be increased to	£0.24
	20	£4.70 shall be increased to	£6.58.

This Order shall apply only to business transacted after the 29th day of June, 1978.

Dated this 29th day of June 1978.

Thomas F. O'Higgins, Chief Justice.

Thomas A. Finlay, President of the High Court.

Brian Walsh, Senior Ordinary Judge of the Supreme Court.

J. L. Dundon, President of the Incorporated Law Society of Ireland.

Explanatory Note

(This note is not part of the instrument and does not purport to be a legal interpretation thereof)

This Order authorises an increase in specified charges in solicitors' costs for non-contentious business. It does not affect the present commission scale fee on sales, purchases, leases, mortgages or settlements.

Statutory Reform of the Law of Misrepresentation

by ROBERT CLARKE

In this article the author intends to examine the effects the Sale of Goods and Supply of Services Bill 1978 has on the general law of misrepresentation.

Whilst the Draftsman has relied heavily upon terms of the English Misrepresentation Act 1967, the Sale of Goods and Supply of Services Bill 1978 however does not have as wide an ambit and it is suggested that the provisions of the 1978 Bill should be extended into areas of Irish law which have not been included within the ambit of the recent Bill.

Part V of the Bill is headed "Misrepresentation" and comprises four sections. Section 40 provides:

> "In this Part 'contract' means a contract for the sale of goods, a hire purchase agreement, or a contract for the supply of a service."

This provision, whilst understandable in the context of a piece of legislation designed primarily, though not exclusively, to amend the law relating to sale of goods, hire purchase and services contracts, immediately reduces the scope and importance of this part of the Bill.

Section 41 of the Bill is designed to remove certain bars to the right to rescind a contract which has been induced as the result of an innocent misrepresentation, that is, a representation that was not made fraudulently within the test laid in *Derry v. Peek* (1889) 14 App. Cas. 337. This section, which corresponds with Section 1 of the 1967 English Act provides: "Where a person has entered into a contract after a misrepresentation has been made to him, and (a) the misrepresentation has become a term of the contract, or (b) the contract has been performed, or both, then if otherwise he would be entitled to rescind the contract without alleging fraud, he shall be so entitled, subject to the provisions of the Act of 1893 and this Bill notwithstanding the matters mentioned in paragraphs (a) and (b)".

Thus, Section 41(a) attempts to clarify the vexed but underlitigated question of whether the incorporation of a misrepresentation into a contract, either as a condition or a warranty, subjects the misrepresentation to the limitations that attach to a contractual term *qua* a condition or *qua* a warranty. In other words once a misrepresentation takes on the status of a contractual term does it, strictly speaking, cease to be a misrepresentation giving rise to a right to repudiate? *Benjamin's Sale of Goods* (1974) paragraph 758 suggests that the better view is that the right to repudiate would be subject to the rules relating to contracts for the sale of goods because the equitable rules on misrepresentation and the right to repudiate were developed simply to fill a lacuna in the law. Under Section 41(a) then the limitations on the right to repudiate turn upon the Act of 1883 as amended by the 1979 Bill itself, in particular, Section 11 of the 1893 Act which caused several difficulties and which it is now proposed to amend so as to allow a greater degree of flexibility to a judge faced with an action involving recission of a contract.

Section 11(3), as amended, provides: "Where a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect."

While this amended section 11 no longer precludes recission of a contract for specific goods simply because property has already passed, acceptance of the goods or a part thereof under a non- severable contract will preclude rescission unless an express or implied term to the contrary can be found. "Acceptance", the key to the amended Section 11 is defined in Section 20 of the 1978 Bill (which amends S. 35 of the 1893 Act) as an intimation from the buyer that he has accepted the goods or any act in relation to the goods inconsistent with the ownership of the seller, for example sale or pledge by the purchaser. Further, if after a reasonable time the buyer retains the goods without intimating rejection (See *Leaf v. International Galleries* [1950] 2 KB 86) that will be deemed acceptance.

Thus in contracts for the sale of goods there are clear limitations upon the right to repudiate a contract for mis-misrepresentation. However, the terms of Section 11 do not extend into contracts of hire purchase or for the supply of services. Such a contract may still be capable of being set aside notwithstanding lapse of time if induced by a misrepresentation. *Leaf v. International Galleries (supra)* does not apply the doctrine of laches but a separate rule adapted from Sections 11 and 35 of the Sale of Goods Act.

The rule in Seddons case

Section 41(b) of the 1978 Bill attempts to repeal the doctrine first countenanced in *Wilde v. Gibson* (1848) 1 H.L. Cas. 605 at 632-3 by Lord Campbell who stated that "where the conveyance has been executed ... a court of equity will set aside the contract only on the ground of actual fraud." This doctrine was subsequently developed and applied to all executed contracts and became known as the arbitrary rule in *Seddon v. North Eastern Salt Co. Ltd.*, [1905], 1 Ch. 326. The rule in *Seddon v. North Eastern Salt Co. Ltd.* was applied in Ireland in *Lecky v. Walter* [1914] I.R. 378. In that case the plaintiff purchased bonds issued by a dutch company as the result of a misrepresentation made by the defendant's agent who stated that the bonds were fully secured and charged against the companies assets. The bonds were not so secured and were described by the court as virtually worthless. The plaintiff brought an action claiming rescission of this executed contract. The action failed for it was said that an executed contract, whether for land or chattels cannot be rescinded on the grounds of innocent misrepresentation. An executed contract can only be repudiated if the representation is fraudulent or if there

has been a total failure of consideration. On the facts of *Lecky v. Walter* the second ground was held inapplicable. The plaintiff had bargained for bonds and had got bonds, albeit worthless bonds!

In England the 1967 Act Section 1(b) gave effect to the Law Reform Committee's denouncement of the rule by providing that no matter what the subject matter of the contract be, the fact that a contract has been executed should not impede the right to rescind. The provisions of Section41(b) obviously attempts also to sweep away the rule but it is clear that the Irish courts are still in the majority of cases saddled with the rule in *Seddons Case*. This is the result of an unfortunate piece of drafting, for Section 41(b) only applies to contracts for the sale of goods, hire purchase agreements and the supply of services: see Section 40. Most of the cases which arise under this rule will be outside those three situations. A contract for shares, shares being a chose in action, is not a contract for the sale of goods so the Act leaves *Lecky v. Walter* unimpaired. On the facts of *Wilde v. Gibson*, the contract there being a contract for the purchase of land would also escape Section 41(b).

Damages for an innocent misrepresentation

The law student confronted with the problem of coming to terms with the law relating to misrepresentation finds that he is invited to accept the proposition that while the victim of an innocent misrepresentation may be entitled to rescind a contract in equity, he cannot recover damages unless the misrepresentation is either a contractual term or actionable in tort, either in deceit (see *Fenton v. Schofield* 100 ILTR 69) or under *Hedley Byrne* (approved and discussed by Kenny J. in *Bank of Ireland v. Smith* [1966] I.R. The non-fraudulent/non-contractual representation, or bare representation as it is traditionally described is not to give rise to a remedy in damages because of the decision of the House of Lords in *Heilbut Symons & Co. v. Buckleton* [1913] AC. 30 in which an oral representation inducing a contract was held not to sound in damages principally on the ground that innocent misrepresentations are not intended to have contractual effect: See *Treitel, The Law of Contract* 4th Edition at 97. This assumption has been challenged by Denning M.R. as being "out of date" and Kenny J. has stated that "the modern cases show a welcome tendency to treat a representation made in connection with a sale as being a warranty unless the person who made it can show that he was innocent of fault in connection with it" *B. of I v. Smith (supra)* at p. 659. In addition the *Hedley Byrne* development in tort further indicates that the tactic of arguing a collateral contract in order to avoid *Heilbut Symons & Co.* has become less important.

The English 1967 Act section 2(1) removed all doubts and uncertainties and considerably reduced the chances of a court finding that a misrepresentation was not to sound in damages. This section has been reproduced in section 42(1) of the Sale of Goods and Supply of Services Act Bill which provides: "Where a person has entered into a contract after a misrepresentation has been made to him *by another party thereto* and as a result thereof he has suffered loss, then, if the person making the representation would be liable to damages in respect thereof *had the misrepresentation been made fraudulently*, that person *shall be so liable* notwithstanding that the misrepresentation was not made fraudulently, *unless* that he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true." [author's italics].

Because the Irish legislation is so closely linked to the English 1967 Act it may be instructive to examine how this section has been viewed by the English courts. The present writer intends to do so by examining three aspects of the section.

(1) The scope of the section

The Misrepresentation Act 1967 has been found most useful by the English judiciary in a few residual cases where a remedy in damages was not previously available. For example, in *Gosling v. Anderson*, The Times, February 6th 1972, the Court of Appeal awarded damages to the purchaser of a flat who had been informed wrongly by the defendant's agent that planning permission had been granted to permit garages for each of the flats to be built notwithstanding the fact that the agent honestly believed this to be so. However, the most important effect the 1967 Act has had in England has been to virtually eliminate the rule in *Bain v. Fothergill* (1874) L.R. 7 H.L. 158 which, it may be recalled, limits the recoverability of damages where, without fraud, a vendor cannot make out title to land, to the expense incurred, if any, in searching title. This rule, whilst understandable in the context of 18th and 19th century conveyancing practice has unfortunately been accepted as good law in Ireland although modern judges attempt to distinguish the rule as inapplicable whenever this is possible: see an interesting note by O'Driscoll in Volume X (1975) Irish Jurist 203. The 1967 Act has been held by Graham J. in *Watts v. Spence* [1975] 2 All E.R. 528 to limit *Bain v. Fothergill* to cases where there was no misrepresentation, fraudulent or innocent.

Unfortunately the rule in *Bain v. Fothergill* is unaffected by the 1978 Irish Bill despite the fact that Section 42(1) and Section 2(1) of the 1967 English Act are identical. Again, the difficulty stems from Section 40 which limits "contract" to mean contracts for the sale of goods, hire purchase agreements and supply of services. A contract for the sale of land cannot be either of these.

The fact that very real difficulties may arise in this context turns upon the likelihood of an increase in the number of actions in which a vendor has not been able to transfer title and is sued by a disappointed purchaser. The Family Home Protection Act 1976 Section 3 has recently been held by the Supreme Court in *Somers v. Weir* to render a purported contract by a husband to sell the matrimonial home void even if at the time of sale the wife is not in occupation and the marriage has broken down. The purchaser was unable to show she was a bona fide purchaser without notice. Although the vendor was not sued in that case any future action for damages brought against the vendor of a matrimonial home will meet the full force of *Bain v. Fothergill* unless deceit or fraud is shown which may be difficult or if Section 3 is held to be an impediment to making good title which because of its statutory origin is outside *Bain v. Fothergill:* see Megarry J's judgement in *Wroth v. Tyler* [1973] 1 All E.R. 897. It is suggested that the best solution would be to amend the proposed section 40 so as to bring *Bain v. Fothergill* within the scope of Section 42(1).

(2) The Measure of Damages under section 42(1)

It may be important to determine whether the cause of action is founded in contract as against tort because the

measure of damages recoverable may differ according to the cause of action. This important practical consequence flows from the theoretical differences underlying principles of assessment. Whilst the starting point is the same in that an award of damages is seen as compensatory the essential differences that underline contract and tort actions can result in the measure of damages differeing quite dramatically according to the cause of action. In an action for breach of contract the courts seek to place the contracting party in the position he would have been in if the contract had not been broken. If a person strikes a good bargain and the bargain is broken the injured party should find his negotiating skills rewarded, or more accurately, compensated; so if I buy a ton of coal for £10 and at the time of delivery and breach a ton of coal is worth £30, £30 should be my measure of damages. This is known as an award of damages for loss of expectation. However, if an action is brought in tort the courts do not seek to allow a party to be in a better position than if the tort had not been committed. Indeed if the tort arises from a contract the courts go further by placing the party in his pre-contractual position. So if I enter into a contract to buy coal and it is represented that a ton of coal is worth £30 and I pay £10, if I subsequently discover a misrepresentation has been made and I sue in tort I will be placed in the position I was in before the tort was committed. Thus I will be awarded my £10 by way of restitution. See *Treitel, The Law of Contract* 4th Edition Chapter 21 and *Ogus, The Law of Damages* especially pages 286-8.

The question of classifying the right to damages created by Section 42(1) at first sight should be a rather simple task. It will be noted that that section imposes upon a misrepresentor the duty to pay damages where fraud cannot be shown. An innocent misrepresentor "shall be so liable", i.e. liable in deciet. Therefore it seems the tortious measure should apply.

Two difficulties however result from this proposition. First of all the English Courts have indicated that the measure of damages in tort and contract should, in certain instances, be the same. In *Jarvis v. Swans Tours* [1972] QB, Denning M.R. said " ...[i]t is not necessary to decide whether they [the statements] were representations or warranties: because since the Misrepresentation Act 1967, there is a remedy in damages for misrepresentation as well as for breach of warranty." This, of course, ignores the theoretical differences relating to principles of assessment as well as the difference between the rules on remoteness of damage. Lord Denning's dictum above however has since applied in two decisions which suggest on the one hand that all consequential loss will be recoverable under the new statutory right to damages, see *Davis & Co. v Alfa Minerva* [1974] 2 Lloyds L.R. 27 and secondly, that despite the wording of Section 42(1), damages for loss of bargain will be recoverable. This second feat is achieved by Graham J. in *Watts v. Spence* (supra). That case concerned an action in damages against a husband who purported to sell a house, his interest being that of a joint tenant with his wife. An action brought against him for damages looked destined to meet the full force of the rule in *Bain v. Fothergill* until Graham J. allowed the pleadings to be amended to avert to S. 2(1) of the Misrepresentation Act. Graham J. in awarding damages said, "The 1977 Act for the first time enables a plaintiff to sue for innocent misrepresentation, a cause of action now made akin to an action for damage for fraud. The 1967 Act has thus created a new cause of action, one with which *Bain v. Fothergill* never had anything to do. The practical effect is however, that some purchasers who would have been caught by *Bain v. Fothergill* if the 1967 Act had not been passed can now by suing on the new statutory right, *get damages for loss of bargain* which they could not have recovered before." [italics added].

Thus, it seems even in those limited situations to which S. 42(1) applies in Ireland there is authority for the view that loss of expectation can be compensated for, even though the cause of action is a cause of action analagous to an action in tort!

(3) The Proviso to S. 42(1)

The effect of the proviso is to bring together principles of tort and contract by rendering misrepresentations actionable if fault can be attributed to the representor. Thus an innocent misrepresentation in the narrow sense that the representor was, objectively speaking, innocent of fault still remains non-compensable. The proviso has been recently considered in the case of *Howard Marine & Dredging Co. Ltd. v. A. Ogden & Sons. (Excavations) Ltd.* [1978] 2 WLR 515. In that case the plaintiffs who were negotiating with an engineering firm who wished to hire barges misrepresented the capacity of the barges. The figure represented was an incorrect recollection of the capacity of the barges as contained in Lloyd's Register. That figure in the Register was also incorrect and the correct capacity could have been discovered by consulting the ship's documents in the plaintiff's possession. When the error was discovered the plaintiff barge owners sought to rely on an exemption clause and themselves sued for arrears of hire charges. On appeal the contractors were held entitled to damages in tort under Section 2(1) of the 1967 Act. The owners were not able to rely upon the proviso. Whilst the misrepresentor did believe that the facts stated were correct he could not show any objectively reasonable ground for disregarding the figure in the ship's documents. Thus it seems the misrepresentor will not be entitled to exclude liability merely by showing the belief was held.

S. 42(2)

It has already been suggested that the law of misrepresentation is curious if only because the courts of equity permitted rescission for any misrepresentation. Thus the more drastic remedy of rescission was available in cases where damages were not. The courts have recently attempted to control the extent to which repudiation will be available in contracts for the sale of goods: see *Cehave N.V. v. Bremer Handelsgesellschaft mbH* [1975] 3 All ER 739. The provisions of section 42(2) also attempt to control the extent to which repudiation will be possible by permitting a court or arbitrator, in cases of non-fraudulent misrepresentation to declare the contract subsisting and award damages in lieu of rescission if "of opinion that it would be equitable to do so" having regard to circumstances set out in that section. Whilst the English and of course the Irish courts have not considered the effect of this provision one great difficulty arises from the wording of Section 42(2) of the 1978 Irish Bill and Section 2(2) of the 1967 English Act. For the judicial power to substitute damages for rescission to operate the representee at the time of adjudication must be in the position where "he would be entitled, by reason of the misrepresentation, to rescind the contract." Thus if

the power to rescind has been lost by reason of waiver, affirmation or acceptance, then a right to damages will not exist. Whilst it is understandable that the power to award compensation by way of damages should only exist if the right to repudiation which it replaces or limits exists, there is an argument for dispensing with this requirement because, at the end of the day, misrepresentees may still be deprived of any remedy.

Whittling down exemption clauses

Section 43, which has as its counterpart in England Section 3 of the 1967 Act limits the extent to which a contract may contain a provision limiting the liability of a misrepresentor, either in relation to the cause of action itself or the remedy available. The limiting clause will only operate in favour of the proferens, (a person seeking to rely on an exemption clause), if the court considers reliance "as being fair and reasonable in the circumstances of the case."

The schedule to the Act lays down that reasonableness is to be judged by reference to circumstances which were in the contemplation of the parties at the time of contracting. Paragraph 2 to the Schedule lays down factors that the court may avert to if considered relevant by the judge and those factors will normally provide guidance on whether the parties were contracting at arms length, whether the bargain was part of an established commercial relationship and whether more advantageous terms could be obtained elsewhere. Section 43 however will only apply to cases where a misrepresentation has been made. In other situations it may be necessary to cut down an exemption clause by resorting to the doctrine of improvident bargains: See *Grealish v. Murphy* [1964] I.R. 35.

Summary

While the terms of Part V of the Sale of Goods and Supply of Services Bill 1978 will be effective in a few cases the primary objectives that underlie the provisions of that Part are largely subverted by the proposed Section 40. Section 40 should therefore be amended. While some uncertainty remains in relation to the measure of damages recoverable under the Bill the English courts have awarded damages for loss of bargain even though Section 42(1) is analagous to a right of action in tort. Further consideration of the vexed problem of the unconscionable exemption clause will be necessary notwithstanding Section 43.

Book Review

An Introductory Guide to EEC Competition Law and Practice – Valentine Korah (ESC Publishing Ltd., Oxford 1978). £6.75 (£7.20 direct from the publisher).

The casual purveyor of law books might well remark that there is no area of legal publishing apparently as competitive as that of competition law; and this little book (142 pages *in toto)* is the latest in a long line of writings upon this subject of increasing contemporary interest. Yet there is certainly a niche for Mrs. Korah's book. If one views the entire corpus of competition law literature as a long and shaky ladder which leads the reader from the murk of ignorance to the radiant sublimity of knowledge, this work may be likened to those first few lowly rungs which must be safely negotiated by the inexperienced reader before further ascent is contemplated. Indeed this *Introductory Guide* is aimed especially at the reader who may have some knowledge of business or commercial practice but who, while not a lawyer, must converse with lawyers and grasp their concepts before he can decide which course of action he is to follow. That the book succeeds in this aim is attributable largely to its brevity and its emphasis upon matters of principle. rather than detail.

The format of the *Guide* is simple. The reader is introduced to the basic sources and enforcement machinery of competition law; then follows an account of articles 85 and 86 of the Treaty of Rome and their effect. Those articles are appended together with Regulation 17/62, a glossary of terms and a brief but useful bibliography of further reading. There are no diagrams or flow-charts. The author's style is generally lucid if occasionally awkward (the subject itself does not encourage flowing prose). Fortunately it is neither obscure nor condescending in tone, as introductory works may sometimes appear.

The book bears some of the haste with which it was brought out. There are, for example, rather more errors of spelling and punctuation than one would like to see, especially in a book of this brevity. None of these errors are fatal, though one or two would be annoying to the completely new reader; the *United Brands* case is twice (at pp. 32 and 99) cited for 1975, and the reader seeking the full reference from the index will have to decide whether it is the 1976 or the 1978 citation to which the author refers. While on the subject of the 1978 *United Brands* decision, the author makes it perfectly clear that her views on excessive pricing are not those which are held by the officers of the Commission. It is wise that she confines her criticisms largely to the practical aspect of that case – the problem of advising dominant firms in advance as to the prices they may charge without running the risk of fines – and does not seek to answer the vexed and difficult question: who or what, other than the market itself, is to determine the economic value of a product? That problem is left for more detailed works to solve.

Jeremy Phillips.

New Training Course for Solicitors' Apprentices

Every solicitor in the Republic knows of the controversy surrounding the establishment of the new scheme of legal education and training but not every solicitor knows the views of the Incorporated Law Society in that controversy. Following the despatch to public representatives of an anonymous circular in which the actions and attitude of the Society were criticised, the Education Committee approved a Memorandum setting out the Society's position and a copy of this Memorandum has been furnished – with a personal covering letter signed by the Director General – to each Dail Deputy and Senator. For the information of members of the profession and those members of the public seeking practitioners' views on the topic, there is set out hereunder the text of the Society's Memorandum.

Professor Richard Wolfe,
Director of Education

Dissatisfaction with the existing educational process leading to the admission of solicitors in the Republic was being widely expressed in the middle 1960s. It had become clear that the arrangement whereby an apprentice's academic studies overlapped both with his service in his Master's office and with his professional examinations was becoming more and more unsatisfactory, to the detriment of his professional training. A report by the Society of Young Solicitors in 1967 recommended the separation of academic studies from professional training, (a system which operated in Northern Ireland since 1951). The Ormrod Report on the education of lawyers in England and Wales published in 1971 gave further support to this view.

Approaches to the Department of Justice by Law Society representatives suggesting that amendments to the Solicitors Acts might be introduced to enable the system of professional training to be altered were received courteously but the Department indicated that it was unlikely that parliamentary time for such legislation would be available in the near future. Accordingly the Society was obliged to see if a new system of training could be introduced within the framework of the 1954 and 1960 Solicitors Acts and with some difficulty, (and unfortunately certain anomalies, largely relating to the length of the apprenticeship period for persons who are not graduates of British or Irish Universities), a new scheme was worked out within the existing statutory framework. This scheme was given statutory support by two Statutory Instruments, the Solicitors Act 1954 (Apprenticeship and Education Amendment No. 1) Regulations 1974 (S. I. No. 138 of 1974) and the Solicitors Acts 1954 and 1960 (Apprenticeship and Education) Regulations 1975 (S. I. No. 66 of 1975).

From the outset the Society was anxious to ensure that the number of solicitors qualifying under the new scheme would be adequate to meet the demands of the public. In the early stages of its preparatory work in 1974 the Society took the view that an annual intake of approximately 100 into the profession would be adequate, the numbers which had been admitted over the previous 10 year period averaging 64 per year. At a later stage noting that the demand for newly qualified solicitors had been maintained the Society reviewed its figures upwards to 125. At this stage the Society took advice on the formation of its new professional training course from Mr. Kevin O'Leary, head of the Professional Training Course at the Australlan National University at Canberra, a pioneer in legal training courses who advised the Society that it would not be educationally sound to attempt to cater for more than 75 students in any one training course. Taking all factors into account the Society decided to hold two training courses in each year, each of which could accommodate 75 students making a total of 150 per annum. Shortly after this the Society discovered on receiving statistics from the Higher Education Authority that there had been a phenomenal increase in the number of students entering the Law Faculties during the early and middle 1970s. The increases in law students over a five year period totalled 84% whereas the average increase in other faculties was less than 11%. During its negotiations with the University Law Faculties which had been taking place regularly from 1974 onwards, it had always been the hope of the Law Society that it would be able to offer exemption from the Society's Final Examination – First Part (the entrance Law Examination) to Law Graduates but the great increase in the law student numbers, for whose future career prospects the Law Faculties apparently proposed to rely almost exclusively on the professions, rendered this position impossible. The Society has always been proud of its tradition of admitting as solicitors, through the seven year law clerk mode of entry, persons who have not had the opportunities of reaching second level, not to speak of third level education and also believes that a leavening of entrants from other disciplines, subject to their having the necessary academic legal qualifications, is a benefit to the profession and therefore to the public. Accordingly the Society was obliged to indicate to the University Faculties that it could no longer grant automatic exemptions to law graduates.

To become apprenticed, a student must hold a university degree of a type specified in the legislation, or have been a bona fide law clerk for at least seven years or be a mature student who passed the Society's degree-level entrance examination. In every case the student must have attained an acceptable level of knowledge in six core legal subjects – Contract, Property, Tort, Constitutional Law, Company Law, and Criminal Law.

The ususal – but not the only – method of entry is by having a law degree. Apprenticeship normally lasts three years.

The student will usually attend at the office of his "Master" solicitor for two or three months to get a feel of a law office before embarking on the Society's Professional Course. This is an intensive five and a half day week in a workshop setting; it is followed by 18 months in the office of the master solicitor and a further two months back in the Society's Law School in Dublin doing the Advanced Course. The student: staff ratio is 12: 1 with instruction given by practising solicitors for the most part. Over 130 members of the profession are taking part as tutors in the Professional Course.

This comprehensive preparation will enable the newly qualified solicitor to apply immediately his theoretical knowledge and give a better service to the public, having had a basic practical training during the Professional Course.

The Society wishes to stress the following points:

(1) The cost to the student of the Professional and Advanced Courses is £1,050; examination and registration fees (which have not been increased) bring the total cost to the student to £1,315 over three years *(not £1,315 a year* as has been suggested.

(2) The cost to the student would be greater were it not directly subsidised by the Society and below cost tuition given by members of the profession.

(3) Higher Education grants are available to students entitled to grants.

(4) The Society has arranged Bank Loans, repayable after the student qualifies, and scholarships and itself gives bursaries – based on need. In the first course, five apprentices secured scholarships or bursaries.

(5) The overall cost (including maintenance) to a new regulations student is less than to an old regulations student because the new course of studies (which is much more intensive) is compressed into a shorter time and also because students who have completed their Professional Course will be paid by their master solicitor – the minimum recommended weekly wage being £30.

(6) None of the new regulations apprentices have been charged a fee or premium by their master solicitor.

(7) The Society proposed limiting the number to 150 a year and it does so for the following reasons:

(a) The Law is the only profession whose members have increased and are increasing. Twenty years ago 40/45 solicitors qualified a year; within the past ten years, the number of solicitors has risen from 1300 to 2200. As of now, over 200 solicitors qualify yearly and there are 1100 students under the old regulations of whom a large proportion will qualify as solicitors.

(b) Between the present time and 1986, the number of solicitors will increase from 2200 to more than 3300 – an increase of over 50% even though the projected rise in population during the same period will be 1% a year.

(c) The Society's assessment of the Supply and Demand for solicitors up to 1991 assumes increased numbers of lawyers in industry, commerce and the public service; it assumes continuing economic growth demanding greater services in domestic and E.E.C. law; it specifically takes the Pringle Committee recommendations into account and allows for 100 solicitors engaged whole time in civil legal aid areas. Even so, the projection ends up with a surplus of solicitors in 1986.

(d) It would be a waste of resources as well as doing no service to those students who end up as a surplus to have anyone spend three or more years qualifying as a solicitor and then find that there were no employment opportunities in the profession.

(8) The Higher Education Authority has *not* stated that it is prepared to subsidise the new course. Indeed, it could not make a grant to the Society at this stage because the Society is not an institution to which the authority is entitled to make such grants.

(9) It is sometimes alleged that the student body is largely comprised of solicitors' children but of the 73 students on the first Professional Course, two are children of solicitors, one a brother and one related to a solicitor as a first cousin once removed.

(10) 73 Apprentices sought places in the first Professional Course, 73 were granted places and all 73 have embarked on the Course. None fell out because of the cost of the Course.

(11) In March 1977 the Society, by circular letter to all post-primary schools in the Republic – notified intending apprentices that there would be a limit of 150 places in the Law School and that no guarantees of entry into that school could be given to law graduates. The Society concedes that those students who had entered the university law faculties in 1975 and 1976 ought to have and will have automatic entry into its Law School provided they obtain their university law degree within a reasonable time but this automatic entry arrangement does not extend to students who commenced their university law course in October 1977 and they will have to pass the Society's entrance examination in the six core legal subjects already mentioned. The Society does recognise that a problem exists for those students by reason of the March closing date for Central Applications Office applications in which students would have set down their initial preference for university courses. To meet that problem, the Society has decided that for the Professional Course commencing in November 1980 and for the next ensuing course, there will be 150 places available for competition to gain entry into its Law School in addition to the places for guaranteed entrants. Thus, there will be 150 places available for competition by the 1977 entrants into the B.C.L. courses at U.C.C. and U.C.D. who will graduate in 1980 – these being the persons claiming that they were not properly informed – together with the non-law graduates.

The purpose of the new course of training is to provide the country with solicitors who can give the public the highest quality of legal service. The Society believes that it will do so.

3rd May, 1979.

Labour Law – Another Area Slipping Away

By ROBERT FLANAGAN

It has been a common complaint among Solicitors for many years that taxation is an area of law which has been allowed to slip out of the hands of Solicitors into that of Accountants and other Advisors. Recent developments in the area of labour law suggest that, notwithstanding the impetus which might have been given by the recent spate of employment legislation, this too is an area which will soon be largely lost to the legal profession.

The participation of lawyers in the area of labour law, particularly in the area of the negotiations of settlements of industrial disputes has been at a low level in Ireland since the introduction of the Labour Court by the Industrial Relations Act 1946. The Labour Court did not welcome the appearance of solicitors qua solicitors though they were permitted to appear as spokesmen for interested parties appearing before it. Indeed the late Charles Cuffe, Solicitor, was the principal spokesman of the Federated Union of Employers in the Court for many years.

Perhaps as a result of their non-involvement in labour disputes, apart from the area of injunctions to restrain picketing, the legal profession seems to have held back from actively seeking to participate in the operation of the Employment Appeals Tribunal, ("the Tribunal") established by the Unfair Dismissals Act 1977. It appears from the reports of cases heard by the Tribunal that persons appearing before it are represented by such varied groups of people as trade union officials, accountants, and management consultants.

It is true that in a number of cases lawyers have appeared before the Tribunal but the percentage of these cases is surprisingly low having regard to the legally substantial and complicated areas of law now falling within the jurisdiction of the Tribunal. It may not be fully appreciated by the legal profession (although there have been several well publicised cases which should have highlighted the position), that the jurisdiction of the Tribunal under the Unfair Dismissals Act far exceeds the jurisdiction of the Circuit Court in the amount of its awards. Many professional and white collar workers come within its jurisdiction and awards of up to £17,000 have already been made by the Tribunal. It is true that there is no provision for the awarding of costs unless a respondent has acted frivolously or vexatiously but the amounts of the awards which have been made, leave room for the charging of reasonable costs to a successful applicant.

Another factor which seems not to have been fully appreciated is that a claim under the Unfair Dismissals Act is now an obvious alternative to the older common law claim for damages for wrongful dismissal, indeed an attractive alternative since the Tribunal has frequently made awards which may be substantially greater (i.e. up to a maximum of two years salary) than those which could be obtained in the ordinary courts. Because of a provision in the unfair Dismissals Act that claims under it and claims at common law for wrongful dismissal are to be mutually exclusive it is obviously necessary for every solicitor consulted by a dismissed employee to consider immediately the advisability of proceeding under the Unfair Dismissals Act, particularly since the time for instituting proceedngs under that Act is six months from the date of dismissal.

A solicitor so consulted, who overlooks the possibility of bringing a claim under the Unfair Dismissals Act but instead choses to institute a common law action might well find himself the target of a professionl negligence action even if the common law action were successful, in that the amount which might have been achieved under the Unfair Dismissals procedure might more than likely be greater than that awarded by way of common law damages.

Apart from Unfair Dismissals Act claims simpliciter, the interaction of the Redundancy Payments Acts 1967/79, the Minimum Notice and Terms of Employment Act 1973 and the Unfair Dismissals Act gives rise to a good deal of what could be described as "lawyers law" in which both employers and employees may have need of careful advice from a lawyer as to which of several courses of action open to them would be likely to be the most fruitful.

With this in mind the Public Relations Committee of the Law Society arranged a series of seminars throughout the country (i.e. Cork, Dublin, Limerick and Galway) on the operation of the Tribunal. The Society was extremely fortunate to be able to enlist as participating lecturers, Circuit Judge John Gleeson, who had been the first Chairman of the Employment Appeals Tribunal (formerly the Redundancy Appeals Tribunal) and Ercus Stewart B.L. and Brian Gallagher, Solicitor, both of whom have extensive experience of appearing before the Tribunal.

Unfortunately, the legal profession as a whole still do not seem to have appreciated the need to educate themselves on the operation of the Employment Legislation of the 1970s and in particular the working of the Tribunal because so far the response to the Seminars has been disappointing, even when allowance is made for the present difficulty of advertising Seminars due to the postal dispute. The last of the four current series of labour law seminars was held in University College Galway on the 26th May 1979. If, as is hoped, further interest is indicated to the Law Society by members of the profession, a further series of such seminars can be arranged at various locations in the near future.

As an additional spur to the continuing education of the profession in this important and developing area of legal practice the Publications Committee hopes to have available shortly a book by Ercus Stewart B.L. on the recent labour legislation.

In conclusion, it must be said that at a time when the Solicitors' monopoly in conveyancing matters is under critical examination it would seem shortsighted for the profession to allow another area of legal expertise to pass from its ken, and perhaps into the hands of persons, not all of whom would have had any adequate training for undertaking such important work.

Dublin Solicitors' Bar Association

COMPULSORY PROFESSIONAL INDEMNITY INSURANCE IN IRELAND

On 14th March, 1979, Mr. Kenneth Pritchard, Secretary of the Law Society of Scotland, spoke to members of the Association on the origins and working of the scheme of compulsory professional indemnity insurance introduced in Scotland in 1976.

Introducing Mr. Pritchard, Mr. John Buckley, President of the Association, reminded the audience that they were listening to Mr. Pritchard in the context of the prevailing Irish situation in which only 50% of the Solicitors profession was covered by any form of professional indemnity insurance and in the likelihood of future legislation which might in due course require *all* Solicitors to be insured against professional negligence. The Incorporated Law Society has done a great deal to protect the public through its own compensation fund but it remains desirable that the entire profession should be covered by proper insurance.

Mr. Pritchard, in describing the Scottish Scheme, was careful to emphasise that while the Scheme seemed eminently suitable in Scotland, it might not necessarily suit Irish circumstances, or even conditions in various other parts of the U.K.

During the early 1970's, experience in Scotland showed that, while many firms were covered by professional indemnity insurance, and had been covered for many years, many firms either were insufficiently covered or were finding it impossible to obtain insurance cover at any price. This, it was felt, was not based on the loss record of Scottish Lawyers, but on the national experience over the whole U.K., and Scottish Lawyers felt they were being penalised unfairly for the shortcomings of Lawyers elsewhere.

In this context, the Scottish Law Society decided to consider whether it might itself negotiate a scheme whereby all Scottish Solicitors could be covered, motivated in part by the belief that, if compulsory professional indemnity insurance was to be introduced, then it would be preferable that such insurance should be introduced by lawyers themselves, in the most suitable form and on the best possible terms, rather than have some scheme imposed upon the profession which might not, in fact, be the best that could be arranged.

As it would be necessary to have special legislation passed to enable the Law Society to introduce its own compulsory scheme, it was decided initially to negotiate terms with a leading insurance company whereby *all* Scottish Solicitors who sought it could be guaranteed cover, but at premiums negotiated individually with each firm or sole practitioner. This "voluntary" scheme was introduced in 1974, at premiums which seemed acceptable, but in 1976 the insurers notified the profession that all premiums would be increased by 400%!

After much argument, a reduced increase of only 350% was negotiated with the Company concerned.

During the negotiations on this premium increase, it was established that during the period of the "voluntary" scheme, the insurers had collected £300,000 in premiums and had paid out only £21,000 in claims. Not withstanding these figures, the Company insisted that it must establish a very considerable insurance fund to underwrite the scheme and this was its justification for the large increase in premiums.

At this stage (1976) the Scottish Law Society's parallel endeavours are successful in procuring the passing of the Solicitor's (Scotland) Act, 1976, which included radical provisions enabling the Council of the Law Society to introduce compulsory insurance and to make all or any enabling Rules, as and when necessary.

Almost simultaneously Mr. Harold Wilson, the then Prime Minister, established a Royal Commission to investigate the Solicitors' profession in Scotland. The Royal Commission has not yet reported, but it may well attack Solicitors' monopolies and may also recommend compulsory insurance.

The Scottish Law Society decided to move while it had a free hand and, in accordance with the provisions of the Act, it sought advice from three independent firms of Insurance Brokers and from the profession itself.

The alternative concepts permitted by the Act were:-

(i) A Mutual Fund;
(ii) Individual "approved" insurances, negotiated individually, but within requirements to be laid down by the Law Society;
(iii) A Master Policy for the profession as a whole, to which all would contribute.

It was ultimately decided, and with a remarkable similarity of advice from all three Brokers, that the third

alternative would be the most suitable and would, in particular, have the very important advantage that from its inception all claims records would be available in the one Scheme, so, for the first time ever, the profession could really assess its own performance and negotiate premium levels with proper statistical backing.

The "Master Policy" was in due course arranged with a leading Insurance Group, and the fact that the insurer receives a very large premium indeed provides the Law Society with considerable strength to negotiate on an "each and every claim" basis.

It was recommended that the Scheme should operate on a "flexible premium", whereby the good risks pay less than the bad. The latest available statistics for the Scheme show that:-

81.1% are on "normal" risk premiums;
3.15% have a compulsory excess of cover;
9.3% have premium loadings.

Only two firms are subject to maximum premium loadings.

This must be seen in the context of 3,100 Solicitors practicing in the private sector, paying between them approximately £1,000.00, per annum in premiumsm

The Scottish Law Society decided that sole practitioners should be covered in the sum of £75,000 each and that firms of more than one Solicitor should be covered for £50,000 per partner, up to a maximum cover of £500,000. The Scheme also enables optional extra cover to be arranged on negotiated terms.

In negotiating premium levels, the Scottish Law Society insisted that quotations should be based on the then available statistics for Scottish Solicitors only. In the result, a sole practitioner pays at present for his cover of £75,000 a premium of approximately £390 per annum.

A four-partner firm, pays £950 per annum for its cover of £200,000 (£50,000 x 4); a ten-partner firm pays £2,000 per annum for the maximum compulsory cover of £500,000 (£50,000 x 10).

These levels compare very favourably with the U.K., where a three-partner firm in London pays over £2,000 per annum for cover of £150,000 (50,000 x 3).

The cover negotiated extends to all acts of omission or commission *in everything that a Solicitor does in Scotland.* This includes practice as Estate Agents (and 65% of all house sales in Scotland are negotiated by Solicitors acting as such) as well as acting in other capacities such as Executors or Trustees, Company Directors or Company Secretaries.

So far, Mr. Pritchard was happy to say, the claims experience has been excellent. The latest available figures show that £1,200,000 has been collected in premiums. Twenty-six Claims Files have been opened. Six such Files have been closed. Claims paid out amount to £6,000. Pending claims (which may not all be sustained) amount to £200,000.

Mr. Pritchard was in no doubt whatever that some form of insurance, covering the entire profession without exception, is essential and that the public is entitled to the reassurance that if *we* make mistakes, *they* will not suffer.

Arguably, as the Solicitors' profession in Ireland is of comparatively modest size, it should not be unduly difficult to devise an Insurance Scheme in this Country which would give the public maximum protection at rates which the profession could afford. This could well require special legislation but, in the present climate of ever-increasing awareness of the vulnerability of professional and public alike, such legislation might be easier to obtain in this Country now than was the case in Scotland in the early 1970's.

It is certainly a subject which the profession should take further – and fast!

Bills Introduced in the Oireachtas in 1979

The following list of 1979 Bills is up to date as of 2 May, 1979

Redundancy Payments Bill, 1979 entitled An Act to amend and extend the Redundancy Payments Acts, 1967 to 1973, and to provide for other connected matters. (Initiated 15/1/79) – **No. 1 of 1979,** as amended in Committee 21/2/79; as passed by Dail Eireann 28/2/79; as passed by both Houses of the Oireachtas, 14/3/79).

The Bill provides for changes in the Redundancy Payments Scheme and also includes a provision which would empower the Minister for Labour to appoint two additional vice-chairmen and six additional ordinary members to the Employment Appeals Tribunal and to make further appointments should the workload of the Tribunal warrant it.

Tribunals of Inquiry (Evidence) (Amendment) Bill, 1979, entitled An Act to amend the Tribunal of Inquiry (Evidence) Act, 1921. (Initiated 31/1/79 – **No. 2 of 1979;** as passed by Dail Eireann 7/2/79; as passed by both Houses of the Oireachtas 20/2/79).

Amends Sec. 1 of the 1921 Act relating to the conduct of witnesses and the giving of evidence to a Tribunal and provides for penalties for offences under Sec. 3 of the Bill. Vests a tribunal with the powers of the High Court or a High Court Judge in respect of the making of Orders.

Payment of Wages Bill, 1979 entitled An Act to provide for the payment of certain wages otherwise than

in cash and for other matters related to the payment of salaries or wages. (Initiated 2/2/79 – **No. 3 of 1979).**

The Bill applies to employees engaged in the trades specified in the Truck Act, 1831, The Truck (Amendment) Act, 1887, and the Hosiery Manufacture (Wages) Act, 1894.

Fisheries Bill, 1979 entitled An Act to establish a body to be known as the Central Fisheries Board and to define its functions, to enable Regional Fisheries to be established and to define their functions, to dissolve the Inland Fisheries Trust Incorporated and certain Boards of Conservators established by The Fisheries (Consolidation) Act, 1959, to provide for other matters connected with the foregoing and otherwise to amend and extend the Fisheries Acts, 1959-1978. (Initiated (Dail) 22/6/78; Initiated (Seanad) 14/2/79 – **No. 4 of 1979;** as amended in Committee 21/3/79).

The object of the Bill is to secure the more effective conservation, management and development of inland fisheries through the re-organisation and strengthening of the existing administrative structures. Proposals in the Bill are based on the Report of the Inland Fisheries Commission, July, 1979 (Prl 4712).

Imposition of Duties (Amendment) Bill, 1979 entitled An Act to amend the Imposition of Duties Act, 1957. (Initiated 21/2/79) – **No. 5 of 1979).** Amends Section 5 of the 1957 Act.

Under this new Section none of the provisions of the 1957 Act may be used to impose a levy or charge on the sale into processing or for export of the following agricultural commodities – cattle, milk, pigs, sheep, sugarbeet and cereals.

Housing (Gaeltacht) (Amendment) Bill, 1979 entitled An Act to amend and extend the Housing (Gaeltacht) Acts, 1929 to 1967. (Initiated 23/2/79) – **No. 6 of 1979).**

Provides for the amount of a building grant available in respect of dwelling houses in a Gaeltacht area, either on the mainland or on an off-shore island, the erection of which commenced (1) on or after 1st January, 1973, and before 27th May, 1977; (2) on or after 27th May, 1977.

Landlord and Tenant (Amendment) Bill, 1979 entitled An Act to amend the law relating to the renewal of leases and tenancies and to compensation for improvements and for disturbance or loss of title and for these and other purposes to amend the Landlord and Tenant Acts, 1931 to 1978. (Initiated (Seanad) 28/2/79) – **No. 7 of 1979;** passed by Seanad Eireann 2/5/79).

Provides for the repeal and re-enactment with amendments of the Landlord and Tenant Act, 1931 and the Landlord and Tenant (Revisionary Leases) Act, 1958. Contains provision that new leases under Part 3 of the Landlord and Tenant Act, 1931, will now be subject to rent review. Recommendations for the amendments in the Act were made by the Landlord and Tenant Commission in the Report on Occupational Tenancies under the Landlord and Tenant Act, 1931, (Pr. No. 9685) and the Report on Certain Questions arising under the Landlord and Tenant Acts, 1958 and 1967 (Prl 59).

Gaming and Lotteries Bill, 1979 entitled An Act to amend Sections 4, 37 and 42 of the Gaming and Lotteries Act, 1956. (Initiated 23/3/79 – **No. 8 of 1979;** as passed by both Houses of the Oireachtas 14/3/79).

Amends the 1956 Act to bring within the jurisdiction of Section 4 (i) (c) the operation of slot-machines designed to deliver a money prize as contained in Section 10 of the 1956 Act but which was repealed by the Gaming and Lotteries Act, 1970. The introduction of this Bill follows the Supreme Court decision in *D.P.P. (Broderick) v. Flanagan*, 19/1/79.

Social Welfare Bill, 1979 entitled An Act to amend and extend the Old Age Pensions Acts, 1908 to 1978, the Unemployment Assistance Acts, 1933 to 1978, the Widows' and Orphans' Pensions Acts, 1935 to 1978, the Social Welfare (Children's Allowances) Acts, 1944 to 1977, the Social Welfare (Supplementary Welfare Allowances) Act, 1975, and the Social Welfare Acts, 1952 to 1978. (Initiated 5/3/79 – **No. 9 of 1979;** as passed by both Houses of the Oireachtas 22/3/79).

Designed to give effect to the increases of 12% and 16% in the rates of payment and other changes in the schemes of Social Assistance and Social Insurance announced in the Budget Statement on 7th February, 1979. Also provides for consequential increases in rates of payment under the occupational injuries benefit scheme and for certain changes in the unemployment assistance scheme as it applies to certain smallholders.

Transport (Miscellaneous Provisions) Bill, 1979, entitled an Act to make provision in relation to certain bridges in the County Borough of Cork and in relation to the members of the Board and the chief officer of Coras Iompair Eireann. (Initiated 29/3/79 – **No. 10 of 1979).**

The Bill gives Statutory effect to an Agreement of 1977 made between Cork Corporation, Coras Iompair Eireann and the Cork Harbour Commissioners, whereby it was agreed that C.I.E. would convert two opening railway bridges over the river Lee into fixed bridges and vest in the Corporation all the right title and interest of C.I.E. in these bridges.

The Bill also makes provision for the remuneration and allowances of the General Manager of C.I.E. and Members of the Board.

Finance Bill, 1979, entitled an Act to charge and impose certain duties of customs and inland revenue (including excise), to amend the law relating to customs and inland revenue (including excise) and to make further provisions in connection with finance. (Initiated 5/4/79 – **No. 11 of 1979).**

The provisions of Part I of the Act relate to Income Tax, Corporation Tax and Capital Gains Tax; Part II to Customs and Excise; Part III to Value -Added Tax; Part IV to Stamp Duties. Part V contains miscellaneous provisions.

Broadcasting and Wireless Telegraphy Bill entitled an Act to prohibit broadcasting in the State save under and in accordance with a licence issued by the Minister for Posts and Telegraphs and to amend and extend the Wireless Telegraphy Acts, 1926 to 1972.

The main purpose of the Bill is to prevent the making of broadcasts from anywhere in the State, unless in accordance with a licence issued by the Minister for Posts and Telegraphs. It makes it an offence for anyone to provide accommodation, equipment or programme material for unlicenced broadcasts or to advertise by means of, or take part in, such broadcasts. (Initiated 6/4/79 – **No. 12 of 1979).**

Housing (Miscellaneous Provisions) Bill, 1979 entitled an Act to amend and extend the Housing Acts, 1966 to 1970, and to provide for certain other matters in relation to housing. (Initiated 27/4/79 – **No. 13 of 79).**

Makes provision subject to Regulations to be made by the Minister for the Environment for the making of grants, or loans or subsidies by the Minister (to persons, approved bodies or housing authorities) for the provision of new houses, house improvements, sites for private housing, houses provided by the housing authorities for letting, purchase or construction of houses and for the payment by the Minister of subsidies for certain loans guaranteed by housing authorities. Requires housing authorities making a vesting order under S. 17 of the Labourers Act, 1936 or S. 90 of the Housing Act, 1966, to put houses into good structural condition. Provides for the granting of Certificate of Reasonable Value by the Minister.

Amends Sections 5, 33, 60, 90 of the 1966 Act and Sections 30, 77 of the Building Societies Act, 1976.

Repeals Sections 13-32, 35(2), 40, 44, 90(6) (a), 98(5) and 106 of the Housing Act, 1966 and S. 2, 3, 4, and 5 of the Local Government (Sanitary Services) Act) Act, 1962.

Bovine Diseases (Levies) Bill, 1979 entitled an Act to provide for the purpose of facilitating the eradication, or the prevention of the spread, of bovine disease, for the charging, levying and payment of certain levies and the operation of certain price differentials, to provide for other matters connected with the foregoing and to amend Sections 48 and 49 of the Disease of Animals Act, 1966. (Initiated 27/4/79 – **No. 14 of 1979).**

Provides for the payment of levies on milk and slaughtered or exported animals, the duty of an accountable person to keep records of all transactions which effect his liability to levy and the right of inspection of those records by an inspector or an authorised officer. Also provides for the making and cancellation of notices of infection and the giving of information to the Minister when required as regards land used for or in connection with grazing or retention of animals.

Penalties provided for in Sections 48 and 49 of the Diseases of Animals Act, 1966, are increased.

Seventh Amendment of the Constitution (Election of Members of Seanad Eireann by Institutions of Higher Education) Bill, 1979 (Initiated 1/5/79 – **No. 15 of 1979).**

Amends Article 18 4° by the addition of 18 4 2° and 18 4 3°. 18 4 2° states that provision may be made for the election of members to the Senate by the institutions of higher education in the State. 18 4 3° states that nothing in Article 18 shall be invoked to prohibit the dissolution of the National University of Ireland or the University of Dublin.

The following is a List of 1978 Bills which have been passed by both Houses in 1979 and is up to date as of 2 May, 1979

Defence (Amendment) Bill, 1978 entitled An Act to amend the Defence Act, 1954. (Initiated 22/11/78 – passed by both Houses of the Oireachtas 14/2/79).

Amends the 1954 Act to make provision for the Army rank of Brigadier-General and the Naval rank of Rear-Admiral. Provides consequently for revised definitions and amendments of the existing rank structure.

Udaras na Gaeltachta Bill, 1978 entitled An Act to establish a body to be known as Udaras na Gaeltachta, for that purpose to dissolve Gaeltarra Eireann and to transfer to Udaras na Gaeltachta the functions and liabilities of Gaeltarra Eireann, to confer certain other powers on Udaras na Gaeltachta and to provide for other connected matters. (Initiated 6/10/78; passed by Dail Eireann 14/2/79; passed by both Houses of the Oireachtas 8/3/79).

Health Contributions Bill, 1978 entitled An Act to provide for the payment of contributions towards the cost of the provision of services under the Health Acts 1947 to 1977 and to provide for other connected matters. (Initiated 30/11/78 – passed by Dail Eireann, 21/2/79; passed by both Houses of the Oireachtas 8/3/79).

Extends the existing scheme to provide for the payment of health contributions by all persons, with certain exceptions, over 16 years of age who have an income. Contributions will be income-related and will be payable on a fixed percentage basis subject to a ceiling.

Sixth Amendment of the Constitution (Adoption) Bill, 1978 entitled an Act to amend the Constitution. (Initiated 13/12/78; passed by both Houses of the Oireachtas 5/4/79).

Provides for the Amendment of Article 37 of the Constitution by the addition to Article 37 of a second Section stating that no lawful adoption taking effect pursuant to an order of authorisation given by a person or body of persons lawfully designated to exercise such functions was or shall be invalid by reason only of the fact that such person or body of persons was not a judge or a court appointed or established as such under the Constitution.

Ensures that adoption orders made by the Adoption Board will not be in danger of being declared invalid.

THE INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

JUNE 1979 VOL. 73 NO. 5

The President, Mr. Gerald Hickey, welcoming new members of the profession at the **Presentation of Parchments** on July 5, 1979. With him from the left are Miss Carmel Killeen, Mr. Maurice R. Curran, Mr. John F. Buckley, Mr. Walter Beatty, Senior Vice-President, the Hon. Mr. Justice T. A. Finlay, President of the High Court, Professor Richard Woulfe and Mrs. Moya Quinlan.

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General Meeting of the Society held in the Great Southern Hotel, Galway, on Friday, 3rd May, 1979

The meeting was called to order by the President, Mr. Gerald Hickey, at 9.45 a.m. The list of members present is recorded in the Attendance Book. The Director General, Mr. James J. Ivers, was also in attendance.

Welcome

The President then introduced Mr. B. Claffey, President, Galway Bar Association to the Meeting. Mr. Claffey said it was an honour for him to be able to welcome the members of the Society to Galway and expressed the hope that the Conference would be successful, especially as the programme seemed most interesting. Also, he was very pleased to have the opportunity of welcoming the representatives of the Law Society, the Law Society of Scotland and the Incorporated Law Society of Northern Ireland.

Notice of the Meeting

The Director General pointed out that due to the postal strike it was not possible to publish the customary Notice. Advertisements had been placed in the public press specifying the date, venue and time of the meeting. This was accepted as adequate notice.

Minutes

As the Minutes of the Annual General Meeting held on 24th November, 1978, were published in the *Gazette*, they were taken as read, adopted and signed by the President.

Appointment of Scrutineers

The following were unanimously appointed scrutineers for the elections to the Council on 15th November, 1979: Laurence Branigan, Eunan McCarron, Alexander McDonald, Brendan McCormack, Roderick Tierney.

President's address

The President of the Society, Mr. Gerald Hickey, then delivered his Presidential Address as follows:-

Firstly, I would like to express my warm appreciation to Mr. Brian Claffey for his very kind welcome to us all in the West of Ireland on the occasion of the Society's Annual Conference.

I hope that the Conference will contain something of interest to you all in professional terms, and that in addition, the social events will provide suitable pleasure for all.

I wish to refer to a number of matters of current interest, and concern to the Profession.

Legal education

The past year has probably witnessed some of the most important changes which the Society has seen since its foundation. In addition to our major move to our new premises in Blackhall Place, this year has witnessed the introduction, last February, of the Society's new Education Programme, and the reception of the first batch of students who will receive the benefit of education under the new system.

Before leaving the subject of education, I should like to point out that the Society has now introduced a series of Seminars for Solicitors on various aspects of law, including Labour Law, Consumer Law and Conveyancing. A Training Officer is now being recruited to develop fully the area of continuing legal education for the Profession, and in particular to organise appropriate Seminars in provincial centres as well as in the Dublin area.

A further matter which may arise in relation to the question of continuing legal education is the provision of a set of courses dealing with the financial management of practices. I propose suggesting to the Education and Public Relations Committee that they consider the organisation of appropriate Seminars dealing with this area, which is becoming of increasingly great importance to the Profession in view of the staggering increase in overheads of all kinds.

Solicitors' costs

With regard to the vexed question of costs awarded in respect of ligitation in the High Court, Circuit Court and District Court, the Council of the Profession has been very concerned at the failure of various Government Agencies to approve appropriate increases in the level of this remuneration since 1975.

It is becoming increasingly clear that unless substantial increases are approved immediately, the Profession is going to have to point out to all litigants, or potential litigants, that even if they are successful, they cannot hope to be fully indemnified on taxation in respect of their costs.

It is particularly unfortunate that the appropriate increases have not yet been approved, while at the same time, the Profession has had to accept very substantial increases in remuneration for Law Clerks, through the Law Clerks Joint Labour Committee.

Contributors to this issue

Mary P. McAleese, Reid Professor of Criminal Law, T.C.D.

Liam T. Cosgrave, Auditor, Solicitors' Apprentices' Debating Society of Ireland, 94th session.

E. Rory O'Connor, Law Agent, Allied Irish Banks.

Harry Sexton, Solicitor, former Education Officer with the Law Society, now practising in Co. Mayo.

If proper and reasonable levels for taxed costs are not approved very quickly, it is the successful litigant who will suffer, finding that his damages are reduced by having to bear a substantial proportion of his own costs. It is quite impossible for Solicitors to bear the vastly increased expenses that have occurred since 1975, without any increase in the level of costs which a successful litigant can tax.

Legal aid

With regard to the question of Legal Aid, I do not wish at present to enter into any detailed discussion, since the introduction of a scheme has only just been announced and the detailed arrangements must yet be considered by the Council of the Society. However in a press interview, giving my personal reactions, I have said that I welcomed the scheme generally, especially if it was as comprehensive as it proposed and not merely limited to Family Law, Landlord & Tenant etc. I said I hoped it might be extended to representation before the tribunals in due course. I also hoped that in future when the scheme was fully established, it would be possible to widen it to allow persons aided under the scheme their own choice of Solicitor in certain cases. I welcomed the compulsory charges as it would be some deterrent to people with grievances and to cranks who might otherwise take up too much of the law centres time. Finally I said I believed the scheme would of necessity lead to a greatly increased level of appearances by Solicitors without Counsel in the High Court and Circuit Court etc., and expressed the hope that the present less than friendly attitude of some judges to the solicitors appearing before them would undergo a change for the better.

I do feel however, that the Society might well consider recommending to the Profession that it should provide an Advice Service to all persons requiring same, whether new clients or existing clients of any office, on the basis of a maximum charge for a half hour's interview and advice.

Such a scheme at present operates in England with the backing of the Law Society, at a charge of £7.50 per half hour. I feel that this might prove acceptable to the Irish public, and be widely availed of, particularly with the vastly increased numbers of Solicitors now practising in the Dublin area.

Discipline

With regard to the Society's Regularity functions – I would like to emphasize strongly that the Society proposes to take a tough line with regard to failure to produce Accounting Certificates. The excuse that a particular Solicitor's Accountant is under pressure, and in arrears, can no longer be accepted. The vastly increased property values of to-day, and the immensely increased awards of compensation in Court, made the impact of any default on the Society's Compensation Fund very much greater.

I would like to emphasize that the Registrar's Committee, and the Interview Board and Disciplinary Committee are continuing to work very hard, despite the postal strike, and there is a determination in the Society to see that the small number, I would say, the very small number, of persistent offenders are properly dealt with for the protection both of the public, the Society and the remaining members of the Profession.

Headquarters in Blackhall Place

With regard to the question of funding Blackhall Place, I would like to pay a tribute to the Profession for its generosity in committing to the project a total, so far, of approximately £450,000 of which approximately £250,000 has already been paid.

I should, of course, sound a note of warning that we need another £250,000, at least, to pay off our present term loan in respect of the property, and I would appeal to the members of the Profession who have not yet subscribed, to do so as soon as possible.

With regard to Blackhall Place itself, I would like to say that it is proving very successful indeed in attracting functions, and its bedroom accommodation is very well utilized. We shortly hope to provide complete lunch facilities for members, and I hope that you will bear in mind the continuing level of first class facilities in Blackhall Place, and make the fullest use of them.

The future of the Profession in Ireland

Lastly, I would like to express some views with regard to the future of the Profession.

A very interesing forecast with regard to Ireland was referred to at the Irish Management Institute Meeting at Killarney last week-end.

This forecast, which I understand is based on E.E.C. projections, says that it is highly probable that within ten years time, Ireland will be wealthier in terms of per capita income than the United Kingdom.

It is evident to us all that there has been a vast increase in the last ten years in the prosperity and industrialization of the country, and it seems highly likely that this progress will be maintained on an overall basis, even if some setbacks occur from time to time, such as the present serious wave of industrial disturbances.

With the greatly increasing prosperity of the country, I think that increasing demands will be made on the legal Profession, and this, in turn, will give the Profession the opportunity of greater prosperity than it has ever enjoyed before.

I think however, the Profession has got to be very careful that it takes appropriate measures to cope with increased demands. A most important measure, in my view, must be the achievement of considerably increased productivity.

If a particular Solicitor today able to deal with two matters in one day, whether they be Company Law matters, Conveyancing matters or Litigation matters, (and when I say, deal with, I mean carry out the main operation in relation to such matters, such as drafting a Deed and Requisitions in relation to Conveyancing, or drafting the main Agreements in relation to a Company Law matter), – if a Solicitor is able to carry out two such matters in one day at present, in a few years time he will have to be able to carry out three, or, possibly, even four such matters, in one day, if he is to take advantage of the greatly increased level of work, which I believe will be available.

Such an increase in productivity can obviously not be made without further streamlining of our present procedures, without greatly increased usage of forms, precedent banks and general mechanization of legal work, and without better organisation of work between Solicitors and their assistants.

I feel that the Law Society could play a part in supplying the Profession with a very wide range of

precedents, and there is no reason why, assuming that we have a proper postal service in the future, such precedents could not be with the Solicitor requiring same, the day after he telephones the Law Society with his requirements.

I am convinced that a precedent bank service could be of great benefit to the Profession, particularly to those practicing alone or in remoter parts of the country, who might not come across certain requirements as frequently as those in the bigger centres of population.

I would like to emphasize my belief that the Profession has a very prosperous future, even apart from the provision of a full scheme of Civil Legal Aid, provided that it increases its productivity to meet increasing demands. I have no doubt that the Profession can do this, and that the Law Society can help in organising it.

Finally, I feel that Solicitors are going to be asked more and more to give advice which has, at least, some relationship to business, and that some involvement in, or knowledge of business is highly desirable for all members of the Profession in the future. Ideally, such a knowledge should be obtained by some personal business involvement, presumably in a non-executive capacity, but as this will not be possible for all, it may be worth the Society's while to consider, in addition to the other Continuing Education Programmes which it provides, the provision of some programmes especially designed for Solicitors in relation to financial and business affairs.

I feel that there is a great future for our Profession, and I sincerely hope that the Profession and the Society will take appropriate measures to capitalize fully on the opportunities which will be available.

The President's address was received with applause.

Retirement Annuity Fund

Mr. Walter Beatty, Senior Vice-President, reported on the growth of the Fund since its establishment four years ago. The value of the Fund was now about £1 million and the initial investment of £100 was now worth £206.85. The Fund was invested in both gilts and equities in the Irish and U.K. markets and it was now proposed to invest in property. Mr. Beatty asked those present to encourage their colleagues, especially the younger members, to participate in the Scheme. He also drew attention to the Income Continuance Plan aspect of the Scheme, which in the future would enjoy tax concessions. He emphasised that the time to join was when one was in good health. Concluding, Mr. Beatty paid tribute to his colleague on the Fund's Steering Committee.

Matters arising out of the Annual General Meeting

The Director General referred to the resolution proposed by Mr. James Heney directing that the Council appoint a professional member of the staff to deal with Government Departments, Local Authorities and other agencies. The Council had referred the resolution to a sub-Committee for action and that Committee had decided to advertise a solicitor vacancy on the staff of the Society. Unfortunately due to the postal strike it had been necessary to extend the closing date to 21st May, 1979.

Other Business

Law Clerks Remuneration: Mr. Gerald Doyle warned of the possibility of further increases in the remuneration already proposed arising out of the suggested "National Understanding". As he saw it such increases would make it necessary to an increasing extent for solicitors to agree costs with clients.

Costs

Mr. W. A. Osborne furnished the meeting with a progress report on developments since the Annual General Meeting. He anticipated that revised regulations would be made in the near future.

Legal Aid

Mr. G. J. Moloney proposed that the Society should not accept the Civil Legal Aid Scheme as announced, due to the limitation of the scheme to Law Centres. The President gave the background to this proposal and emphasised that the heavy cost of the Criminal Legal Aid scheme was a factor in Government thinking in relation to the proposed Civil Legal Aid Scheme. Mr. Michael O'Mahony said it would be difficult to oppose the proposal without seeing the small print. In his view, employing solicitors in centres was the logical extension to the FLAC Centres. He felt the Society should reserve its position until the small print of the scheme was available.

Gazette

Mr. Peter Finlay, Executive Editor, was introduced to the meeting. Mr. Finlay invited members, especially those present from outside Dublin to meet with him to discuss the *Gazette's* programme.

Postal Strike

Mr. W. A. Osborne said that the strike was having an increasing effect in country areas with the result that it was becoming impossible to complete work. The public did not appreciate the position and were blaming solicitors for the delay. He wondered if the Society could do anything to make the public more aware of the position. The President said that as a result of a resolution adopted at the last Council meeting, he had issued a statement to the press which had received some publicity. Mr. Patrick Glynn and Mr. W. B. Allen favoured an advertisment in the papers. Mr. Dominick Kearns said that in Limerick the Inspector of Taxes was declining to hand out letters to personal callers. It was agreed to refer the suggestions made to the Public Relations Committee.

Building Societies

Mr. Michael O'Connell asked if the Society could make representations to the Building Societies regarding the delay in sanctioning loans. The period had extended from 6-8 weeks to 12 weeks. It was agreed that representations be made to the Building Societies.

Vote of Thanks

Mr. Jermyn proposed a vote of thanks to the President for his conduct of the meeting which was carried with acclamation. The President having thanked the members for their participation declared the meeting closed.

Visit of the Deputy Chairman of the U.S.S.R. Supreme Court

The Director General of the Society, Mr. J. Ivers, welcomed the Deputy Chairman of the U.S.S.R. Supreme Court, Mr. E. M. Smolentsey who paid a visit to the Society's premises at Blackhall Palce, during a recent visit to this country. He was accompanied by Mr. G. M. Zeborov, Editor of *International Life*. The Deputy Chairman addressed public meetings in Dublin and Cork on "Soviet Foreign Policy" and "The System of Soviet Law".

Local Authorities Solicitors' Association

The 7th Seminar of the Local Authorities Solicitors' Association was held at the Society's premises at Blackhall Place on the 24th May last. The Seminar was opened by the President of the Society, Mr. Gerard Hickey. Mr. Michael Murphy B.L., Legal Adviser to the Minister for the Environment and Mr. Daniel Brilley, Assistant Law Agent, Dublin Corporation delivered papers at the Seminar.

Association Internationale Des Jeunes Avocats

The Annual Conference of the Association Internationale des jeunes Avocats will take place in Alicante, Spain on the 17th to 21st September, 1979. obtain further details should contact:

The themes for the Conference are:-

1. Latent defects in international Contracts for Sale.
2. The illegitimate child – its future legal status.
3. Entry, training and working conditions of the young lawyer.
4. Environmental pollution.

Anybody wishing to attend the Congress or to obtain further details sould contact:-

Michael W. Carrigan,
Solicitor,
61, Fitzwilliam Square,
Dublin 2.
Telephone 785766.

Dublin Solicitors' Bar Association

DISCHARGE OF MORTGAGES OUT OF PROCEEDS OF SALE

The Conveyancing Committee of the Bar Association has for some time been considering the problems arising from the increasingly common insertion into Contracts for the sale of properties of a clause to the effect that "on closing the Purchaser will accept the vendor's Solicitor's undertaking to discharge out of the proceeds of the sale the mortgage in favour of the Building Society".

While appreciating the practical reasons which give rise to such a clause, the Committee feel that the practice of inserting such clauses in Contracts is not desirable.

The Committee recommends instead, that a clause to the following effect would deal with the difficulties which arise in paying off mortgages where sales are being closed and would avoid the undesirable consequences of the clause above mentioned: "When furnishing the Apportionment Account for the closing of the sale, the vendor's Solicitors will furnish to the purchaser's Solicitors a statement from the vendor's Mortgagees setting out the amount required to redeem the mortgage as at the closing date together with the accruing daily rate of interest thereafter and, on closing, the purchaser will furnish to the vendor separate Bank Drafts for the amount required to redeem the mortgage and for the balance of the purchase monies respectively and the vendor will forthwith discharge the mortgage debt to the vendor's Mortgagees and will furnish to the purchaser proper evidence of such discharge and will furnish to the purchaser such release of the mortgage as may be appropriate."

Motion for Debate: That Civil Divorce should be available in Ireland

Text of a paper read by **Professor Mary McAleese** at the Society's Annual Conference in Galway, 3/6 May, 1979

Any apologist for Civil Divorce in the Republic of Ireland immediately finds himself or herself stuck in the middle of a huge obstacle course littered with insurmountable myths and intractable misconceptions. For while the rest of our European colleagues busy themselves developing sophisticated divorce systems designed to regulate at least some of the problems caused by dysfunctional marriages, we in the Republic have yet to divest ourselves of the deep-rooted belief that far from being a logical and desirable answer to a social problem, divorce is in itself a social evil.

In common with the rest of the Western world we hold the belief that society's best interests are served by the creation and maintenance of stable family units, set in the context of monogamous and lifelong marriage; hence our law perceives marriage as the voluntary union of one man and one woman for life, to the exclusion of all others. However while our neighbours make concessions to the inevitability that the ideal will not always be possible, we steadfastly adhere to the Golden Dream of lifelong conjugal bliss, ignoring the casualties of the married state and making no substantial contribution towards the alleviation of the misery of those who find it less than harmonious.

Divorce and marriage breakdown

De Valera's naive but invincible belief that the remedy of divorce was worse than the problem of unhappy marriages finds expression in Article 41 of the Constitution where immediately after pledging itself to guard the institution of marriage, the State places a total prohibition on the enactment of divorce legalisation. No real evidence was offered then, nor has it appeared since which substantiates the claim that divorce legislation threatens the stability of marriage by diluting the seriousness with which partners view the sanctity of their mutual vows and commitments. Yet it is an argument trotted out with monotonous regularity and unswaying conviction by opponents of divorce. The dangerous simplicity of the argument could perhaps have been forgiven in De Valera talking in 1937 when all he had to operate on was a conglomeration of hunches and educated guesses, but in 1979 with the benefit of probing and comprehensive academic research which discounts divorce legislation as a significant factor in marriage breakdown, it is unforgiveable to continue to assert it as if it were still an incontrovertible fact.

Let us look at some of the real facts. Even in a jurisdiction so idealogically committed to the ideal of lifelong marriage that it forbids divorce, marriages do breakdown. It is hardly an exaggeration to say that in the past decade Family Law in the Republic of Ireland has undergone something of a minor revolution. In that time legislative provision has been made to pay an allowance to deserted wives, spouses can be forced to provide proper maintenance for their families, a deserted spouse has his or her right to remain in the matrimonial home protected, and a battered wife or the less likely phenomenon, the battered husband; can obtain a court order prohibiting the offending spouse from entering or residing in the 'victim's' home. In each of these instances we see an increasing involvement of the State in 'casualty marriages', the intervention being designed to provide a limited form of redress and support. None of these pieces of legislation created deserted wives or deserting husbands or caused husband-battering wives or wife-battering husbands – none of them created the phenomenon they were designed to help – rather each was a response to an extant need. In other words the deserted wife, the battered wife, the spouse threatened with eviction from the matrimonial home, these people and their dilemmas all existed before there was legislation to regulate their problems. And the story is true when we come to divorce legislation. No matter how many times we repeat the assertion that divorce wrecks homes or damages lives we cannot make it valid or true. In the words of Rheinstein in his treatise on American divorce:[1] "The breakdown of marriage is an event in the realm of fact which is different from and regularly precedes that event in the realm of law which is called divorce and which does no more than ascertain the fact that a marriage has broken down and restores freedom to the parties."

Influence of social change on divorce

Perhaps a critical look at the experience of our neighbours in England will clarify the point finally. Between 1901 and 1905 the annual average of divorce decrees made absolute was 546; in 1976 the figure was a startling 125,910. Admittedly there had been significant changes in divorce legislation in the interim, for whereas at the turn of the century, adultery was the sole ground for divorce, by 1976 it was the much wider notion of irretreivable breakdown which concerned the courts. But it would be facile to suggest that the liberalisation of the law was itself the causal factor or even a significant causal factor in marriage breakdown, for those same years there were two major world wars and profound social changes which affected and continue to affect the entire fabric of our society. To ignore the significance of these changes on the institution of marriage is to ignore the very heart and core of why marriage appears to be less stable than before.

If we look at the pattern of divorce petitions in England during that seventy year period some interesting observations emerge which stress and underline the importance and impact of social factors on marriage breakdown. In both 1937 and 1969 the existing divorce law was liberalised. As soon as the new law became operative the number of petitions soared dramatically but within a couple of years had dropped equally drama-

tically and levelled off. The clear implication is not that the new laws caused marriages to break up with remarkable speed, but that there existed a huge backlog of already broken marriages which were simply waiting for a way of obtaining legal recognition of that fact. The new law simply permitted regularisation of an extant situation. Plainly, however, since the new laws broadened the threshold for the bringing of petitions, the overall annual level of petitions was raised.

Precisely the same situation arose with the introduction and extension of Legal Aid for divorce petitioners in 1949 and 1960 respectively. Once again there was an immediate rush to the courts immediately the new rules came into force and once again the swollen statistics were purely a temporary phenomenon. The new regulations were simply creating a situation in which the divorce figures were beginning to approximate more closely to the actual incidence of marriage breakdown. But in the context of the argument that divorce laws precipitate marital instability, the period of the 50s and 60s is perhaps of most interest for while precisely the same legislation operated in both decades, in the first period the divorce statistics fell markedly while in the second period they escalated. Apart from the wider availability of legal aid which obviously explains part of the discrepancy, the only other major differences between these periods were extraneous social factors and it is these which research increasingly show to be influential in affecting attitudes to marriage, expectations of marriage and continuing viability of marriage. Probably the clearest indicator of the immense role of social factors in marital instability is the booming divorce rate in the wake of the second World War. The why and wherefore lay not in the existence of divorce laws for the same law had been operative for almost a decade, but rather in the existence of unusual social circumstances which greatly exacerbated the stresses under which marriages laboured. Many marriages contracted during the war years were rushed and illconsidered. Newly weds were often separated for long periods, wives left to cope alone, there was the nagging uncertainty as to whether absent spouses would survive the war after all. There was too the severe economic hardship of the war and post war years, lack of housing, lack of employment prospects and the more subtle problems caused by having to learn to live with someone who may have become a stranger during those years. Clearly it was a time when, for many, interpersonal relationships were under stress and not unnaturally some went to the wall. Only a fool would suggest that if there had been no divorce laws such marriages would have survived, for from the outset may of these relationships were dangerously vulnerable and at risk. Perhaps the miracle is that so many survived for all that.

Reasons for marriage breakdown

But if then divorce legislation is not a cause of marital breakdown but instead an expression of already changed and changing attitudes to marriage what then are the effective causes of marital disharmony and eventual breakdown. The answer to this operates at two levels. One identifies general factors which have had the effect of subtly changing our traditional concept of marriage, of relationships inside and outside marriage, of male female roles in life and marriage etc. At this level our changing views and expectations are themselves the dynamic force in the changing nature of the institution of marriage. Marriage is perceived not as a set of given and immutable constants but as a growing and developing ideation exposed to and vulnerable to change. The second level identifies individualised factors which if present in a particular marriage may mitigate its viability.

At the general level the greatest contribution is made by the increasingly complex nature of modern life itself. Our sophisticated, consumerised world creates its own tensions and pressures and all too often the home is used as a forum in which such tensions are relieved in an inarticulate and violent way. Simultaneously our expectations of life and marriage are changing radically in step with the social and economic emancipation of women, which while far from complete as yet, is nonetheless real in its consequences. There is a growing realisation among women that there exist alternatives to the traditional subservient door-mat style existence of former days and just as our prospects from life and marriage have widened and been enhanced, so too our tolerance and unacceptable behaviour inside marriage has dropped as a consequence. There have too been real changes in attitudes to contraception, to family planning, to working wives, to sex inside and outside marriage and each of these factors along with many others have almost imperceptibly affected and moulded the overweening attitude to marriage. Incidental to that there is the reality that for many of our young people the sole source of information about sex, love or marriage is gleaned from cheap magazines who traffic in the belief that sexual licence is the hallmark of freedom and that romance is a synonym for love. But where are the official attempts to controvert these fallacies which are more insidious to marriage than any amount of divorce laws. Where are the educational programmes designed to direct the young to mature and unselfish sexual responses, to an intellectual realisation of the need for loving, caring, forgiving and communicating as fundamentals in marriage. Our response instead of being open, confident and positive has on the whole been unerringly negative and our failure is highlighted in the illegitimacies, abortions and marital breakdowns which increasingly form a normal part of everyday life. It may very well be true that there is nowadays a growing tendency to take lightly the marriage vows and a reluctance to overcome problems in marriage but if it is then it is a fact of life which has to be tackled in a radical and realistic way just as it is a fact that marriages break up with or without a legal way out and that this too is a problem which needs an answer or better still a series of answers.

At the level of individualised factors which put marriages at risk research[2] shows a number of recurring factors; e.g. Marriages between young partners or where the bride was pregnant at the time of marriage are over-represented in the statistics. Divorces occur twice as often in the age group who married between 20 and 24 and three times as often as those who married between 25 and 29. Hence factors which intuitive commonsense would tell us to beware of are highlighted by empirical evidence, immaturity, lack of preparation for the responsibility of marriage or parenthood, youthfulness, ignorance of family planning etc. There are two incidental factors which are no less important than immaturity. The young newly-weds also tend to be the most economically and financially vulnerable. Furthermore they also tend to

come from the working classes and again research shows this class to be more at risk in terms of marriage failure than any other social class. Why this should be so is impossible to answer with any certainty for no single cause emerges, but rather one perceives a complex and intricate social process of action and interaction between education, conditioning, economic, social and individual factors in which the vast majority of marriages work well but some adapt badly. To a large degree this notion is substantiated by research in both America and Australia where financial insecurity and economic hardship are identified with marriage breakdown to a high degree.[3]

Ineffective responses to marital breakdown

So we are left with a picture of marriage as a vocation requiring great input from the partners and which adapts as an institution to prevailing social and environmental factors some of which may and do affect it adversely. So how do we cope? To a large extent we have been content to smugly congratulate ourselves on the fact that unlike our English neighbours we have no divorce problem and to the extent that we have no civil divorce at all, this is true; but on the other hand we do have the prelude to divorce, namely unhappy and broken marriages and it is these which are the real problem, not the rise and fall of divorce statistics on a graph. It must now be time for us to ask whether our response to marital breakdown has been a meaningful and helpful one. Our antidotes include a prohibition on divorce and a few pieces of legislation offering limited financial and personal protection to spouses of broken marriages – nothing more, even though the problem is growing. Where are the special support services for families in difficulty, the special courts with expertise in the sensitive area of intimate personal relationships. Where is the sex education which prevents unwanted pregnancies and rushed marriages and which attempts to rationalise sex as part of a loving long term relationship? Where are the attempts to alleviate financial hardship and housing problems, to distribute more equitably the nation's wealth? Is it not something of an indictment of our system that we can on the one hand claim to protect marriage from the many attacks made on it, by nothing more than the bald assertion that we will not permit divorce – and by the cushioning in a very restricted way, of families already on the casualty list?

The traditional concentration of attention upon divorce and the rights and wrongs of allowing it, has done nothing more than to obscure the problems caused by marital failure and has impeded the search for constructive and effective remedies particularly in terms of presentation. If our neighbours have spiralling divorce rates it is because they too have neglected to tackle the problem at source, by developing new ways of dealing with difficult marriages, by insisting on proper preparation for marriage, by ensuring that the first person turned to when a crisis occurs is not a lawyer, trained in advocacy and pitched battle techniques which so often militate against reconciliation. These are some of the things we ought to be doing if we are really concerned to stop the rot setting into the entire institution of marriage, that plus a facility for severing the bonds where there is no hope of the parties ever making a success of their marriage – a facility which is a last rather than a first resort.

We have so little to fear from permitting divorce and so much to be concerned about in continuing to forbid it. Anti-divorce lobbyists often argue that divorce damages children, yet the truth is that what damages children is not the de iure dissolution of the marriage but the process of rows scenes, violence, bitterness, recrimination and upheaval which de facto broke it up. Research shows that children of violent and broken homes suffer from mental problems in greater numbers than those from stable homes, but even without that knowledge it does not require a Ph.D. in psychology to work out that an unhappy home is not the best environment for a child nor the best education for a future spouse and parent. If we add to this the fact that research also shows that violent husbands are often themselves the victims of a violence syndrome learnt from their parents it becomes clear that by officially encouraging people to stay in unhappy relationships we are actually putting children at risk and are helping to perpetuate the syndrome of failed marriages rather than prevent it.[4]

Lack of civil remedy

The counterproductive effects are seen when we contrast the civil law on annulment and divorce with contemporary canon law of the Roman Catholic Church whose traditional antipathy to divorce our constitution mimmicks. The Church has itself undergone radical change in the past number of years and has had to respond to our changing world. It has, laudably, yielded to the demands of those trapped in marriages which have foundered for behavioural reasons; – reasons, traditionally ignored by both Church and State in granting annulments. Nowadays canonical courts regularly decide that a violent and abusive husband has been too immature at the time of the marriage to appreciate the nature of the contract, therefore no real contract could be said to have been made hence the marriage is void; it never existed. So despite the home, the children, the shared years there never was a marriage. In other jurisdictions these same reasons more logically and honestly found petitions for divorce rather than annulment, but the canon law courts in the best legal tradition, resort to semantic fiction to achieve a desired objective without diminishing a stated principle. The moral myopia, not to mention hypocrisy of this stance which denies divorce on the one hand yet provides it under a different label on the other, is matched only by the State's blind indifference to the now numerous people who fall into the limbo of being free to remarry in the eyes of the Church but who at civil law are bound by the legal bonds of a marriage the Canon Law says never existed. It is ironic that the same Church which so greatly influenced the decision to prohibit constitutionally divorce legislation, should now be itself creating a situation in which the argument of divorce becomes compelling.

This lack of civil remedy is further complicated by the fact that many people in this no-man's land, do enter new relationships some of them bigamous, in which new family units are created and illegitimate children born. Hence the absence of divorce legislation is itself a causal factor in the creation of 'illicit' relationships and illegitimacies. For those who sanctimoniously preach that divorce laws weaken the attitude adopted to marriage vows it is quite a comeuppance to realise how many of our illegitimate children are fathered by married men. Is our ban on divorce, far from strengthening the marriage bond, perhaps helping to create a situation in which a

fickle spouse can afford to take less than seriously his obligation to marital fidelity because there is no fear of official censure. Do we encourage him to take the best of both worlds?

No-one suggests that divorce solves the problem of unstable marriages – the only real answer to that lies in prevention through education and support. Nor can it heal the wounds caused by two warring spouses. It cannot replenish the wasted years or excise the damage but it does permit a clean finish and a fresh start, with, hopefully, lessons learnt and experience gained. There is no guarantee of a happy ending but divorce does at least hold out the possibility. Without it there remains the syndrome of break-down, of frustrated people trapped in unsatisfactory relationships, of children soured by their experience at the hands of incompatible parents, of illegitimate children and illicit relationships which have their own form of inherent misery precisely because they cannot be legitimised.

We need to stop thinking of marriage as a rigid structure alien to and isolated from the couple who make it function. We must stop thinking of divorce as an inhuman monster who creeps in through open bedroom windows disseminating huge dollops of marital dis-harmony. It is to cherish the nation's children less than equally to expect and to coerce any one of them to live out his or her life in a loveless and embittering union. "Nothing less than love should hold us in the bonds of marriage." I have never been a believer in the philosophy that once you have made your bed you must lie on it – many is the time I have to get out and remake it. In the words of George Bernard Shaw – "Indissoluble marriage is an academic figment advocated only by celibates and by comfortably married people who imagine that if other couples are unfortunate it must be their own fault just as rich people are apt to imagine that if other people are poor it serves them right – Divorce only reassorts the couples, a very desirable thing when they are ill-assorted." *(Sub-headings did not form part of the address).*

REFERENCES
1. Rheinstein: Marriage, Stability, Divorce and the Law.
2. Eekelaar: Family Law and Social Policy.
3. Ibid.
4. Gayford: "Wife-battering - A survey of 100 cases" *British Medical Journal*, 1975 Vol. 1. Borland: Violence in the Family (M.U.P. 1976).

(The paper read to the Conference by Sean P. Bedford, K.S.G. opposing the motion will be published in the next issue).

Solicitors' Apprentices Debating Society of Ireland

Committee for the 96th Session

Auditor: John J. Reid
Treasurer: Joseph M. Gavin
Records Secretary: James O'Mahony
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Public Relations Officer: Laurence Ennis
Social Secretaries: Maria T. Gillis, Anne O'Neill
Ordinary Committee Member: Murrough O'Rourke
ex-Officio Committee Member: Liam T. Cosgrave, ex Auditor.

RETIREMENT PRESENTATION TO WILLIE O'REILLY
4 APRIL, 1979

Members of the profession from all parts of the country attended the presentation ceremony in the Society's premises, Blackhall Place, to wish Willie O'Reilly well on his retirement from the society after 33 years. The President, Mr. Gerald Hickey, presented Mr. O'Reilly with a suite of Waterford Crystal and the proceeds of a testimonial fund from the members of the Society.

Solicitors' Apprentices' Debating Society of Ireland

Address by The Auditor, Liam T. Cosgrave, on "Political and Economic Unity for Europe - Myth or Reality" at the Inaugural Meeting of the Society on Friday, 26th January, 1979, in Solicitors' Buildings, Blackhall Place, Dublin.

The 95th Inaugural Meeting of the Society was held in Blackhall Place on Friday, 26th January, 1979 at 8.00 p.m. In the absence of the President abroad, Mr. P. C. Moore, past-president, presided. The minutes of the previous meeting were read with the customary humour.

Mr. Moore then presented the following awards for the 94th session:-

Oratory – Incorporated Law Society's Gold Medal: David Leon; Society's Silver Medal: Adrienne Grant.

Legal Debate – President's Gold Medal: Maria Durand; Society's Silver Medal: Liam T. Cosgrave.

Impromptu Speeches – Vice-President's Gold Medal: Eugene Tormey; Society's Silver Medal: Finian Branigan.

Irish Debate – Society's Parchment: Frank G. Nyhan.

Replica of Auditorial Insignia – Michael D. Murphy, B.C.L.

Mr. Moore then called on the Auditor, Mr. Liam T. Cosgrave, to deliver his Inaugural Address.

POLITICAL AND ECONOMIC UNITY FOR EUROPE – MYTH OR REALITY

I have chosen as the topic for my Paper "Political and Economic Unity for Europe" because I believe that the European Economic Community has reached a stage in its development when either its future could more than fulfil the aspirations of its founders or and it is a real danger it could go seriously wrong. Also since decisions from Brussels are affecting each and everyone to a greater extent than ever before the question can be asked whether the Community has taken on a role of even greater significance than ever its founders could have envisaged and one must ask that if the new momentum is to be injected whether changes or amendments to the treaty itself ought to be considered because events have occurred whose magnitude were certainly not conceivable to politicians and planners two decades ago. The Community has been visibly marking time for several years and as we stand here at the beginning of 1979 let us look at several factors which could literally make or break the Community and as a result achieve or knock the hopes of political and economic unity for Europe.

I propose to take a brief look at the Rome Treaty in the light of hindsight with a view to identifying its strengths and weaknesses. Then to look at what effect the Direct Elections and the possible enlargement of the Community will have on the attaining of greater political unity. Then to examine the prospects of economic unity among countries whose markets and economies are so diverse that real economic unity seems beyond reality.

Those who drafted the Treaty 20 years ago showed remarkable judgment as to the obstacles to be overcome in moving towards economic and political integration of the member states and remarkable foresight as to the type of structure that could be established which would have within itself the leverage necessary to secure continuing progress towards that goal over a period of many years and in the face of inevitable obstacles. It was this judgment and this foresight that gave to the Community the momentum that carried it through the first 20 years of its existence and that gave it the resistance to survive, with minimal damage to its fabric, a recession whose origins and whose magnitude were certainly not conceivable to politicians and planners two decades ago. They had the foresight to see that progress towards political integration required as a condition precedent a solid basis of economic integration. They planned accordingly and to this we owe the extreme concentration of the Rome Treaty on economic matters and its virtual silence on political aspects of European integration.

They were right in starting with the idea of a Customs Union, not confined simply to the freeing of trade and the establishment of a common external tariff but also including stringent provisions designed to secure the elimination of non-tariff barriers to trade whether these took the form of cartels, monopolies, State aid or obstacles to the free movement of the factors of production. The institutional structure which they invented also contained a number of elements which proved of crucial importance in maintaining throughout so much of the following two decades the momentum of the development of the Community. They guessed that the enthusiasm of Governments for economic and political integration, although it might have sufficient strength and vigour in the 1950s to enable six Governments to sign the Rome Treaty, might wane in the years that followed and that to leave the initiative in respect of the many developments that would have to take place during the period of evolution of the Community exclusively to member Governments subjected to domestic pressures would be dangerous and possibly fatal. It was this insight that led to the development of the concept of a European Commission, independent of member Governments and having an exclusive power of initiative subject only to the right of member Governments to request the Commission to study matters considered desirable for the attainment of common objectives and make proposals on them. Also they saw the danger that national Courts might interpret this Treaty in different ways and they achieved a solution to this by giving to the Court of Justice of the European Community the final power of interpretation and judgment of the Treaty. This would be a power which could bind national Goverments. The harmonisation of laws within the Community is a complex task. It will take time to implement and involve Legal and administrative changes some of a far-reaching character. In the future a new code of European Law will mean changes in some domestic laws of member States. These developments were recognised by the founders of the Community. Implementing these changes is a matter for the Legislators and Jurists in the member States.

But inevitably the structure of the Treaty had weaknesses and it is worthwhile perhaps to list some ot

these weaknesses, because it is these deficiencies that have contributed, it is true, to the slowing-down of the momentum of the Community and to growing doubts as to its continuing internal dynamism. If these dificiencies are not overcome the loss of momentum could become a permanent source of weakness. The Treaty is notably weak in the section on economic policy. There is a notable absence of the kind of provisions with respect to the co-ordination of economic policies in member States that would be essential if full economic union was to be achieved and there is a lack of adequate provisions with respect to monetary policy.

Another deficiency was the implied assumption that seems to run through the Treaty that exchange rate stability could be readily maintained between member Countries. The founders of the Community were also over-optimistic in expecting that decisions would be taken quickly and that the consultative Assembly would quickly establish itself. We must be clear-sighted about the deficiencies of the Treaty seeking in the immediate future to minimise their impact on future progress and then to think about alterations or amendments to the Treaty which will form a basis for progress in the years ahead.

I will now examine several other factors which hopefully will pave the way for greater unity within the E.E.C. and ultimately within Europe. In June the first direct elections to the European Parliament will take place. In certain Countries there has been a certain amount of misgiving over these elections, in some cases amounting to almost outright opposition. People have questioned the value of holding such elections and what they will achieve. In Articles 138 of the Rome Treaty it is clearly stated that "the assembly shall draw up proposals for elections by direct universal suffrage." But it has taken a long time to honour this commitment. However there is an overwhelming case for holding direct elections to the Parliament of the Community. The Community's performance is based solidly on the principles of representative democracy. One of the most necessary and essential elements of such democracy is that those who make decisions should be subject to control and scrutiny by the representatives of those in whose name decisions are made and plans carried out. At the moment many decisions are taken at Community rather than National level. If the Community is to develop and greater unity is to be achieved more important decisions will have to be taken at Community level than in the past. National Parliaments already scrutinise and control the activities of their National Governments within the Community and to a certain degree the activities of the Community itself. But it is simply not possible to scrutinise and control the whole of Community decision making and planning at nine National levels. National Parliaments elected on national issues have a full time job as it is – and in my opinion, Community decisions and Community decision makers can only be controlled by a Community Parliament elected solely for Community tasks by Community Constituents. Also the problem of Politicians serving two Parliaments must be looked at – While they might appreciate the two salaries they might not be able to fulfill their duty adequately at home and in Europe.

In all the member States there is a certain resentment against the bureaucrats of Brussels, remote figures who basically appear to take insensitive decisions which effect everyone and these people are apparently accountable to no-one. If the Community is to move forward and achieve more, then the ordinary citizen of the member States must get more involved in the whole European concept and feel that his voice is being heard in Burssels. The issues which are decided there must be made more real to him and the means by which they are decided more clear. I do not think a nominated Parliament can achieve this but a directly elected Parliament may be able to do so. However, all must recognise that the new Parliament must play a bigger role in the Community process than the existing Parliament.

Turning to the challenge of the Community's own enlargement. Recently three new democracies in Southern Europe have applied for Membership. They have done so partly because they wish quite legitimately to share in the economic advantages which membership of the Community can give to them. But their motives are not chiefly economic for there are greater and more pressing motives for seeking membership. They are seeking membership because for them as for us the Community represents a gathering together of a Europe, a Europe with its commitment to representative democracy social justice and human rights. They see membership of the Community as being membership of a powerful body whose voice will be listened to and respected. It would be too easy for us to say that Greece, Portugal and Spain are far away and can take care of themselves. To hold such a view, in my opinion, would be a great mistake. Greece, Portugal and Spain have every right to join the Community. They have all made contributions to European civilisation which can be compared to those made by existing Member States. To reject European Countries entitled and qualified to join would not only be a betrayal of the Treaty upon which the Community is founded but also make a mockery and a farce of all the underlying principles and aims to which the Community is dedicated.

Enlargement of the Community augurs for the greater unity of Europe. But let us not deny that the enlargement will create difficult problems for us all. But in the Community we are not either losers or gainers according to some narrow profit and loss account. In fact we all gain – Adaption will be necessary but adaption was necessary before, and took place, and the result was eventually good for all. I see no reason whatsoever why current fears of competition in the Industrial or Agricultural fields should be any more soundly based. On the industrial side the effects of Greek, Portuguese and Spanish membership could be to contribute that stimulus to our economies which is badly needed and on the agricultural side, their membership will coincide with necessary and overdue changes in the balance of the Common Agricultural Policy between North and South, designed to bring more sense and greater equity into the system as a whole. Enlargement carries many perils. If it does not succeed the future of Greece, Portugal and Spain could be greatly affected. Hopefully it will bring about reinforcement of our institutions and stimulate economic growth and necessary change. The result is far from certain.

But a fact which is certain is that political unity requires economic stability as a basis. This has been made all the more difficult in the face of the economic pressures of the last few years. As a result the national economic

policies of the Member States have in fact diverged much more profoundly than at any other time since the immediate Post-War period. Some Countries have weathered the storm better than others and have been able to control inflation fairly well but others have not found it so easy. These different outcomes of what is certainly a common wish to control inflation derive from a number of basic differences between Member States which have proved more important than had perhaps been envisaged in earlier years. These include differences in the stages of economic development of Member States which as a result requires the application of different economic policies, differences in the degree to which Member States are dependant on export trade, differences in the institutional structures of Member States – a particular sector being that of Trade Unions and their role in Industry. How a country is placed in relation to such factors will depend on what rate of inflation will affect such a country. With divergences in inflation rates there follows a decisive impact on the stability of exchange rates and this has a detrimental effect on policies – an obvious one being the Common Agricultural Policy. As a result the emergence of a Common Community Economic Policy is faced with many difficulties and is unlikely to emerge unless a number of pre-conditions are met. These pre-conditions would basically include mutual assistance on an extensive scale. But that is not the complete answer – Member States must create for themselves a climate to take advantage of this assistance – otherwise these loans or grants will be worthless because Countries will not have the basic elements for stability. The recent agreement to introduce a European Monetary System is a combined effort on behalf of the Member States to stabilise exchange rates. With its introduction there will be restrictions and thereby limits to the extent by which any currency may be allowed to deviate from the system. This will inevitably involve discipline and possibly restraint but the acceptance by Member States of such discipline could provide the basis for sound economic and indeed social progress. The problems in this area remain immense but their solution is a pre-condition for the ultimate achievement of political and economic unity.

Some of the problems arise because the Member States are deeply involved in the world economy and the experience of the 1970s has shown how damaging the turbulence of the international economy can be. The rampant inflation, the many unemployed, the near destruction of major industries have largely been induced from outside. The Community cannot turn its back on the world economy but it must have some form of protection. A general tariff is a blunt instrument of protection and maybe the Community does not need it. But the Community has not replaced the declining tariff by other means of defence against the turbulence of the international economy nor has it done much to bring the instability under control by commmon actions with its economic partners. Tariff-cutting can be one element in a constructive policy but it must be supplemented by other measures in order to give stability to the Community in this turbulent world.

The Community is seeking positive solutions to these problems through the collective and co-ordinated action of its Member States aimed at benefiting all rather than through unilateral and perhaps contradictory measures which although possibly of benefit to some might by the same token prove injurious to others. This co-ordinated approach is the essential characteristic of the Community and while it may sometimes appear slow to those demanding immediate action it represents a fundamental application of the democratic method and ensures that before decisions are taken the long-term interests of all the Member States are duly taken into account. It is this basic principle which has guided Community policies and which will continue to govern its approach in the future. Unfortunately the future well-being of the Community is far from certain. There are many problems to be solved and if we fail to meet this challenge we shall certainly be worse off in all respects and Western Europe would enter a time of troubles such as we have not known since the War. Public opinion must also regain confidence in the potential of the Community to serve the interests of the peoples of Europe. Ireland has benefited from Membership of the Community. The market opportunities have provided the means for Economic expansion on which Social and even Political progress will be possible. The future of this country is closely linked with future developments in the Community. However, we have problems of our own making and these we will have to solve if we are to benefit from Community Membership. This will not be easy but we must face that reality. And eventually this economic progress could contribute to the political progress of the whole of Ireland. This is surely an ideal worth striving to achieve. Ladies and gentlemen, the Community is at the crossroads but we cannot stand still – We must go forward together. I will leave you with the words of Robert Schuman, the French Foreign Minister who said in 1950:

"Europe will not be built in a day; nor as part of some overall design. It will be built through practical achievements that first create a sense of common purpose."

The Guest Speakers at the Meeting were Mr. Richard Burke, member of the E.E.C. Commission, the Hon. Mr. Justice Liam Hamilton, Judge of the High Court, and Mr. Michael O'Leary, T.D., Deputy leader of the Labour Party.

Northern Ireland Courts

(The Ulster Commentary)

Principal remaining provisions of the Judicature (Northern Ireland) Act came into operation on 18 April last.

Main provisions of the Act relate to:

Transfer of ministerial responsibility for the administration of the courts from the Secretary of State to the Lord Chancellor.

Creation of a reconstituted Supreme Court of Judicature in Northern Ireland. In particular provision is made for the creation of a new Family Division within the High Court, and for the merging of the present Courts of Appeal and Criminal Appeal.

Creation of a new Crown Court to which will be transferred all criminal cases on indictment, presently dealt with by Courts of Assize and County Courts.

Merging of the administrative staffs of each of the three tiers of the present courts structure into an integrated Northern Ireland Court Service.

Revision of the territorial boundaries of the courts to relate them to local government boundaries (see below).

Creation of Circuit Registrars who will have a capacity for minor judicial functions, in particular for hearing certain claims up to £300 which are now within the capacity of the County Courts. They will also have jurisdiction for 'small claims' up to £200 for which there is at present no specific provision in Northern Ireland.

Under the new legislation the Lord Chancellor has made an order specifying petty sessions boundaries. County Court divisions will be formed from appropriate groupings of new petty sessions districts, and these, in turn, will be grouped to form new Circuits for Crown Court and administrative purposes.

There will be 26 Petty Sessions districts based on 26 local government boundaries and there will be eight new County Court Divisions based on groupings of local government districts as follows:-

Londonderry – Londonderry, Limavady, Magherafelt, Strabane.

North Antrim – Coleraine, Ballymoney, Moyle, Ballymena, Antrim.

South Antrim – Larne, Newtownabbey, Carrickfergus.

Fermanagh and Tyrone – Cookstown, Omagh, Fermanagh, Dungannon.

Armagh – Craigavon, Armagh.

South Down – Newry and Mourne, Banbridge, Down.

Ards – Lisburn, North Down, Ards, Castleragh.

Belfast – Belfast.

Small Claims Courts cut out formality

Small claims courts, now set up in Northern Ireland, enable two or more people in dispute to take it informally before a third independent person, a Circuit Registrar.

This means that the dispute can be settled quickly and cheaply (usually without the aid of a solicitor) but still within the framework of the courts.

Circuit Registrars can deal with disputes where the amount of money or the value of the goods involved is not more than £200.

Some types of disputes, however, such as those involving personal injuries, libel or slander, a legacy or annuity, or the ownership of land must be taken to court in the normal way.

This also applies to the property of a marriage, a matter referred from the High Court, and undefended summary and default civil bills.

Claims can be made for faulty goods, for unsatisfactory workmanship or for damage to your property.

Hearings at the Small Claims Court will usually be in private, so that probably the claimant, the respondent and the Circuit Registrar will be present in a small room in the courthouse.

Those involved will normally sit at tables and there will be no witness box.

For claims not exceeding £50 there is a fee of £2 and for those exceeding £50 and not exceeding £200 the fee is £5.

Application forms should be lodged at one of the Court Offices. These are in Belfast (Crumlin Road), Armagh, Downpatrick, Enniskillen, Londonderry and Omagh.

The necessary form can be obtained from any Court Office or from the Citizens Advice Bureau or Trading Standards Office.

If the claim is dealt with by arbitration and you are successful there will be no costs. If you are not successful you may have to pay the costs of the other party but these will not exceed £22.

Fixed charge on Future Book Debts of a Company

The Judgment in *Siebe Gorman & Co. Limited v. Barclays Bank Limited* (1978) reviewed.

by
E. Rory O'Connor

The Judgment delivered by Mr. Justice Slade of the English High Court in the above Action on 26th May, 1978, generated more than average interest in legal, banking and accountancy circles. In the first place it highlighted a difference between the practice of the principal English Commercial Banks and the Irish Commercial Banks in taking security over book debts of a company. The English Banks have for some time used a provision in their debentures which purports to create a fixed charge on all book debts both present and future; whereas Irish Banks have traditionally regarded security over book debts as more appropriate for inclusion under a floating charge. In the second place it proved that in the English Courts at any rate a fixed charge on future book debts will be recognised and enforced as such where the circumstances warrant such a conclusion.

The case was concerned with a question of priorities between an assignment of a bill of exchange made by a company in favour of Siebe Gorman & Co. Limited and a fixed charge over present and future book debts and other debts of the company created by a debenture issued by the company to Barclays Bank Limited. The debenture contained an express prohibition against the company charging or assigning any book debts or other debts without the prior consent of the Bank.

In its Judgment the Court considered the provisions of Barclays Bank's debenture which, *inter alia*, purported to create a *fixed*, as distinct from a *floating*, charge on existing and future book debts of the company. The relevant clause read as follows:-

> "3(d) by way of fixed charge all book debts and other debts now and from time to time due or owing to the Company."

The Court, having reviewed a number of earlier authorities on the subject, concluded that the debenture did create a first fixed charge on the Company's book debts and other debts including future debts. The position was expressed thus by Slade J.:

> "... it is perfectly possible in law for a mortgagor, by way of continuing security for future advances, to grant to a mortgagee a charge on future book debts in a form which creates in equity a specific charge on the proceeds of such debts as soon as they are received ..."

However, the Court went on to hold that the assignment of the bill of exchange in favour of Siebe Gorman & Co. Limited took effect free from the fixed charge over the future book debts of the Company granted to Barclays Bank Limited by the debenture. This was, the Court explained, by reason only of the fact that in the form 47 (particulars of charges) delivered by Barclays Bank Limited to the Registrar of Companies under Section 95 of the Companies Act, 1948, no mention was made of the provision in the debenture which prohibited the Company from charging or assigning its debts in favour of any third party.

It is correct to say that the Siebe Gorman case is authority for the proposition that it is competent for a company to create a fixed or specific charge on existing and future book debts. It is authority for little else. Indeed the decision on the priorities issue cannot be regarded as satisfactory considering that the Court had held that Barclays Bank had a valid *fixed* charge in respect of which particulars had been duly registered in the Companies Office which should have put any person dealing with the company's book debts on notice of the existence of the charge and of its particular nature.

The reaction among Irish Banks and other lending agencies to the Siebe Gorman decision has been quite dramatic and already many institutions have amended their forms of debenture with a view to providing for a fixed charge on book debts. Other Banks have such amendment under active consideration. In these circumstances it is thought well to caution against the conclusion that the mere describing of a charge as a *fixed* charge will have the desired effect on all occasions. In the writer's view it will still be open to a Court in any case where the nature, quality or priority of a charge is in dispute to examine the provisions of the instrument of charge and to look at the intentions and attitudes of the parties as regards the company's freedom to deal with any particular class of asset embraced by such charge. This is clearly illustrated by a Judgment of the Irish High Court delivered by Mr. Justice Costello on 20th December, 1978, in an application brought under the Companies Act, 1963, by the Official Liquidator in the matter of Lakeglen Construction Limited, the winding up of which had commenced in March, 1978.

In this case the Company had issued a debenture on 24th November, 1977, in favour of a group of major creditors to secure existing indebtedness. The debenture purported to create a number of charges over various properties and assets of the Company including *a charge on all the company's book debts* and all rights and powers of recovery in respect of them. The debenture also contained a "sweeper-up" provision which created a first floating charge on "all other" assets of the Company present and future. The issues to be determined were whether the undefined charge over book debts would include future book debts and whether it constituted a *fixed* charge or a *floating* charge over such debts. If it was a *fixed* charge then the debenture holder's security would not be invalidated by Section 288 of the Companies Act, 1963 and the proceeds of such book debts, when collected, would not be subject to the claims of the preferential creditors. If on the other hand it was a *floating* charge it would be invalidated by Section 288 since it was acknowledged that the Company was insolvent when the debenture was created and that no fresh moneys were advanced at the time and in consideration of the granting of the debenture.

On the preliminary point the Court (Costello J.) con-

cluded that a charge on "all the Company's book debts" embraced those debts of the Company presently in existence and those which as a result of future trading may come into existence. Having so decided it was now necessary for the Court to determine the character of the charge i.e. whether it was fixed or floating. In his judgment Costello J. reviewed a number of English cases which laid down certain tests to be applied in determining this issue and quoted the following passage per the Lord Chancellor from the Judgment of the House of Lords in *Illingworth v. Houldsworth & Anor.* [1904] A.C. 355 at p. 357:

> "In the first place you have that which in a sense I suppose must be an element of the definition of a floating security, that it is something which is to float, not to be put into immediate operation, but such that the Company is to be allowed to carry on its business. It contemplates not only that it should carry with it the book debts which were then existing, but it contemplates also the possibility of those book debts being extinguished by payment to the Company, and that other book debts should come in and take the place of those that had disappeared. That, my Lord, seems to me to be an essential characteristic of what is properly called a floating security."

In the same vein Costello J. had earlier in his Judgment referred to the obiter of Farwell J. in dealing with the same issue in the lower Court[1] where the learned Judge stated that if the security was to be treated as a fixed charge then the Company had no business in receiving one single book debt after the date of the charge; but if on the other hand it was intended that the charge was to remain dormant until some further date, and the Company was permitted to go on receiving the book debts and using them until then, then the security would contain the true element of a floating charge.

The Court held that the charge created by Lakeglen Construction Limited over all its book debts constituted a floating charge and consequently was invalid under Section 288 of the Companies Act, 1963.[2] It is clear from the Judgment that the learned Judge was influenced by the fact that there was no provision in the debenture, or no circumstance existed from which it might reasonably be inferred, that after the execution of the debenture the Company was not to be at liberty to deal with its book debts in the ordinary course of carrying on its business – such as by receiving them and bringing new debts into existence – until such time as the debenture holders intervened in the Company's affairs; and further, that there was no provision in the debenture which required the Company to pay over the book debts and other debts when received to the debenture holders.

If one must draw a conclusion from the foregoing analyses of two recent cases which indirectly bear on the same subject it must be this, that where a debenture purports to create a fixed charge on existing and future book debts and (1) there is no provision made in the debenture, or by separate contract with the Company to control the company in collecting, receiving and dealing with its book debts from time to time; or (2) there is no express arrangement in regard to the manner in which, or the period for which, the company may be permitted to use such book debts in the ordinary course of business; and (3) there is no prohibition on the company from charging or assigning such book debts to any third party without the prior consent of the debenture holder, then it is likely that a Court would hold such a charge to possess the characteristics of a floating charge and construe it accordingly.

And so it would seem that, in this country at any rate, the drafting device of creating a *fixed* charge on book debts present and future, designed to secure that in a winding up of a company such debts would not be available to meet the preferential claims, is not the panacea which it is thought by many to be. Liquidators and preferential creditors may take heart – all is not lost which seemed to be lost.

1. In re *Yorkshire Woolcombers Association Limited. Houldsworth v. Yorkshire Woolcombers Association, Limited* [1903] 2 Ch. 284.
2. 288—(1) Subject to subsection (2), where a company is being wound up, a floating charge on the undertaking or property of the company created within 12 months before the commencement of the winding up shall, unless it is proved that the company immediately after the creation of the charge was solvent, be invalid, except to the amount of any cash paid to the company at the time of or subsequently to the creation of, and in consideration for, the charge, together with interest on that amount at the rate of 5 per cent. per annum.

INCORPORATED LAW SOCIETY OF IRELAND

Employment Register

Members and apprentices are reminded that the Society keeps a register of

(i) Solicitors seeking Assistants;
(ii) Solicitors seeking Vacancies;
(iii) Apprentices seeking Vacancies.

Members or apprentices who wish to avail of this service (which is free of charge) should write to:

NICHOLAS MOORE,
Education Officer,
The Law Society,
Blackhall Place, Dublin 7.

Landlord & Tenant Acts, 1978

TIME LIMITS

Correction to Notice published in the January-February Gazette, 1979

The attention of readers is drawn to comment on Section 13 of the Landlord and Tenant (Ground Rents) (No. 2) Act, 1978, on p. 21 of the January-February Gazette. This Section confers the right to acquire the fee simple within one year of the commencement of the Act, expiring on the 1st day of August, 1979, where a lease expired within **10** years before the commencement of the Act (and not **8** years as was stated in the January-February Gazette), the Lessee is in possession under a yearly tenancy or as tenant at will or otherwise without having obtained a new Tenancy or acquired the Lessor's interest and no person was immediately before such commencement entitled to be granted a lease under the Act of 1958.

Are Young Solicitors Getting a Raw Deal from the Profession?

Text of an address read by **Harry Sexton** at the Society's Annual Conference in Galway

I must first question why, from the wording of the motion, it is clearly assumed that young Solicitors are quite set apart from and unconnected with "The Profession". This, of course, is not the case and figures can show that today we have a very young profession – so young in fact that it can be argued that young Solicitors largely constitute "The Profession". Suffice it to say without delving too deeply into the realm of statistics that roughly one third of the profession is less than five years qualified. Another way of putting this is to say that 40% of members are under the cradle age of 30. When making comparisons with other jurisdictions of similar size and population these statistics are not particularly unusual. However, no other jurisdiction is expecting anything approaching the rapid growth in numbers forecast for our own profession. Another thousand newly qualified Solicitors will emerge within the next four years and almost as many again will qualify under the new training programme by 1986. And then we are labelled exclusionists.

It is clear that young lobby is becoming increasingly strong, if not yet vocal, and that the demands of the young Profession are of everyday concern to the majority of firms in the Country, large or small. These demands are many and varied whether you are among the members of a panel or partners in a large firm employing many assistant Solicitors or simply the principal in a small office employing perhaps one or two assistants. On reflection this is hardly surprising in that the present younger generation – not merely Solicitors – irrespective of class, background or occupation has far higher expectations of life in general than any previous generation. Career's Guidance experts are often amazed at the expectations of School leavers especially among those who for want of ability or ambition or both will almost inevitably fail to reach those expectation. Similarly, young Solicitors embarking on new careers could be criticized for having unrealistic expectations regarding salary and conditions. On the other hand it would be difficult to alter these expectations given today's affluent Society and, having accepted them as fact, attention must be focussed on whether young Solicitors are given a raw deal. I must make it absolutely clear that the comments and criticisms I shall offer are in no way intended to be a reflection on any of my colleagues with whom I am professionally associated at the moment but are drawn mainly from my knowledge of the experiences of friends and acquaintances in the Profession.

Young Solicitors not infrequently accept employment where unknown to themselves at the outset, they are required to perform what are vulgarly called "fire brigade" jobs in their employer's Offices. The place is never actually on fire. Nor are flames leaping to the heavens in a metaphorical sense for then the Law Society's trusty firemen would be foaming and splashing out freezing Orders and all sorts of molten brimstone to quell the raging torrent. No. The kind of place I am speaking of could be compared to old smouldering coals which are at anytime going to kindle violently. And the trouble is that you need quite an experienced and hard necked chap to be able to sit down on these coals in order to prevent the said kindling. These Offices have three distinguishing features; first, work is normally badly in arrears; secondly, the work to be cleared up cannot be cleared up quickly since this is the main reason why it has fallen into arrears in the first place; lastly, things keep getting lost as a result of poor or non-existant filing and indexing systems. How often have we all heard of the young Solicitor, now two or three years qualified who has been driven to setting up practice on his own largely out of sense of despair that he would never find a satisfactory place to work. Even though establishing a new practice is fraught with all sorts of difficulties such as attracting business in the early stages and initial cash flow difficiencies regular perusal of the Personal Columns of the daily newspapers will normally reveal one disatisfied young Solicitor setting up on his own each week. Without exaggeration and humorous analogies apart, this is quite a serious indictment of the Profession as a whole. While many more factors may influence such a decision, what Solicitor will happily remain for long in an office where many difficult administrations must be completed in respect of deaths occurring in excess of 20 years ago? How long will an assistant stay in a place where Title Documents all too frequently get lost or where papers often are misfiled because of an antiquated filing system? Not long. And these deplorable conditions are frequently encountered. The irony is that only a small number of offices are in such a state and it is true that many offices have changed to employ proper filing systems and methods of indexation and are now grappling with problems such as the storage of old files and the making of old information more easily accessible. The problem is that generally it is the static and unchanging office which engages the services of a young Solicitor and it is a fairly safe bet that up to one half of nationally advertised vacancies emanate from office of this kind.

Hand in hand with "fire brigading" go poor physical working conditions. It is frequently said that a professional should have a small room and a small desk for otherwise, with a big room and a big desk, he will soon need two big rooms and two big desks. This may be an exaggeration but the principle is correct. A balance must be struck between too much space on the one hand leading to losing things and over crowding on the other leading to ... losing things. Much of this may be a matter of personal taste and it is true that spaciousness may have little to do with efficiency. Generally speaking, however, an assistant Solicitor's room measuring in floor area perhaps the size of some of our more renowned practitioners desks is somewhat less than adequate. And these conditions exist, make no mistake about it. In such circumstances even the most energetic and efficient young assistant will find it tiresomely difficult to wage war and

win against the inevitable rising tide of paper. And even if he succeeds, he certainly will not feel a boost in his morale while interviewing clients in a dirty, pokey, dimly lit room with just enough space for one dingy guest's chair. Matters will not improve on the day when a family of five call to execute a transfer in consideration of natural love and affection.

I find it difficult to complain about salary levels because of the absence of any really accurate information about them. In Dublin, the average starting salary for a newly qualified Solicitor appears still to be in the region of £2,500 to £3,000 per annum. Outside Dublin, there seems to be a wider range. However, the base figure appears to be £3,000 per annum but in some cases it may be up to £4,500 per annum. The substantial difference between Dublin and the rest of the country would seem to be caused mainly by market forces. Dublin has always lured a disproportionate number of Solicitors in relation to the national population. Dublin City and county with almost 30% of the population of the country has 45% of the total number of Solicitors, the figure now being about 1,000. And yet younger Solicitors (even those coming from the country) continue to flock to practice in the Dublin area and here I am prepared to concede that younger members are the over supply which depresses the Dublin salary levels. What firm of Solicitors in Dublin will take on a young Solicitor at £4,500 per annum when 20 more will settle for a little more than half that? The contrary is of course true in small towns where difficulties are frequently experienced in recruiting assistants, principally, no doubt as a result of the fallacy that Dublin and the larger urban centres jealously harbour all of the worthwhile social life in the country and that Islandbridge marks the beginning of obscurity and darkness. Again the message to the younger profession is the same as before – make for the smaller rural practice in whcih you will get a very wide range of experience and, more than likely, higher pay.

On the question of whether or not salaries are low, three criteria may be applied. The first is simply whether or not the young Solicitor brings in enough money in costs to justify his wage. More senior practitioners, seem to take a rather short term view of this issue. They fail to regard the payment of a decent wage to an assistant as an investment in the future, which, of course, it is, if it is the object of the firm to avoid a situation in which assistants are coming and going every six or nine months. The second is whether newly qualified Solicitors earn more than other newly qualified professionals. Again we are faced with a shortage of accurate information. However, almost any comparison between the starting salaries of Solicitors and Accountants will reveal that Solicitors salaries fall considerably behind. It is likely that it is not until a Solicitor is between three and five years qualified that his slaary comes into line with those of other professionals. The final criterion involves this question of "gross" and "net" pay and incentives generally. Naturally enough, many principals merely draw so much money each week as will finance their normal cost of living and do not bother to convert this weekly amount into an annual salary. So, I feel, there is a general failure among employers to appreciate that the £100 or £150 drawn each week or drawings over a stated period averaging such amounts constitute a very considerable salary indeed. These same principles are unaware (out of thoughtlessness more than anything else) that £3,000 per annum after the appropriate deductions for Income Tax and Social Welfare comes to less than £45 a week for a single person. It is very difficult to justify wage packets of this order for any considerable length of time given that "take-home pay" for totally unskilled employment can frequently stand at much higher levels. Finally, on the question of salary, the profession seems to be lacking in inventiveness when it comes to incentives and the proper treatment of expenses. Few assistant Solicitors are able to negotiate arrangements whereby they get a certain proportion of the costs derived from business they themselves attract to the office. Even more surprising is the fact that in country areas where considerable expense may be incurred in travelling to and from Courts, few assistants seem to be recompensed on a mileage basis I think that the whole area of justifiable expenses could be re-examined with mutual advantage to both the assistant and the firm.

I think we are all agreed now that our methods of training intending Solicitors have in the past, been far from satisfactory and that there have been at least two major flaws. The first was that apprenticeship was seldom served in a meaningful way owing to the fact that up to 1975 it was possible to serve only a nominal apprenticeship during the course of a university degree. The second was that the Society's own courses of lectures in practical subjects such as Conveyancing, Litigation and Probate and Administration have proved to be inadequate for the newly qualified Solicitor emerging on to the platform of practice, the main inadequacy arising out of the teaching methods rather than deficiencies on the part of the lectures or materials disseminated. The result has been that many newly qualified Solicitors have commenced practice with only a little practical experience behind them and without the benefit of having taken effective courses in professional practice. Thankfully this picture has changed with the introduction of the new criteria for apprenticeship and the Society's new intensive legal practice courses, and even the strongest of critics of other aspects of the new system will unite in agreement with the greatest of its advocates that the "workshop" and "learning by doing" approach to professional legal training is far superior to methods previously used. Nevertheless, just as the fledgling Solicitor under the old system has lacked self confidence and has asked questions of his superiors so will his counterpart under the new system and here a little soul searching is necessary. Can you, as boss, honestly say that you are reasonably approachable to a young assistant who might want an answer to a problem which to you might seem insignificant? Quite clearly, no one is expected to remain a model of patience and understanding when an enthusiastic assistant interrupts an important consultation for the purposes of obtaining your advice. However, having accepted that learning the skills of any profession or trade is continually an on going experience, would you say that your staff are inhibited either by your attitude or manner, from asking you a question about any aspect or practice? Maybe you have forgotten your own lack of self confidence when starting out ten, twenty or thirty years ago to such an extent that you now expect your assistant to be an instant genius in an age when law and procedures are considerably more complex than when you were starting. These matters may appear trivial but are important to the

conscientious beginner and I have known one or two cases in which improvement and increasing competence have actually been stifled partly as a result of a fear of appearing foolish with questions and partly as a result of anticipating the "you're being paid good money to act without plaguing me with problems" response.

There are some other smaller but none the less irritating thorns in the sides of young Solicitors. For instance it can be quite agitating never to see a client. I think we all have a natural tendency and desire to a greater or lesser extent to project one's own image and personality and to stamp one's mark on the Solicitor client relationship. Interviewing can be difficult and indeed for the inexperienced a time wasting experience. Never the less it does not take long to learn the essential information to be elicited in each case and once the technique is mastered it is very satisfying principally because of the personal contact and the satisfaction gained out of seeing a case conceived, living, and hopefully stone dead as quickly as possible. Another difficulty is frequently encountered particularly, I think, by younger lady assistants in rural offices and that is what could be described as total non-acceptance on the part of clients who cannot accept that this "pretty slip of a lass" is actually a Solicitor. The problem is certainly not solved by the principal deflecting such clients to himself and this indeed can be a major blow to the assistants morale.

A possible criticism that could be made of younger Solicitors in general is that for a couple of years after qualifying they slip from office to office parasitically draining the knowledge and experience of the professions more senior members, ultimately for the purpose of establishing practice in opposition to the very ones by whom they were tutored. Some of you may have had the frustrating experience of taking on a young Solicitor and going to considerable trouble in showing him the ropes in the office only to find that he had handed in his notice within a year. The reasons for his handing in his notice so quickly may be many and varied and indeed may stem largely from the problems I have already discussed. In the rather chaotic aftermath of such a desertion some Solicitors will, not unreasonably, require their next assistant to make a commitment to stay for a period of two or three years, at least. There are still some firms, however, in which little or no value is placed in staff continuity at any level and bearing this in mind I would like to conclude on a positive note by pointing out some of the steps that can be taken to give young Solicitors a better deal thereby inducing them to remain for a reasonable length or, indeed, permanently.

First, put him in a fair sized presentable room into which he will not be ashamed to bring clients or colleagues. Practical comfort with knee-deep pile carpeting is not necessary; simply provide a desk and some drawers, a telephone and a dictaphone. Secondly, when you have decided after some weeks of "probation" that he has the potential to make a good Solicitor, pay him decently. It is difficult to decide what is "decent" but £60 a week "take home pay" seems to me to be the minimum acceptable starting wage in these expensive times. This may appear costly at first but it pays dividends later particularly if the assistant is given scope for the use of his own initiative in improving his own level of efficiency and that of the office as a whole. Thirdly, listen to his ideas in connection with office administration. He may have small suggestions to make which if implemented might make your office more efficient in some way. At least have an open mind. Finally, for the practitioner whose work is in arrears and who needs some radical changes, try and engage the services of an assistant who stands some chance of making inroads into the backlog. This, of course, is a real problem for Solicitors outside Dublin who at best seem able to recruit people with only up to a year's experience. And if you take on someone who is not very experienced, then give him every assistance you can.

INDUSTRIAL CREDIT CORPORATION SCHOLARSHIP

Mr. Frank Casey, Director and General Manager of the Industrial Credit Corporation, presenting a cheque for £1,000 to Professor Richard Woulfe, the I.C.C.'s scholarship awarded to a student on the first Professional Course in the Society's Law School. Pictured above are from left, Mr. Frank Casey, I.C.C., Mr. Gerald Hickey, President of the Society and Professor Richard Woulfe, Director of Education.

The Register

REGISTRATION OF TITLE ACT, 1964

Issue of New Land Certificate

An application has been received from the registered owners mentioned in the Schedule hereto for the issue of a Land Certificate in substitution for the original Land Certificate issued in respect of the lands specified in the Schedule which original Land Certificate is stated to have been lost or inadvertently destroyed. A new Certificate will be issued unless notification is received in the Registry within twenty-eight days from the date of publication of this notice that the original Certificate is in existence and in the custody of some person other than the registered owner. Any such notification should state the grounds on which the Certificate is being held.

Dated this 31st day of July, 1979.

W. T. MORAN (Registrar of Titles)

Central Office, Land Registry, Chancery Street, Dublin 7

1. Registered Owner: Kieran Daly; Folio No.: 7674 (This Folio is closed and now forms the property Nos. 1, 2 & 3 comprised in Folio 11881); Lands: (1) Charlestown, (2) Derryhomes or Timolin, (3) Cloniffeen; Area: (1) 17a. 2r. 16p., (2) 2a. 3r. 0p., (3) 1a. 1r. 2p.; County: Offaly.

(2) Registered Owner: Thomas McLoughlin; Folio No.: 7465; Lands: Drumlaheen; Area: 67a. 2r. 0p.; County: Leitrim.

(3) Registered Owner: John Higgins; Folio No.: 15252; Lands: Part of the townland of Newtown with the cottage thereon situate in the Barony of Ballybritt; County: Kings.

(4) Registered Owner: Martin Donohoe; Folio No.: 29162; Lands: (1) Lismanny, (2) Lismanny; Area: (1) 23a. 3r. 0p., (2) 18a. 3r. 20p.; County: Galway.

(5) Registered Owner: Arthur Titer; Folio No.: 9048; Lands: (1) Kilnanare, (2) Kilnanare; Area: (1) 59a. 2r. 19p., (2) 10a. 2r. 11p.; County: Kerry.

(6) Registered Owner: Edward Jennings; Folio No.: 44667; Lands: (1) Cashel Beg, (2) Cashel Beg; Area: (1) 36a. 0r. 7p., (2) 20a. 0r. 5p.; County: Cork.

(7) Registered Owners: Charles Wilson and Ann Wilson; Folio No. 24152; Lands: Dunboyne; County: Meath.

(8) Registered Owner: Endcamp Limited, 60/62 Amiens Street, Dublin; Folio No.: 8962; Lands: Grange (E.D. Coolock); Area: 4a. 0r. 6p.; County: Dublin.

(9) Registered Owners: Robert O'Donnell and Elizabeth O'Donnell; Folio No.: 35821 L: Lands: Townland of Balbriggan, Barony of Balrothery East situate to the North of Skerries Road Town of Balbriggan; Area: 0a. 0r. 8p.; County: Dublin.

(10) Registered Owner: Brendan Carroll, Cuillalea, Ballincurry, Kiltimagh, Co. Mayo; Folio No.: 993; Lands: (1) Cuillalea, (2) Cuillalea (one undivided twenty fourth part of other parts); Area: (1) 27a. 1r. 15p., (2) 123a. 0r. 37p.; County: Mayo.

NOTICES

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Law Books – Miscellaneous Selection for list and prices write or phone Maurice J. Kenny, C.I.E. Solicitor, St. John's, Islandbridge, Dublin 8. Tel. 775661.

LOST WILLS

William Thompson, deceased, late of Cappanarrow, Camross, Portlaoise, County Laois, Farmer. Will any person having knowledge of a Will of the above-named deceased, who died on the 17th April, 1979 at the Mater Hospital, Dublin, please communicate immediately by Telephone or otherwise with Fletcher, Sheedy & Co., Solicitors, Main Street, Mountrath, Co. Laois, and 27, Upper Ormond Quay, Dublin 7.

Maurice McDonnell, deceased, late of Boggin, Kilbride, Carlow. Will any Solicitor holding an original Will in respect of the above named deceased please contact A. B. Jordan, Solicitor, Court Place, Carlow. Tel. (0503) 42157.

Mary A. Caples, deceased, late of 14 Emmet Street, Fermoy, County Cork, died on the 29th day of May, 1979, at Heatherside Hospital, Mallow. Would any Solicitor having a Will of the above named deceased please communicate with Guest Lane Williams & Co. Solicitors, 32/34, South Mall, Cork.

Eileen Palmer, deceased, late of Eventide Cottage, Kilpedder, Co. Wicklow. Will anybody who knows of a Will made by the above named deceased who died on the 24th November, 1978, or the whereabouts of Land Certificate Folio No. 5545, Co. Wicklow, please communicate with P. P. O'Sullivan, Solicitor, 24 Dame Street, Dublin 2.

THE INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

JULY-AUGUST 1979 VOL. 73 NO. 6

At the launching of Mr. E. M. Walsh's book, *Planning and Development Law*, on 28 August, 1979, in Blackhall Place, were *from left* — the Hon. Mr. Justice Denis Pringle, Chairman of An Bord Pleanála, the author, Mr. E. M. Walsh, S.C., Mr. Oliver D. Gogarty, S.C., and Mr. Charles Aliaga Kelly, Dublin City Planning Officer.

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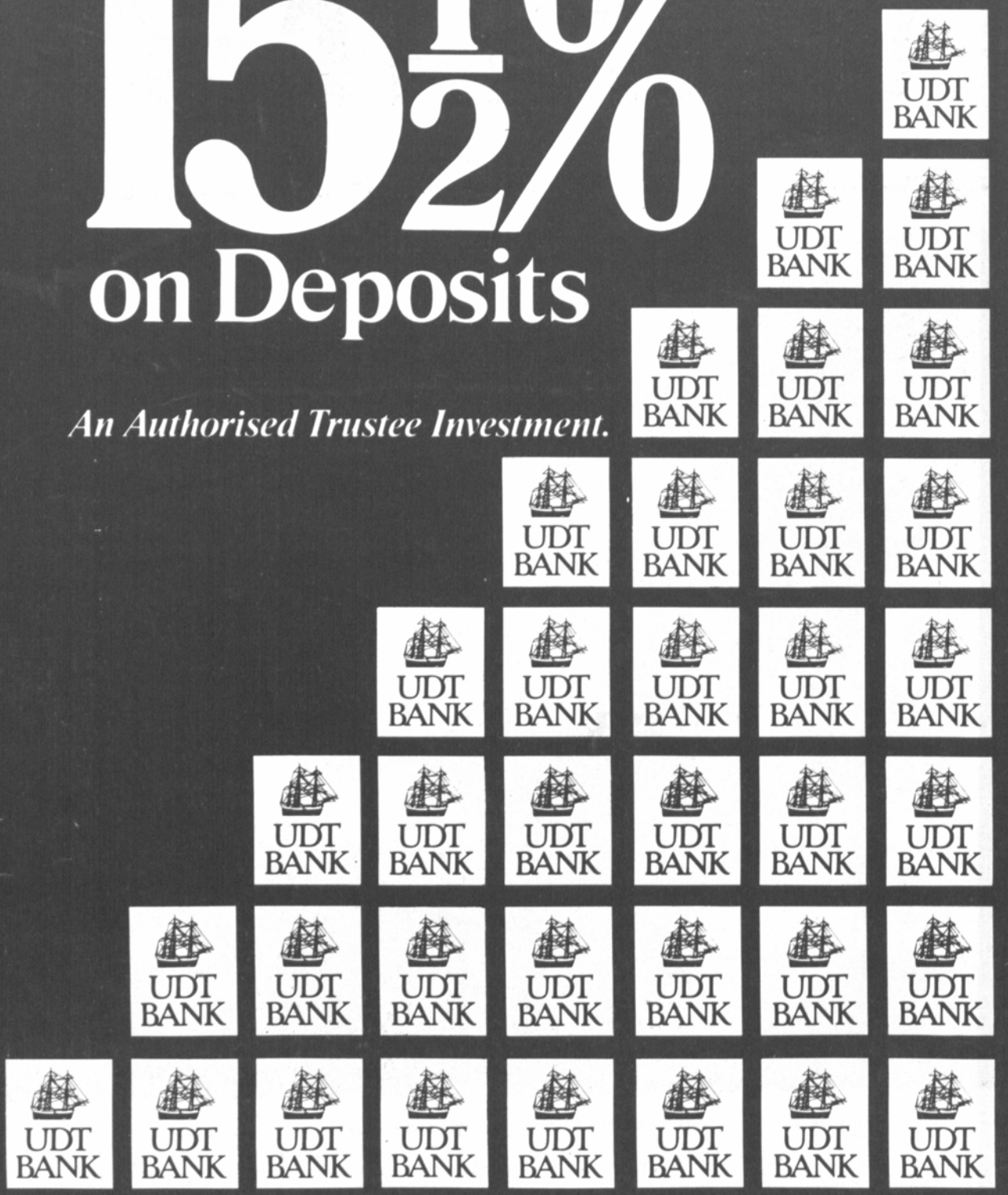

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Approved by the Incorporated Law Society of Ireland.

Address by Garda Commissioner, Patrick McLaughlin, to the Conference of The Incorporated Law Society

3/6 May, 1979

We in the Garda Siochana have held the Incorporated Law Society in the highest esteem, albeit sometimes tinged with envy. Your skilled advocacy has not only been very successful in getting your clients off but has highlighted how ineffective our criminal justice system is as a means of fact finding and protecting society from the ravages of crime and over the years has bit by bit pressed the Courts into a straight jacket where they cannot investigate, cannot ask the accused whether he is guilty or not.

You probably could do more than anyone to influence the making of laws and establishing an effective criminal justice system. We regard you as a cardinal element in encouraging what is right and discouraging what is wrong.

It is both a distinction and a pleasure for me to be here but I would have enjoyed myself a lot more if I had not to address you.

Some of the things I am going to say on the subject 'that the law is unduly weighted in favour of the criminal' will not be acceptable to some of you and even less acceptable to some other organisations. There is no need for me to emphasise how crime has increased both in volume and gravity. It would not be possible in the time available to cover all aspects of the law which favours criminals, but in the matter of Fraud and False Pretences many deeds which are now blatantly fraudulent do not infringe the law. For example, dishonest persons, with a small deposit obtain a cheque book which they retain for a time and then in the space of a couple of days cash all the cheques for the maximum amount of the guarantee card. The bank is obliged to honour all the cheques issued yet no offence is committed by the person issuing the cheques. This, Ladies and Gentlemen, is surely absurd. The same position obtains in relation to the issuing of cheques subsequently dishonoured, for work done or services rendered which do not come within the definition of 'goods', 'chattels' or 'valuable security'.

There is no power of arrest for such offences as:—

False Pretences;
Fraudulent Conversion;
Credit by Fraud (Debtors Ireland Act 1872)
or Forgery (Forgery Act 1913)

but the Prevention of Offences Act, 1851 confers on a member of An Garda Siochana the power to arrest anyone found committing an indictable offence in the night time, i.e. 9 p.m. to 6 a.m. This creates the anomalous situation that a person could be arrested for obtaining credit by fraud at five past nine but may not be arrested for the same offence at five to nine.

The Bankers Books Evidence Act 1879-1959 lays down, 'A party to a legal proceeding may apply to a Court for an order to inspect a bank account'. This leaves the criminal in the happy position that his account cannot be inspected until legal proceedings have commenced. In many instances the sole or main evidence that a person is wilfully and deliberately issuing worthless cheques is his bank account. But this evidence cannot be obtained until a charge is laid in Court and a charge cannot be laid if the evidence cannot be inspected.

Many youths in their early teens who have never been employed are known to have sizeable bank accounts because they realise that their houses can be searched under warrant whereas they are aware that bank accounts cannot be inspected until court proceedings have commenced. Of course the position is even worse when the thief deposits his ill-gotten money in one of the Building Societies. As the law stands at present there is no means whatever whereby such accounts can be examined.

By way of illustration let me recount briefly a happening of fairly recent origin (names not disclosed to protect the guilty). The crime was a suspected False Pretence and the amount involved was about £100,000. The suspects were two male persons and a female secretary who between them operated a business. Initial enquiry revealed that the secretary was involved but in order to obtain evidence it was essential to inspect certain bank accounts. To get Court proceedings started it was necessary to get a warrant for her arrest and then apply for the order to inspect the Bank Account. This revealed that it was likely there was documentary evidence available at the Company's office and that the company manager was perhaps involved in the fraud. But there was no means of obtaining a warrant to search the Company Office. It therefore, became necessary to arrest the secretary at the office in order to give effect to a common law right to search. As it happened no objection was raised to the search and an abundance of evidence was found in the office. As if that was not enough, two further problems were created because of the investigators ingenuity (1) as the secretary was now in custody in relation to the crime it was not possible to interview her further and (2) because of the enforced early arrest pressures were created by the Courts for the production of a 'Book of Evidence'.

Each and everyone has an obligation to prevent crime but when crimes are committed the Gardai have the responsibility of investigating them. We are regularly criticised for not being more successful, for not being painstaking enough in our enquiries, for not discovering crucial witnesses, for not developing adequate criminal

Contributors to this issue

Patrick McLaughlin, Commissioner, An Garda Siochána.
John F. Buckley, Solicitor, practising in Dublin.
Seán P. Bedford, K.S.G.
Anthony Kerr, Assistant Lecturer in Law, U.C.D.

intelligence, for lack of scientific expertise and for placing too much reliance on interrogation of suspects.

Considering how hampered the Gardai are by passive and active resistance and by restrictive rules and regulations, most of which have not been reviewed for centuries, it often amazes me that so many crimes are solved.

Apart from the small number or instances where culprits are caught in the act of committing a crime or in possession of firearms, explosives or stolen property the only means of detecting crime are:—

(1) Expert examination of the scene of the crime;
(2) Collection of evidence from the injured party and witnesses;
(3) Criminal intelligence and obtaining information from informers 'fellow criminals';
(4) The questioning of suspects.

(1) Entails a thorough meticulous examination of the scene of the crime for minute traces and clues left by the culprit at the scene or which may have become attached to his person or clothing from the scene. The most common of these clues are fingermarks, blood smears, semen, hair, fibres, soil stains, saliva, explosives residue, cartridge cases, fragments of glass.

Professional criminals don't make a habit of leaving obvious material clues lying around the scene of a crime. So to locate and develop such traces requires highly skilled scientific techniques and processes embracing many of the physical sciences. Some clues have a positive investigative value as they indicate a definite line of enquiry but most of them are of no use until a suspect is traced and matched up with the evidence found at the scene. How can this be done if we cannot detain the suspect and get samples?

(2) The collection of evidence from victims, if alive, and from witnesses.

This entails deep penetrative questioning with great attention to detail, but while we can ask questions and are expected to make such enquiries, there is no obligation on any potential witness to answer. There is a distinct reluctance by most people to become involved, first there is the traditional fear of being regarded as an informer; there is the fear of retaliation by a criminal or criminal groups; there is the fear of having to go to Court as a witness and to being subjected to severe cross-examination and even abuse. There is the inconvenience of being involved at all. Even those who might be willing to assist are often too frightened to do so. There are many instances of people who are not only reluctant to co-operate but who do everything to thwart the investigation and to help the suspect to cover up. This unwillingness to become involved, results in many potential witnesses refusing to answer any questions or make a statement. Others who are better disposed to assisting will disclose any knowledge they have, only on a strictly confidential basis and on the clear understanding that their names will not be used and that they will not under any circumstances be brought to Court as a witness. In many instances this information may be positive, clearly naming the culprit, but as it cannot be used as evidence the Gardai must try to do, what the ordinary citizen shirks doing, and the only way they can is to interrogate the suspect.

These are understandable reluctances and fears and unless some statutory means of protecting witnesses is introduced by making any form of intimidation a more grave offence than that under investigation and by making the withholding of information an offence, then the Gardai will have no alternative but to rely even more on interrogation of the suspect in the hope of getting an admission.

The third method of detecting crime is the building up of a system of intelligence from police observation, from developing contacts and obtaining information from fellow criminals and informers. In the case of fellow criminals and informers the reliability of the information has to be carefully assessed and checked for accuracy lest it be motivated by revenge, or in the hope of currying favour. Special care has to be taken to shield and protect the source, lest he or his family be embarrassed or their lives endangered. Of course no matter how reliable or accurate this information is, it is of no evidential value and again the investigator has no alternative but to resort to questioning of suspects.

So no matter how good criminal intelligence, no matter how accurate the information, if witnesses are not prepared to come forward and give evidence, and if interrogation of suspects is not permitted, or if permitted and the suspect will not answer any questions and is under no obligation to do so crimes just cannot be solved. The effectiveness of the law depends on the ability to enforce it.

Which brings me to the final method of investigation that one that is practically forced on us, the interrogation of suspects. It is not with any relish that we rely on interrogation as a means of obtaining evidence, it is simply that in most cases there is no option and this applies not only to the Gardai but in all countries where a system similar to ours is operated.

At the initial stages of the investigation of any major crime there are for various reasons a number of possible suspects. Any experienced investigator realises that any one of these may be the actual culprit but he also realises that as additional facts are discovered additional suspects may be indicated so one of the first priorities is to eliminate the suspects who were not involved. This process is made very easy when the suspect readily co-operates by accounting for where he was at the crucial times and which when checked is found to be correct. If however he tells lies and his story does not check out this heightens the suspicion. It may transpire on deeper probing that he lied to cover up some embarrassment which has to be satisfactorily checked out before he can be eliminated from the investigation. When he doesn't answer any questions and refuses to talk then the suspicion remains and he cannot be eliminated from the investigation. This means that members of the investigation party must concentrate on finding other evidence to either eliminate him from the investigation or if this is not possible to target him as a prime suspect. The process works on the basis of reducing the number of suspects as quickly as possible by working from known facts to establish the unknown — never trying to make the suspect fit the facts which is regarded as the hallmark of inexperience.

A lot has been said and written about the danger of innocent persons being suspected, being subjected to interrogation and being wrongly convicted and this is very proper and it is a matter that we must all guard against. The present system of advising every person whether

innocent or not, who is suspected, not to answer questions or make any statement, definitely helps the guilty to get off but does not always help to clear the innocent of suspicion, can heighten the suspicion against them, does not relieve them from being interrogated and, while it may prevent them from being charged or convicted in Court, it very often leaves them convicted among their neighbours and in the eyes of many local people. If a genuinely innocent person either on his own or through his solicitor were to co-operate with us, we will do everything in our power to help establish his innocence as quickly as possible; save him from embarrassment by neighbours; save him the anxiety of awaiting a Court trial which may acquit him but does not clear him in local opinion. Such a system would be a much greater safeguard for the wrongly suspected innocent, would relieve them of anxiety much quicker and would save us considerable waste of time and effort which we could use to concentrate on the real culprits.

The law on questioning those whom we know were involved or whom we strongly suspect is rather complex. The first of the Judges Rules authorises questioning — 'When a police officer is endeavouring to discover the author of a crime, there is no objection to his putting questions in respect thereof to any person whether suspected or not, from whom he thinks that useful information may be obtained'. But this questioning cannot take place in a vacuum. It cannot be done at his home because in most instances we won't be let in to the house. It cannot be done at his place of work, if he has any, and it cannot be done on the side of the street. He cannot be brought to a Garda station unless he is arrested. Contrary to the general belief we would prefer to do this questioning at any place other than a Garda Station because if it is done elsewhere we don't have to caution the suspect until we have made up our minds to charge him under Rule 2, but if he is taken to a Garda Station he is deemed to be in custody and must be cautioned before being asked any questions. In addition, as soon as he is taken to a Garda Station he can ask to have his solicitor notified. Practically all solicitors will advise him not to answer any questions or make any statement. The position is further complicated by the ruling *Dunne v. Clinton* which states inter alia, 'It is the duty of the police officer arresting him to take him with reasonable expedition before a P.C., any question of time necessary to investigate the offence, or to obtain evidence upon which to found a charge is quite irrelevant'. This decision which was somewhat dormant for a number of years was re-activated by the decision in *The People v. Ronan Stenson* which stated, 'That the accused was not brought before a P.C., Justice of the District Court or the Special Court as soon as conveniently possible after his arrest' . . . consequently the Court is of the opinion that at the time he is alleged to have made the statement which the prosecution seek to have admitted in evidence against him, the accused was in unlawful custody'.

Whereas heretofore evidence could be given of articles found as a result of a statement (even though such statement was deemed inadmissible) but evidence discovered consequent upon a person not being brought speedily enough to a Court or as a result of a delay in permitting access to a solicitor or as a result of searching the wrong house cannot be given as it is deemed unconstitutional.

In England, the New Judges Rules, as they are called, permit the police to question a suspect, even in custody without caution, until they have evidence for suspecting that he committed an offence. After being cautioned he may be questioned until such time as he is charged.

These Rules are much less restrictive than ours, especially when we take our Constitution and Case Law into consideration yet they are regarded as too restrictive by prominent people such as Sir John Foster Q.C., the chairman of the International Commission of Jurists who said, 'Innocent People must not be convicted, but these rules go far beyond that . . . . they reflect the sporting principles in English law under which the criminal must not only be given a fair run, but an absurdly advantageous system for the guilty, a system which results in more guilty persons remaining unpunished should be changed'.

We would be delighted to be relieved of the interrogation of suspects which is imbued with all sorts of sinister connotations and results in allegations of torture, misbehaviour and other excesses by the Gardai.

I want to make it absolutely clear that I condemn the use of any form of threats, torture or violence by our members and I have continually down the years warned members not to use such tactics, not only because they are legally and morally wrong, but also because every investigator worthy of the name knows that they are totally unproductive and ineffective.

No matter how correct our members' conduct is, the fact that such interrogation must take place in private as pointed out by the Supreme Court of the United States in the Miranda case — 'The principle psychological factor contributing to a successful interrogation is privacy, being alone with the person under interrogation' — exposes our members to allegations of brutality, threats and oppression and leaves them vulnerable to staking their credibility against the natural prejudices of others. If the prosecution makes an allegation they must prove it but if the defence makes allegations the prosecution must disprove them. The investigation of such allegations is subject to the same restrictive rules as any other criminal investigation with the Garda suspect being aware of all the tricks used by the hardened criminal to baulk an investigation but if we do not succeed in getting sufficient evidence we are open to the accusation that dog will not eat dog.

Why continue a system to which all parties are so vulnerable? It is time to give serious consideration to this enormous and profound problem which needs to be fundamentally and informatively re-examined, maybe on the lines of the French Inquisitorial system. Perhaps the system could be altered so as to have a full disclosure of all the facts where the prosecution and the defence would not find themselves engaged in a full confrontation searching for errors and proofs but rather in a genuine effort to establish the truth. If they could combine, albeit by their different ways, to extract the truth at every trial this would ensure that the innocent are always acquitted and the guilty convicted.

It is usually argued that because we have a very sophisticated system of law here based on the adversary system where the State must prove and satisfy the Jury beyond reasonable doubt and the Defence is entitled to make them do that, there is a grave danger that for the purpose of dealing with an urgent pressing problem, if we

upset the complicated balance, by shifting the onus of proof, or by removing the right not to incriminate oneself, that we may upset the entire mechanism of this delicate balance which is favouring the criminal now but which operated in the other direction in the 18th century. No one wants that but, let us look at this delicate balance.

In 1968 the persons responsible for committing 8,877 indictable crimes went 'Scot-Free' without ever reaching a Court hearing. Indeed most of them did not reach the stage of being invited to a Garda Station.

In 1971 the number of crimes for which the culprits went 'Scot'Free' more than doubled to 20,263.

In 1975 it increased to 27,367 and in 1977 it escalated to 38,507 and none of these figures include acquittals in Court, which averaged about 6%. Lest you think, as I'm sure many of you are thinking, that this is due to a deterioration in Garda efficiency I must hasten to point out that last year the Garda detected 25,281 crimes, that is 2,117 more crimes then were committed altogether in 1968.

No, the balance is not delicate, it is critically ill.

Printing or Publication of Newspapers

Mergers, Take-overs and Monopolies (Control) Act 1978

The attention of members is drawn to the fact that by virtue of the Mergers, Take-overs and Monopolies (Newspapers) Order 1979 (Statutory Instrument No. 17 of 1979) the Mergers, Take-overs and Monopolies (Control) Act 1978 applies to any merger or take-over involving enterprises at least one of which is engaged in the *printing or publication* of newspapers regardless of the turnover or gross assets of either of the enterprises concerned.

It should be noted that 'Newspaper' means any periodical consisting substantially of news and comment on current affairs, excluding newspapers intended for circulation only to members of a particular trade, profession or occupation.

The effect of the very wide ranging provisions of the Order is to bring within the ambit of the Mergers Act a merger or take-over involving any enterprises, no matter how small and regardless of turnover or asset thresholds, engaged in the printing or publication of newspapers.

Accordingly under Section 5 of the Act it is necessary to notify the Minister for Industry, Commerce and Energy of any proposed merger or take-over involving an enterprise engaged in the printing or publication of a newspaper. Under Section 3 of the Act the title to any shares or assets concerned in the proposed merger or take-over shall not pass until the Minister has indicated that he does not propose to prohibit it, or that he has made an order prohibiting it except on specified conditions or a period of three months from date of notification has elapsed without him having made an order prohibiting it.

Aspects of The Landlord and Tenant (Amendment) Bill 1979

By John F. Buckley

The Landlord and Tenant (Amendment) Bill 1979 ('the Bill') is, of course, as welcome as it is overdue. The Bill is primarily intended to introduce, with modifications, the major recommendations contained in the Report of the Landlord and Tenant Commission (popularly and properly referred to as 'the Conroy Commission', after its Chairman, Mr. Justice Charles Conroy) published as long ago as 1969 (PR 9685) and the remaining recommendations (not already enacted) contained in the Conroy Commission Report published in 1968 (PRL 59).

Before giving a summary of the principal and welcome changes proposed by the Bill, reference must be made to two proposals which in my view are unwelcome. The first is the proposal to put the State into a better position than a private individual where a commercial relationship of landlord and tenant is involved and the second is the proposal to interfere with the existing machinery of the Landlord and Tenant Act 1931 ('the 1931 Act') in particular cases where that machinery has already commenced to operate.

First, Section 4 of the Bill provides that the Bill is not to apply to the State in its capacity as Lessor. In a number of decisions the Courts have held that where premises were held under lease by the Commissioners of Public Works and were occupied by another Government department or semi-state body, there was no right to a renewal under Part III of the 1931 Act. It would have seemed reasonable, as has been done, to remedy this situation by providing that the Commissioners of Public Works would be entitled to renewals of Leases where premises were actually occupied by Government departments or semi-state bodies with the permission of the Commissioners.

This exclusion of the State as a lessor from the operation of the Bill seems highly unreasonable. It is not easy to see why the State if it chooses to involve itself in the letting of commercial properties in particular should be in any better position than a private individual or limited company engaging in such lettings. The effect of this provision would be to deprive any person currently holding under a lease from his existing inchoate rights under the 1931 Act.

The second unwelcome proposal in my view is that contained in Section 29 of the Bill which has been imported word for word from the Section 39 of the 1931 Act and this must raise the query whether it was automatically imported without considering its effect. The existing Section 39 of the 1931 Act provided that where a tenancy in a tenement terminated *before* the passing of the 1931 Act, but the tenant was still in occupation without a new tenancy, even if a decree in ejectment had been made against the tenant, that tenancy would for the purposes of the 1931 Act be deemed to have terminated immediately after the passing of the 1931 Act and the 1931 Act would apply accordingly. Section 39 of the 1931 Act was introduced at a time when there was no comprehensive scheme of protection for tenants and it was probably intended particularly to protect tenants on whom notices to quit had been served in advance of the passing of the 1931 Act by landlords who were aware of its proposed provisions. No such situation currently exists. The effect of Section 29 of the Bill appears to extend to cases where a tenant whose term of years has expired has served a Notice of Intention to Claim Relief uner the 1931 Act but to whom a new tenancy has not yet been granted. Under Section 29 of the Bill the tenancy which arose on the termination of the old tenancy would be deemed to terminate immediately on the coming into operation of the Bill. The effect of this would be that the tenant would have to serve a new notice of Intention to Claim Relief and of course, his claim would come under the new Act and not under the 1931 Act. This could only have the effect of encouraging landlords to delay concluding a new tenancy with any tenant who has already served a Notice of Intention to Claim Relief in the hope that the provisions of the Bill, when enacted, would be more favourable to landlords.

The Bill also contains provisions in Part III relating to reversionary leases. There appears to be a conflict between Section 31 (4) and Section 34 (2) of the Bill in so far as the commencement of the reversionary term is concerned. If the matter is not dealt with by way of amendment at a later stage in the Bill's passage through the Dáil, presumably the latter Section will be the governing one. A provision has been introduced in Section 35 of the Bill providing for an abatement of the rent reserved by a reversionary lease to take into account improvements that may have been carried out by the lessee and it appears to suggest some confusion of thought on the part of the draftsmen. Such a provision is naturally appropriate to the calculation of the rent of a building but since a rent under a reversionary lease is supposed to relate to the site value it is not clear why improvements made by the lessee should be taken into account.

The following is a summary of the other major changes introduced by the Bill:

(1) The abolition of the artificial 'termination' of a lease, introduced by Section 19 of the 1931 Act, and the placing on the landlord of an obligation to serve a notice of termination on the tenant (section 20).

(2) The abolition of the seven year qualification period under Section 19(a) of the 1931 Act where the expired tenancy was less than year to year. The tenant is to get rights if he has used the premises for the whole of a three year period next before termination for the purpose of carrying on a business (Section 13).

(3) Where a tenant delays in bringing an application to the Circuit Court to have the terms of a new lease determined the landlord may now do this (Section 21 (2)).

(4) There is a provision for application to the Circuit

Court for review of the rent every five years where the terms of the new lease have been fixed by the Court (Section 24).

(5) Where the Circuit Court fixes the term of a new lease the term is to be 35 years unless the tenant opts for a lesser period (Section 23 (2)).

(6) The definition of 'business' has been extended to include activities of providing cultural, charitable, educational, social or sporting services and also the public service (Section 3 (1)).

(7) Where premises are held by one company and used by a subsidiary company for trading the parent (or holding) company is to be deemed to be entitled to protection under the Bill. However, no protection is given where the property is held by one company within a group of companies and the trading is carried on by a collateral company within the group. Protection *is* given where the tenant is an individual and the premises are occupied by a private company formed by the tenant for the purpose of carrying on a business in the premises (Section 5 (3)).

(8) An 'unforeseen temporary break' in the use of the tenement is to be disregarded where an application is made for a new tenancy (Section 13 (2)), but there must be doubts as to whether this can apply where there has been a break in user, possibly on a sale of the premises while the new purchaser gets ready to take up occupation.

(9) In order to remedy a lacuna in what was Part V of the 1931 Act (the Part dealing with the relaxation of covenants in leases) exposed by Mr. Justice Kenny in his judgement in the case of Whelan and others v. Madigan (High Court 18/7/78 - unreported), the definition of 'lease' in Part V of the Bill is extended to include tenancies arising by operation of law or by reference on the expiration of a lease. (Section 64).

(10) The grounds on which the Circuit Court may extend the time for doing any act or thing provided for in the Bill are now spelled out in some detail (Section 78).

(11) A tenant is now given the right to serve a Notice of Intention to Claim Relief once he has qualified so to do (Section 20 (2)) and it appears to be in the contemplation of the draftsman that an application to the Circuit Court might well be made and the terms of the new tenancy determined before the expiry of the old tenancy. It is also provided in this context that where there has been on order for a new tenancy and the existing tenancy is terminated for a reason arising after the grant of a new tenancy which would have disqualified the tenant from getting such a new tenancy then the new tenancy even though ordered, will not come into effect (Section 26).

(12) The rights of any person claiming under the Bill will extend or survive to their successors in title or personal representatives (Section 72).

(13) Where premises provided by a Housing Authority under the Housing Acts are let for the purpose of business they are not to be excluded from the Bill (Section 6).

(14) The 1931 Act provided that a tenant would not be entitled to a new tenancy if his tenancy was terminated by ejectment for non-payment of rent. This has not been extended to cover any form of ejectment based on non-payment of rent even if framed as ejectment for overholding or ejectment on the title (Section 17 (1)).

Correspondence

Office of the Revenue Commissioners,
Dublin Castle,
Dublin 2.

January 17, 1979

J. J. Ivers, Esq.,
Director General,
The Law Society,
Blackhall Place,
Dublin 7.

Dear Mr. Ivers,

I refer to my letter of the 13th September last in which I expressed the hope that the arrear in cases lodged for adjudication for the purposes of Stamp Duties would be disposed of by the end of December. I am glad to say that that objective was achieved. Every effort will be made to ensure that delays will not recur and that if, owing to unforseen circumstances, they do, the relapse will be of minimal duration.

No doubt you will appreciate that, where cases are referred to the Commissioner of Valuation, delay will sometimes be unavoidable particularly where problems of identification arise. Here again it is proposed with the co-operation of the Commissioner, and consistent with his statutory and other obligations, to keep the time lag at the minimum level.

I might add that the submission of unrealistic valuations in voluntary conveyances is often the reason for delays in many cases.

Yours sincerely,

M. K. O'Connor (Commissioner).

Motion for Debate: That Divorce should be available in Ireland

Response read by Seán P. Bedford, K.S.G., at the Society's Annual Conference in Galway, 3-6 May 1979, to the paper of the proposer of the motion, Professor Mary McAleese, the text of which was published in the June issue of **The Gazette.**

Introduction

This issue is about marriage and society. It is about the desirability of, or the necessity for, changing and existing law relating to marriage in order to overcome the hardships arising from what are broadly termed irretrievably broken marriages. It is essential, therefore, to put it in its proper perspective.

The institution of marriage is so fundamental to our society that any serious debate on proposed changes to the law must embrace the very broad context of marriage and society, and the inter-reaction of the one on the other. The debate must include consideration of the moral, historical, legal and social aspects of marriage. The legal aspect will be of particular interest to you, of course. I do not have to remind you of the necessity for stability in an effective legal system, and I accept that, at the same time, change is inevitable if progress is to be made. However, we are not dealing here with the administration and interpretation of existing law. This can safely be left to the judiciary who invariably carry out these responsibilities with deep understanding and sympathy especially in the field of family law. We are considering a proposal for a very drastic change, an abrupt break in continuity with the past, in existing matrimonial law. There is, accordingly, a very heavy responsibility, especially on the legal profession, to ensure that a very objective and reasoned judgment is made on the issue.

Marriage & Society

If we are to discuss marriage and society there has to be a starting point. There has to be some principles and we must define what we mean by marriage and society, and what we understand to be the inter-reaction of the one on the other.

Throughout history marriage has been one of the vital areas of human life which society has felt the necessity to control by law, and for the most part for reasons which have not primarily been religious ones. The relevant law, too, has always reflected fairly accurately the concept of marriage accepted by the society in which that law applied. Unlike, for instance, Great Britain, there has been in this country an unbroken stream of legal thought and expression in this regard. The law here has never seen marriage as other than the voluntary union for life of one man and one woman to the exclusion of all others, as understood in Christian countries. Article 41(2) and (3) of the 1937 Constitution is, in legal terms, simply a continuation of this age-old tradition. Incidentally, the suggestion by some parties that this Constitutional provision is no more than a reflection of the Catholic ethos cannot be sustained by anyone who takes the trouble to study our legal history in this matter. In this connection, it is worth quoting the words of Lord Devlin in a lecture on 'Morals and the Law of Marriage' published some years ago by the Oxford University Press:—

> Society has a right to define the status of marriage in accordance with the ideas of the majority and to refuse to confer it upon those who do not conform. A society which permits no divorce at all may still properly regard itself as a free society. If the general feeling in that society, whether it springs from a religious source or from any other, is that marriage ought to be dissolved only by death, then that is the sort of marriage that society is entitled to have.

Indissolubility of marriage is firmly enshrined in our existing legislation. It has taken root in our society and irrespective of religious tenets it is a fundamental social fact. There is no deprivation of either religious or political liberty in the constitutional provisions which make marriage indissoluble. In any society, everyone must agree to social norms, and, as regards marriage, must accept it as it is understood and operated by law in that society. For example, public policy in Britain demands marriage should be dissoluble; public opinion in this State demands indissolubility. If we are to contemplate a change in this fundamental issue, all of us must be fully aware of what is involved and the consequences likely to stem from a change. Certainly it reinforces the necessity to ensure stability and continuity in the law and to avoid the dangers inherent in any abrupt break in continuity with the past.

We cannot, in contemplating the proposed change in matrimonial law, adopt the extreme positivist theory that one treat law and morality as two separate concerns. One just cannot separate law from moral values. It is not realistic. They both deal with the practice of human living and with the quality of human life, and they must support each other. Law must keep close to the moral sense of the community and the moral sense of the community must inspire law. This is not repressive of minority opinion because in a civilised and Christian community toleration of differing moral viewpoints and practices will be part of that general moral sense. We are speaking, therefore, of the interdependence of law and morality.

Public and Private Morality

It is impossible to delineate with absolute precision the specific fields of public and private morality. Here reasonable men may differ from time to time and culture to culture. Nevertheless, the immediate issue we are dealing with here is clearly legislation on public morality, affecting the common good and this has to be borne in mind in considering changes in such legislation.

Where law has already intervened in the field of public morality, as in the present case, there are sound reasons for resisting the lowering of legal moral standards. A presumption favours retention of an existing law, and the burden of proof falls on those who advocate change, not on those who wish to preserve the status quo. It is also true that a great many people are incapable of making a distinction between morality and the law and what law can or should do about morality, and, since they tend to take their moral standards from the law, a change in legal attitude can imvolve a really fundamental change in their moral attitudes. The law must, of course, in the long run, reflect the beliefs of the citizens, because it ultimately depends on their consent.

The Irish Catholic Bishops' Conference in a statement in June 1976 emphasised that the impact on society should be the key consideration in making or changing laws with a public morality content. But this social dimension of the matter is usually ignored. The question, instead, is debated in the false context as to whether the State should impose Catholic moral teaching on all, irrespective of their beliefs. The most important question to be answered in considering the proposed change in our marriage laws is the social aspect. The institution of marriage and the family with its associated morality are fundamental for community well-being.

The values at stake here are the:—

welfare of children — their maintenance, education, happiness and security;

welfare of the partners — support in adversity, security in old age

Welfare of the community — certainty of parenthood, harmony in sexual relationships concern that the old and weak are not exploited.

Divorce is of its very nature a matter of public morality and is really central to the marriage institution.

Impact of Divorce

We must, therefore, consider scientifically and objectively the impact of divorce on the stability of family life; on the well-being of the children involved; their physical well-being, their emotional well-being, etc. We must consider the demands on State finances to cater for such children; the issue of authority in society and even the relevance of the evident spread of violence in our society.

The social consequences of state divorce are already well charted. Experience teaches us that where state divorce has been introduced it tends to get more and more out of hand and comes to undermine radically the whole meaning of marriage as a community institution. The stability of marriage and family life is weakened inexorably and progressively. It is a fact of experience that divorce legislation becomes even more lax in subsequent acts of legal reform, and that the possibility of divorce and the threat of divorce leads to insecurity in marriage and too little effort at reconciliation. What begins as a remedy for human failure introduces further and further insecurity and lack of confidence so that the whole institution of marriage is placed in jeopardy.

There is no reason to think that a system of civil divorce introduced into Ireland would operate differently from divorce anywhere else, or that it would prove immune to an inexorable widening of divorce grounds. In practice, as our world experiences it, divorce does not operate responsibly. It tends to erode the values of family stability and security for child and partner, and introduces greater evils than those which it sets out to cure.

One can sympathise sincerely with the motives of those who endeavour to introduce divorce legislation. We are all aware, unfortunately, of broken marriages. We tend to hear more and more frequently of irretrievably broken marriages. By far the great majority of marriages do work more or less successfully, and, of course, all marriages, if they are to be reasonably successful, call for a degree of discipline and effort. It is, nevertheless, a fact that the incidence of marital breakdown is on the increase, and it is a problem for the law to know how best to deal with it. No one can pretend to provide the perfect solution. A valid criticism of divorce is that it does not solve the problem of irretrievably broken marriages. While it gives relief, of a kind, to existing ones, there is strong evidence that it tends to create by its very existence even more and more broken marriages as time goes on. Divorce is now proposed as a solution, but to what problem? It appears to be a problem which has not been comprehensively researched or analysed in the first place. It is very probable that, if the causes of marital upsets and breakdowns were analysed on a comprehensive basis, it would be found that very many of the factors leading to broken marriages could be eliminated by reasonable and evolutionary modifications of existing law, and by appropriate administrative action, thus reducing the volume of marriages which could be factually classified as irretrievably broken down.

Alternatives

There are other avenues also which could be explored with a view to relieving many of the real stresses, difficulties and hardships which undoubtedly, in our modern environment, exist in marriages. For example, some of the really hard cases could be met by widening the grounds on which marriages under civil law can be declared null. Many of our matrimonial laws do in fact offer prospects of a solution to a number of the agonising problems of broken marriages e.g. the provision of a system of properly secured settlements, as well as properly secured maintenance for separated wives with their children, an adequate extension of matrimonial relief to cases of desertion and re-definition of matrimonial 'cruelty' on a broad basis for the purpose of divorce a mensa et thoro.

There is, too, a need for careful and thorough pre-marriage preparation and instruction. It is simply not possible, by means of any legal or social institution, to prevent all forms of marital disharmony and breakdown. It is possible, however, by the type of preparation which ought to precede the adoption of any serious vocation in life to avoid a number of difficulties which might otherwise prove disastrous. Everyone acknowledges, too,

that, even with the best preparation, the experience itself of marriage will turn up problems and difficulties which, if they are not to lead to a breakdown, demand early and expert remedial action. Here is the importance of marriage counselling. This work so far has been initiated principally by the Churches, and society cannot remain indifferent to it. The State itself should see in it the fulfilment of a vital social need which demands effective support.

I would like to emphasise the potential of modernising the civil law of nullity for achieving substantial relief for broken marriages. At the outset, let me refer to the clear distinction between divorce and nullity, a distinction which, to judge from some of the comments made, is not widely appreciated. A divorce is a decision by a judge to dissolve a marriage which up to that point is acknowledged to have been a true and valid marriage. A decree of nullity, on the other hand, is a decision by a judge that something which at the outset had all the outward appearances of a true and valid marriage was not in fact a marriage at all for well defined reasons. It is a declaration that a marriage never existed because of some substantial defect in the law. It is evident from the history of marriage law that this is neither a new distinction nor one which has been easily confounded. The annulment doctrine has inherent consistency as well as an age old respectable tradition. It is the corollary of the basic definition of the nature of the marriage institution, of the freedom and capacity of the partners to contract and live marriage, of an established form of marriage ceremony. It declares that a substantial defect in any identified in the law. It is evident from the history of marriage law that this is neither a new distinction nor one which has been easily confounded. The annulment doctrine has inherent consistency as well as an age old respectable tradition. It is the corollary of the basic definition of the nature of the marriage institution, of the freedom and capacity of the partners to contract and live marriage, of an established form of marriage ceremony. It declares that a substantial defect in any of these areas renders marriage null and void ab initio.

There is an urgent need to update and consolidate our marriage laws. The need is obvious when, for example, one tries to find one's way through the labyrinth of legal prescriptions which comprise the formalities for a valid marriage ceremony in our civil law. The modernisation of our civil law of nullity could provide a remedy for many difficult family situations. The Nullity Bill proposed in 1976 by the then Attorney-General, Mr. Declan Costello, was an honest and responsible endeavour to come to terms with aspects of the social problem of marital breakdown. Its intention was clearly to preserve Irish family and social life from the evils which typically attend straightforward divorce legislation. The desirability of some such legislation is now even more pressing, and this is where we should be directing our attention rather than to divorce. Whatever the limitations of an annulment system, they are socially preferable to the consequences of divorce which are so destructive of fundamental family values. A new law of nullity would have the added merit that it would be an evolutionary step, rather than an abrupt break, in our matrimonial laws. In a matter of such fundamental importance to society, what lawyer would lightly set aside the principle of the indissolubility of marriage, which is an obvious and an integral part of our legal heritage for something to which it has always been diametrically opposed?

Code of Family Law

Divorce is not the answer to our problems in the matrimonial field. It is a social evil, a social evil of such grave consequences that no relief of a relatively few genuine hard cases could compensate for it. Furthermore, there are alternatives in keeping with out traditions which could provide positive reliefs to marriage problems and which could and should be pursued. I would ask you to reject decisively this proposal to introduce dovirce into our country.

Having said this, I do not think that we should adopt a passive or negative attitude. It is the responsibility of us all, including the legal profession, to take positive steps to expand and develop our matrimonial laws in order to alleviate the many hardships and injustices relating to family life in our present society. The question of irretrievably broken marriages is but one of many problems. If we do not take the initative to deal with these in a truly Christian fashion, we could at some future date be pressurised into adopting some expedient which would undermine family structures which many other traditions envy.

The whole institution is so fundamental to our society that it is essential to approach desirable and necessary changes in our matrimonial laws in a comprehensive fashion and not on a fragmented basis arising from ephemeral pressures. We require the compilation of a Code of Family Law which would clarify all of the existing matrimonial legislation and consolidate also for instance, the law on illegitimacy, guardianship of infants, adoption, succession, maintenance, nullity, etc. The question of nullity, as we have seen in the most urgent issue and action should not be delayed. The need for expertise and selectivity in administering such a comprehensive code would suggest Family Courts as the most appropriate method of administering it.

There is a very important aspect in all of this. The issues are too important to be left to a bureaucracy or any Government of the day. If legislation relating to public morality should continue to reflect the level of public morality in the society, proposed changes in this legislation should be initiated, researched and proposed by a body whose objectivity would be beyond doubt. This body should be seen to be free of any pressures arising either from political or religious expediency.

In other words a Commission for the review and codification of family law should be established, with a comprehensive membership. It could be headed by an eminent member of the judiciary with representation on it from, for example, denominational churches, social services, the legal and medical professions. Recommendations for evolutionary improvements in our family laws would be far more likely to prove acceptable to our society coming from such a body than from any other source.

(Subheadings did not form part of the address).

Newly-qualified Solicitors presented with their parchments in July 1979

Ashe, Robert, Valle Pacis, Newtownmountkennedy, Co. Wicklow.

Berkery, Patrick, C., 45 Park Road, Stillorgan, Co. Dublin.

Blake, John V. P., Patrick Street, Portumna, Co. Galway.

Brennan, Laurence, 68 Greenlea Road, Terenure, Dublin 6.

Buttimer, Francis, A., Carrigdhoun, Kilrea Park, Magazine Road, Cork.

Byrne, Jane C., 121 Lower Kilmacud Road, Stillorgan, Co. Dublin.

Cahill, James, Rathbawn, Castlebar, Co. Mayo.

Callanan, Patrick, "Prague", Castleknock, Co. Dublin.

Carroll, John P., 295 Sutton Park, Sutton, Dublin 13.

Carter, Martha, Church Street, Kanturk, Cork.

Cawley, Cyril M., Bridge, Ballaghaderreen, Co. Roscommon.

Chesser, Brian J., Dublin Road, Stameen, Drogheda, Co. Louth.

Clune, Paul, Dunville, Douglas, Cork.

Comiskey, Kevin E., Charlestown Road, Tubbercurry, Co. Sligo.

Cotter, Frances, 2 The Crescent, Midleton, Co. Cork.

Creavin, Bernard, 9 Walshes Terrace, Woodquay, Galway.

Crowley, Daniel, Doirinn Aluinn, Farnahoe, Innishannon, Co. Cork.

Cullen, William, 7 Thomas Street, Waterford.

Daly, James, Westport Road, Castlebar, Co. Mayo.

Delahunty, Michael, 25 Cherryfield Road, Walkinstown, Co. Dublin.

Dillon, Nuala, 51 Woodbine Road, Blackrock, Co. Dublin.

Donaghy, Thomas, 36 Fortfield Park, Templeogue, Dublin 6.

Ebrill, Paul, 7 Ardeevin Road, Dalkey, Co. Dublin.

Egan, Colette, 10 Callary Road, Mount Merrion, Co. Dublin.

Eustace, Paul, 16 Argyle Road, Donnybrook, Dublin 4.

Fahy, Declan L., 7 Mitchel House, Appian Way, Donnybrook, Dublin 6.

Fitzpatrick, Shaun I., 30 Rathdown Ave., Terenure, Dublin 6.

Foley, Charles J., Gort, Co. Galway.

Foley, Declan, 89 Parkmore Drive, Terenure, Dublin 6.

Garty, Vincent P., 31 Patrick Street, Mountmellick, Co. Laois.

Gleeson, Irene, 7 Foxrock Ave., Foxrock, Dublin.

Goodbody, Fergus, 1 Wilton Place, Dublin 2.

Hegarty, Nancy, Griannan Park, Buncrana, Co. Donegal.

Johnston, William, 2 Wynnsward Drive, Dublin 14.

Keane, Paul, Blackstown, Mulhuddart, Co. Dublin.

Mr. Daniel Maher, Dublin, and Miss Mary Tobin, Athy, who received their Parchments.

King, Michael, Ballyoughter, Elphin, Co. Roscommon.

Kinsella, Morette, Graymoor, Priest's Road, Tramore, Waterford.

Kirwan, Brian, 17 Gracefield Ave., Artane, Dublin.

Lacy, Nathaniel, Narena, Castleknock Road, Castleknock, Co. Dublin.

Lavery, John L. Wascana, Newtownpark Avenue, Blackrock, Co. Dublin.

McBride, Margaret, Cill-Ulta, Carnagarve, Moville, Co. Donegal.

McCarthy, Fachtna James, Woodfield, Clonakilty, Cork.

McGarry, Edward P., 15 Adlerwood Ave., Springfield, Dublin.

McDermott, Moya, Riverstown, Sligo.

McGuinness, Richard, 13 Dunville Ave., Ranelagh, Dublin.

McMullan, Theresa M., St. Alban's, Albany Ave., Monkstown, Co. Dublin.

Maher, Daniel, 88 Mount Prospect Ave., Clontarf, Dublin 3.

Mannion, James, Grove House, Barrymore, Athlone, Westmeath.

Margetson, Stuart, Rutland, Crosthwaite Park South, Dunlaoghaire, Co. Dublin.

Murphy, Anthony, Woodlands Drive, Stillorgan, Co. Dublin.

Murphy, Frank, 14 Prince Edward Terrace, Blackrock, Dublin.

Murphy, Linda, 21 Whitebeame Ave., Clonskea, Dublin 14.

Newell, Patrick, 16 Angelore St., Clones, Co. Monaghan.

Noonan, Margaret, Hill House, Cashel, Co. Tipperary.

O'Connor, Julie, 9 Eglinton Terrace, Donnybrook, Dublin 4.

O'Connor, Niall, 10 Northland Grove, Glasnevin, Co. Dublin.

O'Donoghue, Ciaran, 50 Mount Prospect Ave., Clontarf, Dublin.

O'Donovan, Denis, Gortnakilla, Kilcrohane, Bantry, Cork.

O'Donovan, Thomas, 4 Grange Road, Baldoyle, Dublin 13.

O'Driscoll, Denis, Gort, Monkstown, Co. Cork.

O'Hagan, Niall, Ravendale, Dundalk, Co. Louth.

O'Hanlon, Cormac, Ardnalee, Bishopstown Park, Model Farm Road, Cork.

O'Mara, Catriona, Barberstown, Clonsilla, Co. Dublin.

O'Rourke, Anthony, 9 Sans Souci Park, Blackrock, Co. Dublin.

O'Sullivan, Maebh, 6 Greenfield Crescent, Donnybrook, Dublin 4.

O'Sullivan, Mary, 15 Duke Street, Athy, Co. Kildare.

O'Sullivan, Maurice, 28 Church Street, Listowel, Co. Kerry.

O'Sullivan, Niall, Dunboy, 4 Bishopscourt Road, Wilton, Cork.

O'Sullivan, Timothy, 2 Maretimo Gardens East, Blackrock, Co. Dublin.

O'Kelly, Donal, 48 Cedarmount Road, Mount Merrion, Co. Dublin.

Parker, Liam, 9 Moore Park, Newbridge, Co. Kildare.

Prendergast, Norman, 421 Blackhorse Ave., Dublin 7.

Punch, Patrick, 10 Victoria Terrace, Limerick.

Scales, Amanda, Headfort, Harbour Crescent, Dalkey, Co. Dublin.

Shiel, Anthony, 26 Monkstown Ave., Blackrock, Co. Dublin.

Mr Ernest J. Margetson presenting his son, Stuart, with his Parchment.

Shiel, John, 65 Newpark, Foxrock, Co. Dublin.

Sisk, Noel, 23 Glentworth Park, Ard Na Greine, Malahide Road, Co. Dublin.

Tansey, David, 29 Woodbine Park, Blackrock, Co. Dublin.

Tobin, Mary, Geraldine House, Athy, Co. Kildare.

Treacy, John, Rectory Road, Enniscorthy, Wexford.

Turley, John, Hazelgrove, Vicarstown, Portlaoise, Co. Laois.

Turley, Patrick, 14 Clarence Mangan Road, Dublin 8.

Tynan, Edward, Lynn Ave., Mullingar, Co. Westmeath.

Walsh, James V., Deerpark, Fermoy, Co. Cork.

Walsh, Mary R., Airmount, New Ross, Co. Wexford.

Walsh, Maurice, 48 Abbeyfield, Killester, Dublin 5.

Walsh, Miriam, 157 Greenlea Road, Terenure, Dublin 6.

Woulfe, Ernest, 4 Woodside Grove, Castlepark, Rathfarnham, Dublin 14.

SALES BY PRIVATE TREATY

Issue of Contracts to Auctioneers

The Conveyancing Committee has been considering the apparently prevalent practice of solicitors sending out to the Auctioneers concerned copies of contracts for sale where premises are for sale by private treaty and not by auction. It appears that Auctioneers frequently seek contracts from the Vendors' solicitors in order to be in a position to have them completed by Purchasers once a sale has been agreed.

The Committee considers that the best interests of the profession are not served by the existence of this practice which does not allow a Purchaser's solicitor a reasonable opportunity of considering the pre-contract title which is being offered before advising his client as to whether he should proceed to complete the contract. There must also be some doubt as to whether a purchaser who executes a contract presented to him by an Auctioneer without having had the opportunity either personally or through a solicitor of inspecting the title documents referred to in the first schedule of the standard form of contract, would be bound by his having executed the contract in such circumstances.

Apprenticeships

Any sole practitioner or partner interested in taking an apprentice (or two apprentices, with the consent of the Education Committee) is asked to communicate immediately with the undersigned. Masters are urgently needed by a number of students who wish to embark on the Professional Course starting on 6th November, 1979.

Nicholas G. Moore,
Education Officer,
Incorporated Law Society of Ireland,
Blackhall Place, Dublin 7.

Seatbelts, crash helmets and contributory negligence

ANTHONY KERR

Hamill v. Oliver [Supreme Court] - unreported. 24/6/1977 (34/1976).

Giving judgment in the Judicial Committee of the Privy Council Viscount Simon had this to say of the defence of contributory negligence: "all that is necessary to establish . . . is to prove to the satisfaction of the jury that the injured party did not, in his own interest, take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that, where a man (sic) is part author of his own injury, he cannot call on the other party to compensate him in full . . ."[1] Doubt has been raised elsewhere[2] about the relationship between the concepts of contributory negligence and mitigation of damages. Specifically whether contributory negligence extends to failure to take precautions which would not have prevented the accident but would have rendered the injuries less severe. Hicks has pointed out that 19th century decisions on contributory negligence show that where the plaintiff's conduct did not contribute to the occurrence of damage, but only increased its extent, it was not contributory negligence.[3] This is understandable in the light of the then existing rule that a plaintiff who was contributorily negligent failed in his action; and that this does not represent the position today is made clear by Section 34 (1) of the Civil Liability Act 1961 which states that 'where . . . it is proved that the *damage* suffered by the plaintiff was caused partly by the negligence or want of care of the plaintiff . . . and partly by the wrong of the defendant, the damages recovered in respect of the said wrong shall be reduced by such amount as the court thinks just and equitable . . .' The distinction drawn above was however raised in argument before the Superme Court in *Hamill v. Oliver,* (Supreme Court, 24 June 1977 — unreported. Ref. 34/1976).

The plaintiff was a passenger in a car which was involved in a collision with the defendant's car. The defendant admitted negligence but sought to have a question on contributory negligence left to the jury on the ground that, at the time of the accident, the plaintiff was not wearing a seat belt, even though one was fitted in the car for use by the front seat passenger. The trial judge refused to allow this in the absence of evidence that the *accident* would not have happened if the plaintiff had been wearing a seat belt. The Supreme Court[4] unanimously overruled him.

The English and Commonwealth courts had already had an opportunity to consider this and a considerable body of case law had developed. The leading case is undoubtedly *Froom v. Butcher*[5] and was approved by the Supreme Court here. A strong court of appeal[6] had held that the question to be asked was, 'what was the cause of damage?' and confirmed both the trial judge's finding that failure to wear a seat belt was contributory negligence and his subsequent decision to reduce the damages by 20%. Prior to *Froom v. Butcher* there had been a number of conflicting first instance decisions.[7]

In both *Hamill* and *Froom* the passenger was in no way to blame for the accident, which was caused solely by the defendant's negligent driving, and it is somewhat understandable that judges are reluctant to allow the defendant to say "well you should have been wearing a seat belt". This is apparent from the judgment of O'Connor J. in *Smith v. Blackburn*[7] where he says "the idea that the insurers of a grossly negligent driver should be relieved in any degree from paying what is proper compensation for injuries is an idea that offends ordinary decency". However the idea that once a defendant has been negligent he is liable automatically to all the damage caused is no longer part of the common law. As Millner points out: "The conclusion that once some carelessness is shown, some behaviour falling below the standard of a reasonable person, then liability follows to whomsoever is injured and in whatsoever respect expresses a penal principle. The enquiry into reasonableness as a basis of liability to make compensation for harm suffered by the particular plaintiff and to this extent it is a genuine enquiry into blameworthiness"[8]

This applies as much as to the plaintiff as it does to the defendant; this is why the important question is what was the cause of the damage, not the accident. This was always the approach in the Admiralty Court which did apportion liability before 1961.[9]

Once this is clear a defendant must then first show that the device, be it a seat belt or a crash helmet,[10] would have prevented or reduced the plaintiff's injuries, and secondly the unreasonableness of the plaintiff's ommission.

The Supreme Court were of the opinion in *Hamill* that the type of accident would not have happened if she had been wearing a seat belt. She had been thrown forward and to the right onto the gear stick and fractured the 5th, 6th and 7th ribs on her right side and suffered a collapse of the lung. They held that a person who travels in the front seat of a car without wearing a seat belt must be held guilty of contributory negligence (subject to excusing circumstances) if the injuries in respect of which he sues were caused wholly or in part as a result of his failure to wear a seat belt. The court felt that the plaintiff could not but have been aware of the advisability of wearing a seat belt and the risks incurred if she failed to do so. But they concluded with this

> "As the accident was caused by the negligent driving of the defendant and as the injuries resulted only to a minor extent by reason of the failure to wear a seat belt the jury should be directed that in the apportionment of degrees of fault between plaintiff and defendant much the greater attribution of fault should be held to fall on the defendant as the person primarily responsible for the plaintiff's injuries".[11]

What excusing circumstances exist? The Supreme Court referred to a number of situations where persons could not be expected to wear seat belts. Firstly where the car was not fitted with them, secondly "in cases of obesity, pregnancy and post operative convalescence the wearing of seat belts may be thought to do more harm than good",[12] in *Froom v. Butcher*, the Court of Appeal were dealing with a plaintiff who claimed that he did not wear a seat belt because he believed that it was more dangerous to wear a seat belt because in an accident he might be trapped in the car. He submitted that it would be a gross invasion of his freedom of choice and that the court would be justified in holding that a decision to act on an opinion firmly and honestly held by many other people was contributory negligence. The trial judge, Nield J., accepted this but the Court of Appeal did not. Lord Denning, M.R., stated "the law [of negligence] eliminates the personal equation, it takes no notice of the views of the particular individual". He added that the law could not admit forgetfulness as an excuse either.

There are clearly strong policy reasons for this. Between 1972 and 1974 the British government spent £2½ million on advertisements advising people to wear seat belts. The Supreme Court also referred to the Irish government's advertising campaign with signs all over the country saying "Live with a safety belt". It is clearly government policy to encourage drivers and passengers to wear seat belts. The Road Traffic (Construction, Equipment and Use of Vehicles) (Amendment) Regulations 1971 (S.I. no. 96 of 1971) makes it obligatory to fit safety belts and anchorage points in cars for use by the driver and front seat passenger farthest out from him. "When the Oireachtas made it compulsory to fit seat belts to a motor car it must have been intended that they should be worn although the wearing of seat belts was not made compolsory" (per Griffin J. in *Hamill*). Subsequent to *Hamill* and since earlier this year the wearing of seat belts and crash-helmets is compulsory (with certain exceptions) on pain of *Criminal* Sanctions.[13]

It is hoped that the decision, if not exactly deterrent value, will encourage their use and "help to educate the public to their effectiveness".[14] Elsewhere the judicial feeling appears to be in accord. In two Canadian decisions failure to use a seat belt was held to be contributory negligence.[15]

(1) Nance v. British Columbia Electric Railway Co. Ltd., [1951] AC 601.
(2) J. C. Hicks. Seat Belts and Crash Helmets, 1974, 37 MLR 308.
(3) Sills v. Brown (1840) 2 C & P 601, 605 (NP)
Walters v. Pfeil [1829] Mood & M 362, 365
Greenland v. Chaplain [1850] Ex 253 where Pollock CB said "I entirely concur with the rest of the Court, that a person who is guilty of negligence and thereby produces injury to another, has no right to say, 'Part of that mischief would not have arisen if you yourself had not been guilty of some negligence'. I think that where the negligence of the party injured did not in any degree contribute to the immediate cause of the accident, such negligence ought not to be set up as an answer to the action . . ."
(4) O'Higgins, T., Henchy and Griffin JJ.
(5) [1976] QB 286
(6) Lord Denning MR: Lawton and Scarman LJJ.
(7) In Toperaff v. Mor [1973] RTR 419,
Pasternak v. Poulton [1973] 1 WLR 476,
Parnell v. Shields [1973] RTR 414,
McGee v. Frances Shaw and Co. Ltd., 1973, RTR 409,
failure to wear a seat belt was held to amount to contributory negligence. But not in
Geier v. Kujawa, [1970] 1 LLR 364,
Challoner V. Williams [1974] RTR 221,
Smith v. Blackburn, [1974] RTR 537.
(8) M. A. Millner. Negligence in Modern Law. (Butterworths 1970) p. 28.
(9) The Margaret, (1881) 6 P.D. 76.
(10) as in O'Connell v. Jackson, [1972] 1 QB 270.
(11) In Froom v. Butcher, damages were reduced 20%,
In Toperaoff v. Mor, damages were reduced 25%,
In Pasternak v. Poulton, damages were reduced 5%,
In Parnell v. Shields, damages were reduced 20%,
In McGee v. Frances Shaw, damages were reduced 33⅓%.
(12) Could it not be held to amount to contributory negligence for people in that condition to travel in the front of a 4-door car?
13. Road Traffic (Construction, Equipment and Use of Vehicles) (Amendment) (No. 2) Regulations 1978. S.I. No. 360 of 1978.
(14) Linden: "Seat Belts and Contributory Negligence" (1971) 49 Can. Bar Rev. 475, 483.
(15) Yvan v. Farstad (1967) 66 DLR (2nd) 295, Jackson v. Miller (1971) 25 DLR (3d) 261.

Council of Europe

Study Visits Abroad

Full particulars and application forms for assistance towards organising or financing study visits in accordance with the Council of Europe Scheme to promote study visits by lawyers from the member states of the Council are now available from the Secretariat of the Department of Justice.

Completed forms should reach the Department by 30th September, 1979.

JUNE COUNCIL MEETING

PROFESSIONAL FEES FOR R.T.A.

Proceedings arising out of road accidents as agreed with the Accident Claims Standing Committee of the Federation of Insurers in Ireland.

1. The following are the minimum proper fees which, in the opinion of the Society, should be accepted by a member of the Society where written instructions are given for:—
   a) Attending a Court of Summary Jurisdiction where a plea of guilty is to be made in proceedings under Section 52 or 53 of the Road Traffic Act 1961 (as amended by Sections 50 and 51 of the Road Traffic Act 1968) £27.00
   b) Attending a Court of Summary Jurisdiction to defend any proceedings under Section 52 of the said Act (as amended) £27.00
   c) Attending a Court of Summary Jurisdiction to defend any proceedings under Section 53 of the Act (as amended) £35.00
   d) Attending to observe such proceedings £27.00
   e) Attending at a Coroner's Inquest £21.00
2. Where a report of the proceedings is required, a minimum fee for the report should be £20.00. A report should contain the names of witnesses, a summary of the evidence of each, decision of the Court and an appreciation of the evidence on the question of civil liability for damages.
3. Where any of the above matters are conducted in a town other than the town where the Solicitor has his principal office, there should be a reasonable addition for time and travelling expenses.
4. The minimum fee does not apply in cases of exceptional difficulty or responsibility. Reasonable additional fees should be paid in such cases.

Postal Strike

The Council unanimously expressed its appreciation of the services given by Pearts, Town Agents, during the strike to the profession at large.

Irish Delegation to the CCBE

Mr. John Moloney was thanked on behalf of the Society on completion of his term as representative of the Society and for the tremendous work he had undertaken during his term of office and particularly in relation to the production of the Lawyers' Identity Card. He is being replaced by Mr. Raymond Monahan.

Seminars

To develop the Society's continuing legal education programme and the organisation of Symposia for the public, the Society has appointed Mr. Patrick Quinn as Training Officer.

JULY COUNCIL MEETING

Solicitors Remuneration

The Council was informed that the Minister for Justice was now prepared to agree to increases in Court Costs as follows:—

Superior Courts — Nil;
Circuit Court — 25%;
District Court — 75%.

Extreme dissatisfaction was expressed at the outcome of the protracted inquiry by Professor Lees and its subsequent consideration over a very long period by the National Prices Commission and the Departments of Industry, Commerce & Energy and Justice. Eventually, the Council approved of its representatives on the District Court Rules Committee agreeing to the proposed increase. It decided to defer a decision in relation to the Circuit Court Costs.

Annual Conference

This will be held from 1st - 4th May, 1980. Mr. Patrick O'Connor, Swinford, Co. Mayo, will be Chairman of the Organising Committee.

Law Clerks Remuneration

Having considered an objection, the Law Clerks Joint Labour Committee has now agreed to the proposed new scales. These will come into force as soon as the Labour Court promulgates the order. The Inspectorate of the Department of Labour will be notified of the revised rates immediately they come into force.

Seminars

A well attended Seminar on Labour law was held in Kilkenny on 9th July for solicitors in the South East. The guest speaker was Mr. Ercus Stewart, B.L.

Upwards of 200 attended a Seminar on Taxation organised by the I.F.A. in Birr. Mr. Donal Binchy was the principal speaker.

The Public Relations Committee propose organising Symposia on Consumer Protection and the Year of the Child in the Autumn.

Education Programme

The first group of apprentices under the new system completed their intensive 6 months course on 27th July and following a short leave break will be commencing practical training in their masters' offices. It is intended that the 18 months training period will be carefully monitored by Professor Woulfe and his staff with a view to improving the course in light of the experience gained.

Michaelmas Law Term Annual Services

All members of the Legal Profession and friends are invited to attend the Michaelmas Law Term Annual Services, on Monday, 1 October, 1979, at:

St. Michan's Church, Halston Street,
Dublin, at 10.00 a.m.

St. Michan's Church, Church Street,
Dublin, at 10.15 a.m.

and afterwards are invited by kind invitation of the Benchers of the Hon. Society in King's Inns to coffee at the Inns at 11.00 a.m.

(Please note that no written individual invitations are being sent to members).

NOTICE
LAW CLERKS
JOINT LABOUR COMMITTEE

The Labour Court, pursuant to Section 43 of the Industrial Relations Act, 1948, has made an Employment Regulation Order dated 9th August, 1979, fixing the statutory minimum rates of remuneration and regulating the conditions of employment of workers in relation to whom the Committee operates. The Order confirms the statutory minimum rates of remuneration and conditions of employment set out in the Notice of Proposals published on 22nd June, 1979.

This notice sets out full details of minimum remuneration and conditions of employment.

As from the date specified in the Order i.e. 13th August, 1979, the workers for whom the Committee operates are legally entitled to rates of remuneration and conditions of employment which are not less favourable to them than those set out in the Order.

James G. McCauley,
The Labour Court,
Davitt House,
Mespil Road,
Dublin 4.

Solicitors Golfing Society Outing

Results of President's Prize at Milltown, 7th June, 1979.

President's (Gerald Hickey's) Prize: Winner - Declan Fallon (14), 40 pts.; Runner-up - Brian Whitaker (3), 37 pts.

Ryan Cup: Winner - Denis McDowell (17), 36 pts. (on 2nd nine); Runner-up: Philip Sheil (15), 36 pts.

Handicap 12 and under: Winner - John Lynch (8), 36 pts.; Runner-up - W. R. White (8), 34 pts. (on 2nd nine).

Over 30 miles: Anthony Ensor (11), 34 pts.

1st Nine: William Harnett (5), 22 pts.
2nd Nine: Sean Kennedy (19), 18 pts.
By Lot: Colm Price (19), 35 pts.

THE NEXT OUTING for Captain's (Frank Byrne's) Prize will take place at Mullingar on Friday, 21st September.

The Register

REGISTRATION OF TITLE ACT, 1964

Issue of New Land Certificate

An application has been received from the registered owners mentioned in the Schedule hereto for the issue of a Land Certificate in substitution for the original Land Certificate issued in respect of the lands specified in the Schedule which original Land Certificate is stated to have been lost or inadvertently destroyed. A new Certificate will be issued unless notification is received in the Registry within twenty-eight days from the date of publication of this notice that the original Certificate is in existence and in the custody of some person other than the registered owner. Any such notification should state the grounds on which the Certificate is being held.

Dated this 30th day of September, 1979.

W. T. Moran (Registrar of Titles)
Central Office, Land Registry, Chancery Street, Dublin 7.

Schedule

(1). Registered Owner: Cormac Cahill; Folio No.: 821 F; Lands: Cloghergoole; Area: 0a. 1r. 1p; County: Cavan.

(2). Registered Owner: Peter Reilly; Folio No.: 17357; Lands: Tullywaltry; Area: 7a. 1r. 10p; County: Cavan.

(3). Registered Owner: Denis O'Keeffe; Folio No.: 24694; Lands: Ummeraboy West (part); Area: 56a. 1r. 20p.; County: Cork.

(4). Registered Owner: Manus Begley; Folio No.: 34968; Lands: (1) Rinmore (one undivided 60th part); (2) Rinmore (one undivided 60th part); (3) Rinmore (one undivided 60th part); (4) Cooladerry (one undivided 60th part); (5) Cooladerry (one undivided 60th part); (6) Magheradrumman (one undivided 60th Part); (7) Kinnalough (one undivided 60th part); (8) Shannaghadas. Area: (1) 268a. 2r. 11p.; (2) 31a. 2r. 6p.; (3) 3a. 2r. 0p.; (4) 115a. 1r. 25p.; (5) 14a. 0r. 17p.; (6) 10a. 1r. 10p.; (7) 0a. 0r. 24p.; (8) 24a. 0r. 10p. County: Donegal.

(5). Registered Owner: Sean and Seamus Kirwan of 3 Parkgate Street, Dublin; Folio No.: 13926; Lands: On North Side of Ballygall Road; Area: 0a. 0r. 25p.; City of Dublin.

(6). Registered Owner: William Dunne; Folio No.: 774 F; Lands: Killinarden; Area: 1a. 0r. 0p.; County: Dublin.

(7). Registered Owner: Thomas Casey; Folio No.: 8703; Lands: (1) Claregalway; (2) Curraghmore; Area: (1) 21a. 0r. 38p.; (2) 3a. 0r. 24p. County:Galway.

(8). Registered Owner: Patrick and Mary Monaghan; Folio No.: 34253; Lands: Carrowbeg South and Thomastown; Area: 7a. 2r. 25p. and 19a. 0r. 21p. County: Galway.

(9). Registered Owner: Frank, otherwise Francis Moore; Folio No.: (a) 11197, Co. Kilkenny; (b) 9684; (c) 34279. Folio 9684 and 34279 are closed and now form the property Nos. 1, 2, 3 and 4 in Folio 39808, Co. Tipperary.; Lands: (a) 1, Urlingford; 2, Urlingford with house and premises thereon in Main Street in the Town of Urlingford; (b) Urard; (c) 1, Killoran; 2, Killoran; 3, Killoran. Area: (1) 30a. 3r. 0p.; (2) 0a. 2r. 8p.; (3) 13a. 2r. 14p.; (4) 18a. 0r. 3p.; (5) 38a. 0r. 22a.; (6) 4a. 1r. 25p. County: (a) Kilkenny, (b) (c) Tipperary.

(10). Registered Owner: James Horan (Junior); Folio No.: 2090; Lands: Mullaghakaraun; Area: 17a. 3r. 0p.; County: Kings.

(11). Registered Owner: Patrick Dolan; Folio No.: 8789; Lands: (1) Drumracken (part), (2) Greaghrevagh More Glebe; Area: (1) 17a. 0r. 2p.; (2) 0r. 0r. 36p. County: Leitrim.

(12). Registered Owner: Patrick McTigue; Folio No.: 26429; Lands: Carrowmore; Area: 0a. 0r. 8p. County: Mayo.

(13). Registered Owner: Annie, otherwise Anne Cremins; Folio No.: 14688. This folio is closed and now forms the property No. 1, comprised in Folio 48358. Lands: Knockfelim; Area: 7a. 2r. 28p. County: Mayo.

(14). Registered Owner: Michael Connaughton; Folio No.: 31149; Lands: (1) Emlaghlasny; (2) Emlaghlasny; Area: (1) 17a. 0r. 34p.; (2) 6a. 0r. 16p.; County: Roscommon.

(15). Registered Owner: Matthew Ryan (otherwise Matthew Ryan (Whip); Folio No.: 26453 (This folio is closed and now forms the property No. 5 in Folio 37813). Lands: Mantlehill Great; Area: 2a. 1r. 8p.; County: Tipperary.

(16). Registered Owner: Most Rev. Thomas Morris, D.D., Archbishop's House, Thurles, Co. Tipperary, Very Rev. Joseph Bergin, of the Presbytery, Thurles, Co. Tipperary, Rev. Michael Russell, D.C.L., of St. Patrick's College, Thurles, Co. Tipperary; Folio No.: 17008; Lands: Stradavoher (part); Area: 0r. 2a. 27p.; County: Tipperary.

(17). Registered Owner: Annie Kearney; Folio No.: 8032; Lands: Kiltankin; Area: 74a. 2r. 20p. County: Tipperary.

(18). Registered Owner: John Kennedy; Folio No.: 376; Lands: Sligaunagh; Area: 31a. 0r. 20p; County: Waterford.

(19). Registered Owner: Patrick Conlan; Folio No.: 1595 (This folio is revised and is now comprised in folio 3498 F); Lands: Derryhasna; Area: 29a. 2r. 38p.; County: Limerick.

(20). Registered Owner: Patrick Dolan; Folio No.: 8789; Lands: (1) Drumrackan (part); (2) Greaghrevagh More Glebe; Area: (1) 17a. 0r. 2p., (2) 0a. 0r. 36p.; County: Leitrim.

(21). Registered Owner: Patrick Noones; Folio No.: 18084; Lands: (1) Coolelan, (2) Coolelan, (3) Coolelan; Area: (1) 13a. 0r. 34p., (2) 48a. 2r. 6p., (3) 3a. 3r. 9p.; County Kildare.

(22). Registered Owner: Michael McLoughlin; Folio No.: 26152; Lands: (1) Deerpark, (2) Deerpark; Area: (1) 13a. 1r. 2p., (2) 5a. 1r. 2p.; County: Roscommon.

(23). Registered Owner: Robert Perkins and Catherine Perkins; Folio No.: 9874; Lands of Santry on South Side of Shanliss Road, known as 184 Shanliss Road; City of Dublin.

(24). Registered Owner: Albert Hayden, 91 Oaklands Avenue, Swords, Co. Dublin; Folio No.: 42667L; Lands: Townland of Towns Park, Barony of Nethercross, situate East of Main Street in the Town of Swords; Area: 0a. 0r. 4p.; County: Dublin.

(25). Registered Owner: Patrick Boylan; Folio No.: 9131F; Lands: Tobergregan with a cottage thereon in the Barony of Balrothery West; County: Dublin.

(26). Registered Owner: John R. Wilkinson and Mary Mullen; Folio No.: 36922L; Lands: Esker North; Area: 0a. 0r. 10p.; County: Dublin.

LOST WILLS

Margaret Feenan, deceased, late of 18 Clonliffe Gardens, Dublin 3. Would any Solicitor or other person having knowledge of a Will executed by the above named deceased who died on the 21st day of December 1978, please communicate with Henry W. McCormick, Solicitor, 37 Molesworth Street, Dublin 2.

Denning Alan Wallis, late of Ballywaltrim, Bray, Co. Wicklow. The above named died on the 29th day of June, 1979. Would any Solicitor holding a Will made by him or having any knowledge that such a Will might have been made, please communicate with the undersigned. McKeever & Son, 5/6, Foster Place, Dublin 2. Telephone 779681.

Miss Maura Hennessy, late of 1 Cul-na-Greine, Clancy Strand in the City of Limerick. Will any person having knowledge of a Will of the above named deceased who died on or about 1st of July, 1979, please communicate with Messrs. Connolly, Sellors, Geraghty & Company, Solicitors of 6 Glentworth Street, Limerick, quoting their reference MEL.

Estate of Mrs. Kate Gilfedder, deceased, late of Loughill, Belleek, Co. Fermanagh. Will anyone having information regarding any Will of the above named deceased who died on 11th April, 1979, please contact: Messrs. Wm. F. Semple & Conpany, Solicitors, of Corrib House, Waterside, Galway, who act on behalf of the next-of-kin of the deceased.

Patrick Flanagan, deceased, late of Burgage, Blessington, Co. Wicklow. Will any person having knowledge of a Will made by the above-named deceased please contact: McGinley Solicitors, 3 Inns Quay, Chancery Place, Dublin 7. Tel. 773682.

NOTICES

Solicitor's Practice for immediate Sale. The Practice is established over 45 years in a South Leinster small town and has potential for expansion. The present practitioner is retiring for health reasons. Enquiries to Robert J. Kidney & Co., Chartered Accountants, 12, College Green, Dublin 2. Telephone 778988.

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Information on the Bank's full range of services is available from any Bank of Ireland Finance Branch or any Bank of Ireland Branch.

Bank of Ireland Finance

Bank of Ireland Finance Head Office, 6 Burlington Road, Dublin 4 (785122) and branches in Dublin at Blackrock (885221), Fairview (331816) and Merrion Square (689555) and throughout Ireland at Athlone (2234), Belfast (27521), Cork (507044), Derry (61424), Dundalk (31131), Galway (65101), Kilkenny (22270), Limerick (47766), Sligo (5207), Tralee (22377) and Waterford (3591).

THE INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

SEPTEMBER 1979 VOL. 73 No. 7

During a recess at "The Child and the Law" seminar organised by the Incorporated Law Society of Ireland at Blackhall Place, Dublin, in September. Mr. Walter Beatty, vice-President, (second from left) who opened the seminar, with (from the left) Mr. J. L. Dundon, past-President, chairman of the morning session; District Justice Eileen Kennedy who spoke on "Administering the Law in the Children's Court"; Ms Colette Delaney, Director of Social Work, Irish Society for the Prevention of Cruelty to Children, who expressed "A Social Worker's Viewpoint" and Dr. Jerry O'Neill, a child psychiatrist from Warrenstown House residential centre. The seminar was well attended by educationalists, child psychologists, social workers from local authorities and voluntary bodies. (see page 143).

INCORPORATED LAW SOCIETY OF IRELAND GAZETTE Vol. 73 No. 7. September 1979.
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Legal Education
The Road Ahead

The text of the 1979 John Mathews Memorial Lecture delivered to members of the Society at Blackhall Place, Dublin.

By K. F. O'Leary

You do me a very great honour indeed, Mr. President, in inviting me to deliver this the first John Mathews Memorial Lecture; an honour enhanced, I feel, by the fact that it is to be delivered on the occasion of the official opening of your great new Law School here in Blackhall Place. I am conscious too of the compliment you pay me in asking me to speak on the very important topic of legal education. Many eminent leaders of our profession have written and spoken about it in recent times; it has been the subject of reports by special Committees, and of papers and discussions at a number of important conferences. It has many facets; it poses a number of very difficult problems, quite a few of which are still not satisfactorily resolved, and some still substantially unexplored. I am not so presumptuous as to think that I can add any new dimension to what has already been said about it; I set myself a much more modest target. And so, what I would like to do tonight is to make a brief survey of the legal educational process in general — at least, as I see it; unfortunately not all see it in quite the same way, and therein lies one of our problems — and then to point up a few of the major issues I think we should be preparing to face in the years immediately ahead.

But here I think I should make a confession, and also give you an assurance. The confession that I have to make is that the subject is one that holds a peculiar fascination and interest for me. The result is that it has been known on some occasions in the past that when speaking of it I have quite forgotten the passing of time. The assurance I give is that that will not happen tonight. Mr. Buckley, good steward and trainer that he is, has given me my riding instructions, and I shall obey them. Besides, I will try to keep in mind the advice that Mr. Disraeli once gave to a young member or Parliament who had just delivered his maiden speech in the House of Commons — a speech, it would seem, that was rather long. Meeting him in the corridor afterwards, Disraeli complimented him on his speech, but went on to remind him that, to be immortal, a speech did not also have to be eternal. And I will see that I do not earn the kind of rebuke that Sir Alexander Cockburn once administered to a young Counsel who, towards the end of a very long address, apologised for taking up so much of His Lordship's time. "Time?", exclaimed the Chief Justice, "Time? Why, you have exhausted time; you are now encroaching on eternity!"

The introduction of Legal Practice Courses, here as in other parts of the world, marks a major achievement in the provision of better legal education, better preparation for the practice of law. Of that I have no doubt. What we have to remember about them though is that they themselves are not the answer to better legal education; they do not have some magic formula of their own that will produce better lawyers. They are a part, one ingredient if you like, of a new concept of legal education. That concept, broadly speaking, sees legal education as being no longer provided by apprenticeship alone, nor by a combination of Law School and apprenticeship, but by a combination of Law School, Legal Practice Course and apprenticeship training. And Legal Practice Course and apprenticeship training. And Legal Practice Courses must be seen in the context of that overall scheme of training. Now it seems to me that if such a scheme of training is to achieve its designed end, the first requirement is that there be a proper definition of roles between the various parts of it, and that there be a harmonious relationship between them. It is about those things also that I want to talk to you tonight.

But to put what I want to say into context, and to point out its importance in the overall scheme of things, I think I must first say something about legal education in general, and particularly about this new concept of it to which I have referred. Not all are yet fully familiar with it, and not all who speak about it do so with the same basic assumptions in mind. It is as well, therefore, that I make my own position clear.

The Lawyer's Identity

The central question around which any system of legal education turns is the definition of the object of that education: the lawyer, the practising lawyer. And so we must first see what we mean by that term. What is a lawyer for the purpose of deciding an appropriate form of education for him?

It has been said that the idea of what a lawyer is is "more Protean and elusive than (that) of the reasonable man", and that apart from a "general agreement that he is a good fellow, (and) not to be confused with the grasping shyster of the world of fiction" he has no other characteristics than can be agreed upon.[1]

There is, of course, a difficulty in finding a satisfactory definition of a lawyer for this, or indeed for any other,

Contributors to this Issue:

Kevin F. O'Leary, Director, Legal Workshop, Australian National University, Canberra.
Gabriel McGann, B.A. Mod. (Dublin), LL.M. (Yale), Barrister-at-law, Legal Assistant to the Law Reform Commission.
Denis Greene, Solicitor, practising in Dulbin.

purpose, and the difficulty springs essentially from the complex nature of the kind of person he has to be and of the work he is called upon to do. And the difficulty is compounded, I fear, by the various ways in which one may look upon a lawyer and his work. Thus one may look upon him in terms of the many and varied roles he often plays in our society — the statesman, the lawgiver, the person of vision, the redoubtable defender of our basic liberties, and so on. In their paper, *Legal Education and Public Policy: Professional Training in the Public Interest*,[2] Professors Laswell and McDougall saw him essentially as a policy maker, a leader in business, in government, in international affairs, and they would direct his education to that end. To one writer at least this would be nothing less than "a thinly disguised elitist programme for the training of national leaders, the sort of thing that might emerge, if, in 1984, Plato's Academy were taken over by M.I.T. with Jeremy Bentham as Director".[3]

And then one may look upon the lawyer in terms of the specific qualities it is said he should have. He should be a person, it may be said, of "intellectual discipline, detachment, breadth of perspective, (with) an interest in human nature and a capacity for independence and critical thought".[4] Bracton, you may recall, thought of lawyers in even more exalted terms. He spoke of them as dedicated to the art of the good and equitable: they are like priests, he said, "for they worship justice and minister sacred rights".

Now no doubt lawyers, or at least some of them, are all those things. But I do not think they are the things to which, primarily, we should have regard for the purpose of defining the lawyer as the object of legal education. I think we must put him on a much more pedestrian level. I think we must look upon him as what, in essence, I believe he is: a person with a specialised knowledge of his subject — the law — and of certain highly specialised skills and techniques that are required for the application of that knlwledge to the business of the law, namely, the adjusting of human and social relationships. The work of a lawyer is, I believe, in large measure that of a highly specialised craftsman.

That is not a view that always and in all places receives ready acceptance, though I suspect that more and more people are coming around to that point of view. Nevertheless, there still seems to be some deep seated reluctance in some places to accept that a lawyer is in some sense a craftsman.[5] Why that should be so, I do not quite know, unless it be traced to some kind of special aura that has grown up, (or been fostered) around a lawyer's work; an aura that deems it anathema to regard it as, in any way, the exercise of a mere craft. But whatever the reason, I think it is time the notion was dispelled. In my view, the mark of a good lawyer is that he is a master not only of his subject, but also of all the craftsmanship that is necessary for its application to a particular legal problem — what Lord Radcliffe once called the "sheer professional expertise" of the practice of law. And may I here recall for you those famous words of the late Judge Learned Hand in his final and moving tribute to those who had taught him law in his youth at Harvard: "From them", he said, "I learnt that it is as craftsmen that we get our satisfactions and our pay". But then, as has been commented, "by Learned Hand's exacting standard, a craftsman in law was a very master and initiate of his art".[6]

Characteristics of the Profession

And I do not fear there is any threat to the higher ideals of the law in looking upon the work of the lawyer in this way; I do not fear that the future will fail to produce lawyers of the calibre of those of the past, or of the present. As craftsmen, they should be better. As leaders, as people of inspired vision, dedicated to the promotion of the common good, I am sure the lawyers of the future will not be found wanting in these qualities, for the fact is that in all ages, and in all countries, the law has never failed to attract to its ranks men and women of the highest intelligence, of the most singular qualities of mind and spirit. "There is so much in the study for the practice of the law", said Lord Radcliffe in a passage to which I have already made a brief reference, "to absorb the man of intellect, so much history, so much argument to engross the reason, so much of sheer professional expertise".[7] The law will not fail to continue to attract people of that kind; its highest ideals and principles, I believe, will be safe in their hands. But the world needs lesser mortals too. In this, at least, all lawyers should be united, that they are competent craftsmen of their art.

The analysis of a lawyer's work that is the most useful for our present purpose, is, I believe, that which appears from the paper written by Brandeis J. of the United States Supreme Court as far back as 1914, which he called "Business - a Profession". And it is pleasing to note that Sir Roger Ormrod himself has recently again drawn attention to it. In that paper Mr. Justice Brandeis set out to identify those characteristics which he thought distinguished a profession from other occupations. If we look at those characteristics, I think they serve very well to identify a lawyer for our purposes — as the object of legal education. He said there were five such characteristics —

1. A highly complex body of knowledge, combined with the ability to use intellectual processes which are, at least to some extent, peculiar to the profession;
2. Certain practical skills and professional techniques without which the knowledge cannot be applied in the practice of the profession;
3. The capacity to use such knowledge from day to day to solve other people's practical problems arising in the sphere of the profession;
4. A particular kind of relationship with clients arising from the complexity of the subject matter which renders the client to a large extent dependant upon the professional man;
5. A self-imposed code of professional ethics intended to regulate this dependant relationship.

It is a person then, who has or should have, those characteristics that I take to be the object of legal education.

Academic and Professional Techniques

If we accept that, the next question we must ask ourselves is: how best may those characteristics be developed in a person; how best may that knowledge, those skills and techniques be imparted.

Now it would be difficult to maintain that there is, or

ever has been, one single, ideal answer to that question. No doubt that kind of knowledge, those kind of skills can be provided in a variety of ways or of combinations of ways. Basically though it does seem that two ingredients are involved: one, an academic ingredient; the other, a professional ingredient. The academic ingredient consists of that highly complex body of knowledge, and of the intellectual processes peculiar to it. The professional ingredient comprises those practical skills and professional techniques necessary to apply that body of knowledge in the resolution of everyday practical legal problems. Now, according to the theory of legal education to which we have subscribed, the academic ingredient is best provided by our Universities, our Law Schools, because they are best equipped to impart that kind of knowledge; the professional ingredient is best provided by a combination of Legal Practice Course training and apprenticeship, because they are best equipped to provide that.

The first question I want to discuss tonight concerns this latter ingredient — the professional ingredient; the part of legal education that is concerned with the practical skills and professional techniques, without which, as Brandeis J. said, the knowledge of the law and the understanding of its intellecutal processes cannot be applied in practice. It is that part of legal practice that partakes of the nature of a craft. It is the ingredient that we expect to be provided by a combination of legal practice course training and apprenticeship training. What role should each play in providing that training?

It seems to me that there are two dimensions to the learning of a craft. The first must be, I think, to acquire an understanding of the instruments, the tools if you like, of the craft, their nature, their purposes, their uses, and their particular application to the raw materials of the craft. And there must also be an understanding of the techniques and skills of the craft itself and of the nature of its raw materials. In the teaching of most, if not all, crafts — from soldiering to plumbing — this part of training is provided in what is now called an "institutional setting", by people who have a specialised knowledge and experience of those particular skills and techniques. And, as part of that training, there is given some practice in the application of those skills, albeit on what might be called "dummy materials", and, of course, in simulated situations. Obviously you do not give a student of surgery a living body to practise on, nor a student of sculpture a flawless piece of marble; nor do you create or wait for a situation of war to give your armed forces some practise in the art of warfare.

That part in the professional's education of a lawyer we have assigned to legal practice courses. It is for that purpose that they exist.

But, as I have said, there are two dimensions of learning a craft: the other is in the application of those techniques and skills to the actual raw materials of the craft. The raw materials of legal practice are people with legal problems, as the raw materials of medical practice are people with medical problems. People with legal problems are the raw materials to which the lawyer has to apply his knowledge and skills in an endeavour to reach a satisfactory adjustment of those problems. To provide the experience and the guidance necessary to achieve that final stage in the learning of a craft is the work of apprenticeship. It is only to a practitioner of a craft that one can look for mastery in the handling of the raw materials of that craft. And to learn that mastery himself the student must have the guidance and direction of a practioner. That is the role of apprenticeship.

Now all this I have expressed in a most general of terms. A major task confronting us in the immediate future is to reduce it to specific, clearly identifiable terms; to define with precision the respective roles of legal practice course training, and of apprenticeship training; and having done that, to work out how best to co-ordinate them.

Roll of Legal Practice Course

Let me first say something about the role of Legal Practice Course training. Educationalists tell us that the way to define the role of a course of instruction is to define its educational objectives. It appears that they may be defined in different ways, but one way of doing so, and it is the way we have adopted up to date, is to define them in what are called "performance terms", that is in terms of what the student ought to be able to do at the end of the course that he could not do at the beginning of it.

Now in professional legal education a distinction has been drawn between what have been called "legal operations" and "legal skills and techniques".[8] The expression "legal operations" is used to describe the jobs that a lawyer is called upon to do; for example, to draw up a will, to obtain a grant of probate or of letters of administration, to convey a piece of property and so on. "Legal techniques and legal skills" describe all those varied skills and techniques that are required for the successful carrying out of those operations; for example, dealing with clients, interviewing them and counselling them, obtaining facts from them, collating and analysing those facts and presenting them, whether to a court or to someone else, in as forceful and telling a way as possible.

Up to date most of us, I think, have defined our objectives in terms of legal operations. Skills and techniques, we say, we deal with "pervasively". But that usually means we do nothing about them at all. At best, we try in some ill-defined way to give the student some general understanding of them. In preparing the curriculum for a course then what we have done is to draw up a list of jobs which we think the students should be able to do at the end of the course and we set out to teach them how to do those jobs.

I, for one, am not at all satisfied that we are right in defining the objectives of Legal Practice Courses in terms of legal operations, leaving skills and teahniques to be dealt with pervasively. I am strongly inclined to the view that we should be defining them in terms of skills and techniques, which may be illustrated through the medium of legal operations, first in simulated situations and with dummy materials, and then later using the raw materials of legal practice. If skills and techniques are not taught in legal practice courses, where will they be taught? Is it good enough to say that the students will pick them up as they go along? Surely that is the very attitude that we are trying to get away from in introducing Legal Practice Courses. I am not at all satisfied that we have drawn the proper distinction between the objectives of Legal Practice Courses and those of apprenticeship. Are not the proper objectives of legal practice courses skills and techniques; those of apprenticeship legal operations?

So far as I know, no thoroughgoing investigation of these questions has yet been made, but I think it must be made if we are to bring coherence and direction to this part, at least, of the legal educational process.

Purpose of Student's Apprenticeship

And then what of the other dimension of the professional ingredient of legal education: apprenticeship? There is a need, as I have said, to define its role and to determine its proper objective. But an equally pressing need, I think, is to being home to all that it still does have a role, and a very important role, in the educational process. This was clearly recognised in the Ormrod Committee Report, but the pity is, I think, that in doing so it used such expressions as "in-training in practice" and "practical experience in a professional setting under supervision". The result has been, I believe, that the profession has come to think that these expressions mean something different from apprenticeship, something that does not involve them in any particular responsibilities.

It sometimes seems to me that the ideal of apprenticeship in the practice of law is one that has now been almost entirely lost. No doubt there are a number of reasons for that. The increasing pressure on practitioners in their daily work leaves them with little, if any, time or inclination for teaching apprentices. The tendency these days to specialise means that many practitioners hesitate, if they have apprentices, to venture teaching them anything beyond the confines of their own specialty. And then too I think there had been a tendency for many years now to leave it all up to the Law Schools anyway; what students don't learn there they can pick up as they go along. Now, I fear, the temptation will be to leave it all up to the Legal Practice Course; to think that students should know it all by the time they have finished there. But, of course, that is not right. Law Schools cannot provide the experience, the teaching and the guidance that belongs to apprenticeship. Neither can Legal Practice Courses. It was never intended that they should. It was never intended that Legal Practice Courses should be a substitute for apprenticeship, but rather should be a complement to it.

I believe therefore we must take some active steps to revive and restore the ideal of apprenticeship in law; to bring home to practitioners the sacred trust they hold to teach those who would undertake the practice of law; to pass on to them something of the wisdom and experience that years of practice have taught them. And when I speak of apprenticeship here I envisage a form of training that involves active participation on the part of the practitioner in accrodance with a predetermined set of objectives.

And then I think we should be exploring ways of integrating Legal Practice Course and apprenticeship training. In particular, I think we should be looking at the possibility of introducing some element of apprenticeship into Legal Practice Courses. Our experience of conducting those courses in Canberra has led us to believe that they suffer from the fact that the course itself is too intensive and that the students are left too long unacquainted with the realities of practice; students should have an earlier opportunity to apply the skills they are taught to the raw materials of practice. Some field work during the course would, we believe, not only reinforce the learning process but also relieve the intensity of the course. For those reasons we hope before long to be able to restructure our course so as to introduce into it some periods when the students will undertake field work in practice. Modern theories of recurrent education would seem to indicate that this concept is sound in principle, and we are hopeful that the difficulties of putting it into operation are not insurmountable.

Components of legal Education

The next matter I want to talk about is a rather broader one; it concerns the integration and co-ordination of the whole legal educational process; the Legal Practice Course/apprenticeship components of it and the Law School/Legal Practice Course components.

For the analysis of these various components of legal education we are, of course, indebted to the Ormrod Committee Report. That report, you will recall, recommended that the training process be planned on a three stage basis —

1. The academic stage;
2. the professional stage, comprising
   (a) institutional training; and
   (b) in-training; and
3. continuing education or training.

There would be few, if any, who would quarrel with that as a correct analysis of the educational process. But there are two things about it that, if not fully understood, are apt to mislead. One I have already referred to: the use of the expressions "in-training" and "practical experience in a professional setting under supervision", to describe what I think amounts to apprenticeship. The other is the reference to planning the educational process in "stages". From the use of the word "stages", there has grown up, I believe, a tendency to think of the process as consisting of a series of unrelated, sequential steps which, if taken one at a time, will produce the desired result. Each stage, it seems to be thought, may be given without any particular regard for the demands of the next stage. Those providing any one stage may, as it were, do their own thing. Now to look at it in that way is, I believe, both wrong and mischievous. The "stages" of which the report speaks, are, of course, steps in the process, but they are also interrelated component parts of that process, and they must be seen as such. They each have their own proper educational objectives, but they must all be co-ordinated towards the objective of the whole exercise. Each stage must have regard for the legitimate demands of the next stage, and each must bear in mind the ultimate goal of the whole process.

What is required here is also a definition of roles; but a definition that recognises the requirements of the other roles in the process, and of the overall process itself.

Objectives of Law School Education

I have already spoken of the need to re-examine the objectives of Legal Practice Course training, to determine the role of apprenticeship training, and to interrelate them so that the one provides a proper foundation for the other. But we must try too to grapple with the very difficult question of determining the objectives of the Law School component — the academic component — of legal

education, and, in particular, to define its relationship to legal practice course training. I readily concede the difficulty — and the genuine difficulty — of that task. To begin with there are the central questions of "core" subjects and the range of elective subjects, about which there is still considerable difference of opinion amongst academic lawyers generally, and often amongst the members of a particular Faculty. And then Law Schools also have to teach law to students who do not propose to practice at all, but who seek legal education for other purposes. That itself presents a problem. The treatment of subjects by law teachers is also a question on which there are still widely differing views and attitudes. Many teach in the way described by Professor Irwin Rutter in his article "A Jurisprudence of Lawyers Operations", where he wrote: ". . . law schools have been concerned substantially with the teaching of *doctrine*, with only incidental attention to professional legal operations. Legal doctrine embodying the *rules* of law, is one essential ingredient of lawyers' operations, but only an ingredient, greatly sterilised by its divorcement from professional operations. That sterilisation", he goes on to comment, "often approaches meaninglessness when the vehicle of doctrine is limited to appellate opinion".[9] The same point has been made by other academic writers. Professor Twining referred to it in his article "Pericles and the Plumber" where he said: "students .... are served appellate judgments as their staple diet;" and "curricula rarely, if ever, descend to even the level of courts of first instance to concern themselves with such matters as thr reasoning processes involved in drawing inferences from evidence or the intellectual processes of sentencing, to take but two examples".[9a] And some Law School teaching took it must be said, does not even descent to the level of doctrines or rules, but seems more akin to a course in or the philosophy of law.

The general aims of University education have been expressed in many ways. Thus Lord Scarman once said that "The job of the University is to fire and discipline the mind of the young"[10] and Lord Radcliffe has said that Law School education should be "something not less than a quickening awareness, continuously related to the Society (the student) lives in and by its own force associating him with changes or developments".[11] Those aims should not be denied, nor should Law School education be put into a straight jacket; and due recognition must be accorded to the legitimate exercise of academic freedom. But the final objective of Law School education must also be kept in mind, as must be the demands of Legal practice course training. I believe it is possible for a just balance to be achieved in all this, that the role of Law School education can be attuned to that of legal practice course training, and that some professional realism can be injected into Law School teaching, without in any way denying or lowering its proper standards. And I am not alone in thinking that. No less an authority than Karl Llewellyn saw no difficulty in wedding the liberal and professional in Law School teaching.

Problems of Integration

Legal Practice Courses inherit the products of our Law Schools, and the problems involved in having to do so can be considerable if Law School education is to any marked extent out of harmony with the objectives of legal practice course training. Let me illustrate by an example. One of the problems associated with legal practice course training is how much substantive law should be taught as part of the course. Now it seems to me that the teaching of substantive law is wholly at variance with the proper objectives of legal practice course training. Nevertheless it does seem to be thought that some substantive law must be taught. Why is that so? I believe the problem is one that has been forced on Legal Practice Courses because of the way in which many Law Schools see their own role. Many see it as being to teach more and more law, and that is evidenced by the number of subjects that are required for the degree and the number of optional subjects offered. The result of this is to create in the minds of students the thought that unless they have been taught a particular area of law they cannot be expected to know it. And many of those who teach in legal practice courses have the same thought, namely that if students are to understand a particular aspect of the law they must be taught it. And this attitude in turn seems to breed in students a resistance to the thought that they ought to be able to discover and unfold for themselves new areas of law by the simple application of the learning and the intellectual processes that they have acquired in Law Schools. For my part, I would prefer to see Law Schools teaching less law, not more law, but teaching it in greater depth, with greater professional content and with greater emphasis on the intellectual processes that are common to all understanding of the law. Given that kind of education, a student should, theoretically at least, be capable of exploring and unfolding new areas of law for himself. Perhaps some help and guidance will be necessary, but this should be minimal.

The problem here then is to define the objectives of Law School training and to integratethem with legal practice course training. It is a part, of integrating the whole legal educational process. It is not good enough any more to say, in general terms, that the Law School will be responsible for one part of legal education, the Legal Practice Course for another part, and the profession at large — which really means no-one at all — for the remainder.That way, I believe, lies fragmentation and en eventual breakdown of the whole process. There is obviously a need here for consultation and co-operation between all those involved in the process, between the Law Schools, the Legal Practice Courses, the Law Society, the Bar too (for I do not think they can afford to remain aloof from all this), and, finally, perhaps, students — I at least have always found their contributions of discussions of this kind helpful and usually sound. Perhaps there is a need for a special body charged with the specific task of co-ordinating the various component parts of legal education, and of being ultimately responsible for its effectiveness. Its task would not be an easy one, but it is a job that I think must be done, if the course of legal education in the future is not to take an altogether different direction.

Now I want to make it clear that nothing I have said here is intended as a criticism of any Law School in particular, and certainly not of any Law School here in Ireland. I am quite unfit to do that, and I have no wish to do so anyway. I offer them only as general comments for which ample support is to be found in the legal literature, and which is supported, to a greater or lesser extent, but my own observation of some Law Schools with which I

have had contact.

Examinations in the Future

The final matter I would like to touch on — though time will permit me to do so only very briefly — is examinations. Most legal practice courses, up to date, have eschewed the idea of examinations, partly, I think, because it has been thought that they were not suitable for testing a person's competence in that kind of course, but partly too because they seemed to smack of qualifying examinations, and, as such, liable to distort the educational process and to inhibit sound education.[11] I concede that there is more than a grain of truth in that latter point of view. But I also think we are gradually being forced to accept that assessment, even continuous assessment, if it can be effectively carried out at all, does not provide any satisfactory criterion for measuring the competence of those who do Legal Practice Courses. Some better form of measuring that (and, of course, of checking against indolence, non-attendance and plain copying from each other) must be devised. I do not envisage it as having anything in common with the usual University-type examinations, but I am sure it is by no means beyond the wit of modern educationists to devise some scheme adequate for the purpose.

In summary then what I see ahead of us is a period devoted to the task of consolidating the very substantial progress that has been made up to date. In particular, I see us having to wrestle with the problem of defining in terms of proper educational objectives the respective roles of the various stages of legal education, the Law School stage, and the apprenticeship stage, and of co-ordinating them so that they become one integrated and effective scheme of legal education. I also see us taking steps to revive and restore the ideal of apprenticeship as a most important part of legal education. And I see us exploring better ways of assessing the competence of those who complete legal practice course training.

But none of this in any way detracts from the very great achievement that the establishment of legal practice courses marks. There has probably been no more significant event in legal education since Blackstone delivered his famous series of lectures at Oxford in the 1750's, which set the scene for the rise of our great modern Law Schools. It is always tempting, though of course dangerous, to try to look into the future. But if I may, I would like to venture the view that, with the passage of time, the role that Legal Practice Courses will play in the education of a lawyer will not diminish, but will grow until they become a central part of that process.

And so, Mr. President, I deem it a privilege to have been invited to be here at the opening of this new Law School. In the accommodation provided (and surely there can be none better anywhere in the world), in your happy choices of a Director of Education and a Director of Training, In the careful and detailed planning that has gone into it, no course could have a more propitious beginning. To all those involved in that planning and preparation, I extend my warmest and sincerest congratulations, and I wish the School all the success I am sure it will have.

FOOTNOTES

1. Twining, Pericles and the Plumber, (1967) 83 L.Q.R. 396 at 397.
2. (1943) 52 Yale L. J. 203.
3. Twining, op. cit. at 413, 414.
4. Ibid. at 398.
5. See Ormrod, "Education and Training for the Professions," *Current Legal Problems* 30 (1975), 15.
6. Radcliffe, The Lawyer and his Times, Opening Address, 150th Anniversary of the Harvard Law School, 1967.
7. Radcliffe, Not in Feather Beds, Rosenthal Lecture, Northwestern University Law School, May, 1960.
8. See Irvin Rutter, "A Jurisprudence of Lawyers' Operations", *Jo. Leg. Ed.* 13 (1961) 301; Gullickson, *Structuring a Legal Practice Course* (1976).
9. Op. Cit.
   (9a) Twining, op. cit., at 399, 400.
10. Structure of Initial Training/Britain, Paper delivered to the Ditchley Conference, 1967.
11. The Lawyer and His Times, Opening Address at 150th Anniversary of the Harvard Law School, 1967.
12. See Ormrod, loc. cit., pp. 17, 19.

The Domestic Violence Jurisdiction of the District Court and the Magistrates' Courts

Gabriel J. McCann, B.A. Mod. (Dublin). LL.M. (Yale), Barrister-at-law

The exclusion of a spouse from occupation of the family home often has very serious consequences. As a result of recent legislation in Ireland and England, District Justices and magistrates are empowered to order the eviction of spouses whose behaviour is intolerable.

The purpose of this article is to examine the relevant legislative provisions governing the jurisdiction of the District Courts and the magistrates' courts.

Prior to the coming into force of the *Domestic Proceedings and Magistrates' Courts Act 1978*, magistrates' Courts in England were virtually powerless to control domestic violence. They had to rely on the non-cohabitation clause (the so-called separation order). The principal deficiency of the cohabitation clause was that although the applicant was no longer bound to cohabit with her husband, it did nothing to remove him from the matrimonial home. He was free to remain in, or to re-enter, the matrimonial home.

Section 16[1] of the 1978 Act abolished the separation order and substituted instead the concepts of the personal protection order and exclusion order.[2]

The English reform bears some similarity to recent changes in Irish law. These changes are contained in section 22 of the *Family Law (Maintenance of Spouses and Children) Act 1976*. The section is based on a recommendation made by the Committee on Court Practice and Procedure, in its 19th Interim Report, entitled *Desertion and Maintenance* (Prl. 3666, Feb. 1974)[3]

The central privision of S.22 is as follows:

> "(1) On application to it by either spouse, the Court may, if it is of opinion that there are reasonable grounds for believing that the safety or welfare of that spouse or of any dependent child of the family requires it, order the other spouse, if he is residing at a place where the applicant spouse or that child resides, to leave that place, and, whether the spouse is or is not residing at that place, prohibit him from entering that place until further order by the Court or until such other time as the Court shall specify".

A number of points may be noted. First, either party to a marriage may, whether or not an application is made for a maintenance order under the Act, apply under the section.[4] This is consistent with the general policy of the Act and of other recent legislation directed at removing legal differences based on sex.[5]

Second, where the safety or welfare of a child requires it a spouse may apply to the court under the section.[6]

Thirdly, "[e]ither spouse may apply at any time to the Court that made it for the discharge of the order under this section . . . ."[7] On each of these three points the English legislation is similar to s.22 of our Act.

Important differences do, however, exist between the two sections. First, provision is made in the English Act for expedited orders.[8]

Subsection (6) of section 16 provides

> "Where on an application for an order under this section the court is satisfied that there is imminent danger of physical injury to the applicant or a child of the family, the court may make [a personal protection order][9] notwithstanding —
>
> (a) that the summons has not been served on the respondent within a reasonable time before the hearing of the application, or
>
> (b) that the summons requires the respondent to appear at some other time or place, . . ."

no equivalent provisions are contained in the Irish Act. It has been remarked that

> "[t]he major disadvantage of [barring order proceedings] lies in the length of time that has to pass before a wife may apply to a court for a barring order . . . ."[10]

A provision similar to S.16(6) of the English Act could with benefit be incorporated into future amending legislation of the 1976 Act. It should, of course, be noted that under existing law, a spouse threatened by imminent violence may always apply to the High Court (or the Circuit Court) for an injunction against the other spouse.

Second, subsection (4) of section 16 provides that "[w]here the court makes an [eviction or exclusion order] the court may, if it thinks fit, make a further order requiring the respondent to permit the applicant to enter and remain in the matrimonial home".

The purpose of this power is to stop a violent spouse who is excluded from the home taking steps, such as interfering with the locks, to prevent the other party who has fled the home from re-entering and occupying it.[11] Protection against this type of conduct is afforded in Irish Law, not under S.22 of the *Family Law (Maintenance of Spouses and Children) Act 1976* but by S.5 of the *Family Home Protection Act 1976*.[12]

Third, an order under section 16 of the 1978 Act "may be made subject to such exceptions or conditions as may be specified in the order . . .[13] The court thus has power to authorise entry into the home for a temporary and limited purpose, such as, the collection and removal of personal belongings or clothes.[14]

No equivalent power is explicitly provided for under the Irish 1976 Act. Finally, the court is making a personal protection order under section 16 "may" include provision that the respondent shall not incite or assist any other person to use, or threaten to use, violence against the person of the applicant, or as the case may be, the child of the family".[15]

Such a power is desirable to cover the kind of case where one spouse instigates a relative or some other person to perpetrate the violence.

The Court is not empowered under the English section to make an order, in default of such an application, that *the applicant* shall not incite or assist any other person to perpetrate violence on the respondent.

There is no equivalent power given to the court by the Irish Act of 1976. It seems likely that such a power — enlarged as to cover violence against the respondent — would be useful and provision should be made in future amending legislation for such a power.

Power to arrest for brach of S.16 order[16]

Section 18 of the 1978 Act goes beyond the recommendations of the English Law Commission by allowing a court to add a power of arrest to a personal protection order and an exclusion order. This follows the experience under the *Domestic Violence and Matrimonial Proceedings Act 1976* which empowered the superior courts in England "to grant injunctions against molestation and to exclude a spouse from the matrimonial home".[17] Indeed section 18 is closely modelled, with some differences, on section 2 of the English Act of 1976.

The Court may only add a power of arrest to an order "if it is satisfied that the respondent has physically injured the applicant or a child of the family and considers that he is likely to do so again".[18]

The attachment of such a power to an order allows a constable to arrest without warrant a person whom he has reasonable cause for suspecting of being in breach of the order.[19] Anyone so arrested must be brought before a justice of the peace within a period of 24 hours.

Breach of a personal protection order or of an exclusion order that does not embody a power of arrest may be dealt with by the issue of a warrant upon the applicant proving on oath that the other party to the marriage has disobeyed the order.[20]

Barring Orders under the Irish Act

Certain criticisms have been levelled at section 22 of the *Family Law (Maintenance of Spouses and Children) Act 1976*, the chief of which relates to the problem of enforcement.[21]

Penalties

Subsection (3) of section 22 provides that

> "without prejudice to the law of contempt of court where a person — (a) contravenes an order under this section, or (b) while an order under this section directed against him is in force, molests or puts in fear his spouse or a dependant child, he shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £200 or, at the discretion of the court, to imprisonment for a term not exceeding six months or to both".

In the District Court the enforcement of a barring order pursuant to subsection (3) is effected by means of a summons.[22] A summons under the District Court [*Family Law (Maintenance of Spouses and children) Act 1967*] Rules 1976 "[must] be served on the person to whom it is directed seven clear days at least before the sitting of the Court to which the summons is returnable".[23]

It is suggested that this rule should be changed so as to allow the Gardai to arrest a delinquent spouse without warrant.[24] It is also suggested that the protected spouse (i.e. the spouse on whose application a barring order is made) should be able to apply *ex parte* to the court to have a warrant issued for the arrest of the delinquent spouse.[25]

While no power of arrest (with or without warrant) is given to the Gardai in section 22 of the 1976 Act the President of the High Court has pointed out that

> "To act in breach of an Order made under Section 22 is a criminal offence and the apprehended or attempted commission of it can therefore be properly restrained".[26]

The learned President also advised that

> "Solicitors should always make sure that where such an Order has been obtained either for a limited time or on a permanent basis, the local Garda Siochana in whose district the house from which the spouse has been excluded [or precluded] is located, should be informed that if an attempt is made to break the order, they can notify the Gardai of that fact".[27]

If adopted, this procedure would certainly be an improvement on the existing position under the 1976 Act.

Physical or Mental Cruelty

The *Family Law (Maintenance of Spouses and Children) Act 1976* refers to the "safety or welfare" of spouses and children without defining the term.[28]

While there are likely to be wide variations of practice among District Justices it would appear that a spouse will generally be liable to the statutory penalties where his conduct would, in proceedings for divorce *a mensa et thoro*, constitute cruelty, physical or mental.[29] It is clear that if a person *molests or puts in fear* his spouse or dependent child while a barring order is in force against him, he will be liable to the penalties set out in subs. (3) of S.22.

In this respect, the Irish Act is superior to the English Act of 1978. While the English *Domestic Violence and Matrimonial Proceedings Act 1976* referred to "molestation"[30] "which has been interpreted to include 'pestering'[31] the 1978 Act uses the more limited expression 'violence'."[32] One commentator points out that "it would thus seem that superior court judges[33] have jurisdiction over mental cruelty whilst magistrates do not".[34] Clearly, this is an anomaly that should be removed.

In conclusion, it must be stated that the recent legislation in this country and in England, by providing a more effective remedy in the District Court and in the magistrates' courts, has improved the lot of the battered spouse and child. Nevertheless, for such jurisdiction to be really effective, it will be necessary to amend the legislation on the lines indicated *supra*.

Footnotes

1. 16.—(1) Either party to a marriage may, whether or not an application is made by that party for an order under section 2 of this Act, apply to a magistrates' court for an order under this section.

   (2) Where on an application for an order under this section the court is satisfied that the respondent has used, or threatened to use, violence against the person of the applicant or a child of the family and that it is necessary for the protection of the applicant or a child

of the family that an order should be made under this subsection, the court may make one or both of the following orders, that is to say —

(a) an order that the respondent shall not use, or threaten to use, violence against the person of the applicant.

(b) an order that the respondent shall not use, or threaten to use, violence against the person of a child of the family.

(3) Where on an application for an order under this section the court is satisfied —

(a) that the respondent has used violence against the person of the applicant or a child of the family, or

(b) that the respondent has threatened to use violence against the person of the applicant or a child of the family and has used violence against some other person, or

(c) that the respondent has in contravention of an order made under subsection (2) above threatened to use violence against the person of the applicant or a child of the family,

and that the applicant or a child of the family is in danger of being physically injured by the respondent (or would be in such danger if the applicant or child were to enter the matrimonial home) the court may make one or both of the following orders, that is to say —

(i) an order requiring the respondent to leave the matrimonial home;

(ii) an order prohibiting the respondent from entering the matrimonial home.

(4) Where the court makes an order under subsection (3) above, the court may, if it thinks fit, make a further order requiring the respondent to permit the applicant to enter and remain in the matrimonial home.

2. Section 16 was yet a further legal response to the widely publicised phenomenon of family violence. Jurisdiction in regard to domestic violence had been conferred on the county courts and the High Court by an earlier Act, the *Domestic Violence and Matrimonial Proceedings Act 1976*.

Both S.10 of the 1976 Act and S.16 of the 1976 Act have been the subject of extensive comment and there is a large literature on each of the Acts. See, e.g., D. Lasck, "Domestic Violence and Rights of Property" (1978) 128 N.L.J. 124-125, 539-540; M. D. A. Freeman, "Violence in the Home — More New Legislation" (1978) N.L.J. 924-925; Margaret Rutheford "Domestic Proceedings in Magistrates' Court — The New Law" (1978) 8 *Family Law* 164-167, 166. Margaret Spencer, "The Domestic Proceedings and Magistrates' Courts Act 1978 - II" (1978) 128 N.L.J. 750-752, Brian Harris "The New Matrimonial Law of Magistrates - II" (1978) 128 N.L.J. 1023-1026; Margaret Rutherford "Domestic Violence and Cohabitees" (1978) 128 N.L.J. 379. On domestic violence generally, see Mary Hayes "Evicting a Spouse from the Matrimonial Home" (1978) 8 Fam. Law 4-7; 41-46; M. L. Parry "Somewhere to Live: Excluding the Husband from Occupation of the Matrimonial Home" (1975) 5 Fam. Law 165.

3. "If the Court finds on the evidence offered that a spouse has reasonable grounds for believing that the safety or welfare of the family requires it, the Court should have power to make an order prohibiting the defaulting spouse from entering or attempting to enter the family home "until further order" and from in any way molesting, annoying or putting in fear the family or any member of it" (para. 46).

4. Section 22(1) of the Irish 1976 Act and Section 16(2) of the 1978 Act.

5. E.g., the *Married Women's Status Act 1957*, the Succession Act 1965, the *Family Home Protection Act 1976*. See also, The Law Reform Commission Working Paper No. 5 - 1978, *The Law Relating to Criminal Conversation and the Enticement and Harbouring of a Spouse* p. 7.

6. Section 22(1) of the 1976 Act and Section 16(2) of the 1978 Act.

7. Section 22(2) of the 1976 Act. Section 17(1) of the 1978 Act provides that "[a] magistrates' court shall, on an application made by either party to the marriagein question, have power by order *to vary or revoke* any order made under section 16 of this Act" (Emphasis supplied).

8. Section 16(6) - (8) and Section 17(3) of the 1978 Act. The expedited order cannot be made in the case of an exclusion order.

9. The personal protection order (the term is not actually used in the statute: it is the English Law Commission's term. The Law Commission Report No. 77 (1976), *Report on Matrimonial Proceedings in Magistrates Courts* (para. 3.13)) may be made where the court is satisfied that the respondent has used or threatened violence against the applicant or a child of the family and it is necessary that an order be made for their protection.

10. A Shatter, *Family Law in the Republic of Ireland*, p. 306.

11. This power was added during the passage of the Bill through Parliament with the agreement of the Law Commission and of the President of the Family Division. *Vide*, B. Harris, "The New Matrimonial Law of Magistrates II", *supra*, fn. 2.

12. Section 5(1) provides as follows:

"where it appears to the court, on an application of a spouse, that the other spouse is engaging in such conduct as may lead to the loss of any interest in the family home or may render it unsuitable for habitation as a family home with the intention of depriving the applicant spouse or a dependent child of the family of his residence in the family home, the court may make such order as it considers proper, directed to the other spouse or to any other person, for the protection of the family home in the interest of the applicant spouse or such child". See, generally, A. Shatter, *supra*, pp. 290-292.

13. Section 16(9) of the 1978 Act.

14. See paras. 3.25(b) and 3.40(d) of the English Law Commission *Report on Matrimonial Proceedings in Magistrates' Courts* Law Com. No. 77 (1976).

15. See S.16(10) of the 1978 Act. This subsection implements the English Law Commission recommendation at para. 3.25(a).

16. 18. - (1) Where a magistrates' court makes an order under section 16 of this Act which provides that the respondent —

(a) shall not use violence against the person of the applicant, or

(b) shall not use violence against a child of the family, or

(c) shall not enter the matrimonial home,

the court may, if it is satisfied that the respondent has physically injured the applicant or a child of the family and considers that he is likely to do so again, attach a power of arrest to the order.

(2) Where by virtue of subsection (1) above a power of arrest is attached to an order, a constable may arrest without warrant a person whom he has reasonable cause for suspecting of being in breach of any such provision of the order as is mentioned in paragraph (a), (b) or (c) of subsection (1) above by reason of that person's use of violence or, as the case may be, his entry into the matrimonial home.

(3) Where a power of arrest is attached to an order under subsection (1) above and the respondent is arrested under subsection (2) above —

(a) he shall be brought before a justice of the peace within a period of 24 hours beginning at the time of his arrest, and

(b) the justice of the peace before whom he is brought may remand him.

In reckoning for the purposes of this subsection any period of 24 hours, no account shall be taken of Christmas Day, Good Friday, or any Sunday.

(4) Where a court has made an order under section 16 of this Act but has not attached to the order a power of arrest under subsection (1) above, then, if at any time the applicant for that order considers that the other party to the marriage in question has disobeyed the order, he may apply for the issue of a warrant for the arrest of that other party to a justice of the peace for the commission area in which either party to the marriage ordinarily resides; but a justice of the peace shall not issue a warrant on such an application unless —

(a) the application is substantiated on oath, and

(b) the justice has reasonable grounds for believing that the other party to the marriage has disobeyed that order.

(5) The magistrates' court before whom any person is brought by virtue of a warrant issued under subsection (4) above may remand him.

17. Section 1(1) of the English *Domestic Violence and Matrimonial Proceedings Act 1976*.

18. Section 18(1)(c) of the 1978 Act.

19. Section 18(2).

20. Sundays, Christmas Day, and Good Friday are excluded when reckoning any period of 24 hours. See S.18(3).

21. A. Shatter, supra, 306 (1977); Coolock Community Law Centre, *Barred*.

22. The *District Court / Family Law (Maintenance of Spouses and Children) Act 1976 / Rules 1976* (S.I. No. 96 of 1976). Rule 39 provides that [a] summons under section 22[3] shall be in accordance with Form 38.

23. *Id.* Rule 41.

24. A. Shatter, *supra*, 307. See generally Coolcok Community Law Centre, *Barred*.

25. *Id.*

26. Mr. Justice Finlay, (1977) 71 *Incorporated Law Society of Ireland Gazette* 176.
27. *Id.*
28. *Vide* S.22(1) and (2) of the 1976 Act.
29. in the context of divorce, a wide variety of different types of conduct, apart from physical violence, has been held to constitute cruelty. These include abuse, threats, nagging, uncontrollable fits of drunkeness and wilful communication of venereal disease. See A. Shatter, *supra*, 119, 120.
30. "Violence is a form of molestation, but molestation may take place without the threat or use of violence and still be serious and inimical to mental and physical health" *per* Viscount Dilhorne in *Davis v. Johnson* [1978] 1 All E.R. 1132, 1144f.
31. *Vide Vaughan v. Vaughan* [1973] 3 All E.R. 449.
32. Section 18(2) and (3) of the 1978 Act.
33. The English superior courts of course are governed by the 1976 Act.
34. M.D.A. Freeman, "Violence in the home - More New Legislation" (1978) 128 N.L.J. 924, 925.

Legal aid in Northern Ireland

New proposals for civil legal aid in Northern Ireland will bring it into line with the recent Legal Aid Act which applies in Great Britain.

An Order in Council follows the substantial increases in the financial limits for legal aid, advice and assistance which came into operation in Northern Ireland earlier this year.

Legal Aid is now available free to those with a disposable income of under £1,500 a year. Those with a disposable income between £1,500 and 3,600 a year pay a contribution on a sliding scale. Under the proposed Order this contribution would be reduced.

The Order would also mean that where a person is getting assisted legal advice from a solicitor, the solicitor may also represent him in court, without a separate application for legal aid being made.

The Order would also enable the Northern Ireland Office, when economic circumstances permit, to provide legal representation before tribunals and statutory inquiries for eligible persons.

The aim is to maintain parity between the legal aid schemes in Northern Ireland and Great Britain and these measures will do that according to Minister of State Michael Alison.

"The proposed Order will not only improve the legal aid scheme and make it more readily available, but should enable us to simplify the assessment procedures, reduce delays and make some saving in administrative costs", he added.

Copies of the Proposal can be obtained from HMSO Chichester Street, Belfast.

Dublin Solicitors Bar Association Notes

Recent Retirements

The Association marked recently the retirement of two notable figures in Dublin legal circles. Indeed, in one case, the person concerned can truthfully be said to have contributed to the Solicitors' profession at a national level!

Mr. Willie O'Reilly retired from his position with the Incorporated Law Society or Ireland, after a career of over 30 years, during which he became a one-man institution in his own right, a friend and helper to the entire profession. Willie O'Reilly's reitrenemt has already been noted in the Gazette, but the Association was concerned to show the appreciation of Dublin Solicitors of the many serives which he rendered to them over the years and marked the event with a small presentation, made on the 6th June 1979.

The other eminent figure to receive a modest memento from the Association is a man whose help will be missed particularly by Dublin Practitioners. Mr. Matthew O'Gradha retired recently from the position of Chief Clerk of the Dublin District Court. Several over-lapping generations of Dublin Solicitors will miss his friendly advice, which has helped many a young Solicitor — and many not-so-young Solicitors — solve their various problems connected with the practice and procedure of the District Court.

The Association extends the best wishes of all its members to Mr. and Mrs. O'Reilly and to Mr. and Mrs. O'Ghrada.

Mrs. O'Reilly, of course, remains a familiar figure in Blackhall Place, where she continues to dispense hospitality to members with all her noted kindness and efficiency.

CONVEYANCING NOTES

Adjudication of Stamp Duty on old Building leases

The Society made representations to the Revenue Commissioners about the difficulties which practitioners faced when they were asked to adjudicate the stamp duty on old building leases. The Revenue Commissioners indicated that it was not possible for them to grant what would amount, in effect, to an amnesty in these cases.

Practitioners will have noticed however, that the Revenue Commissioners do not now appear to raise any queries upon applications to adjudicate building leases dated prior to the 5 April 1963. Full documentation continues to be sought in respect of any leases dated after that date.

Interest on High Court Lodgement Deposits

Following representations to the President of the High Court and discussions between the Society and the Federation of Insurers, C.I.E., Bord Na Mona and E.S.B., agreement has now been secured on a revised procedure to be adopted in relation to Court Orders in respect of payment out of monies lodged in Court by Defendants. The revised procedure will be as follows:—

1. On consent judgements, where there is a lodgement, the interest on lodgement up to the date of making the order should be paid to the Defendant, or his Solicitor, and all interest accruing on the lodgement from the date of the Order until payment out to be paid to the Plaintiff.
2. In cases where an award is made by the Court the same provisions should apply, except if the amount of the award is less than the amount of the lodgement, then the interest from the date of the order payable to the Plaintiff should only be on the *net* amount of the decree or Judgement *after deduction of costs* and the interest on the excess amount of the lodgement *and on the costs* be paid to the Defendant.
4. In infant cases similar provisions would apply on the basis that the operative date for payment of the interest to the infant Plaintiff would be from the date of the ruling of the settlement.

The President has kindly agreed to make his colleagues on the Bench and the relevant Court officials aware of what has been agreed upon.

Practitioners should instruct their Counsel to apply for Orders on these terms.

Solicitors Golfing Society Results

Captain Frank Byrne's Prize at Mullingar

Captain's Prize: William Tormey (17), 36 pts.; Runner-up: Tom Shaw (6), 34 pts on last hole. St. Patrick's Plate: Gordon Ross (10), 35 pts.; Runner-up: Brian O'Brien Kenny (5), 34 pts on 2nd nine. Veterans Cup: Frank Byrne (12), 31 pts; Runner-up: Frank Gleeson (23), 28 pts. 13 and Over: Declan Fallon (13), 31 pts. on 2nd nine; Runner-up: John M. O'Donnell (13), 31 pts. 1st nine: Noel Tanham (9), 19 pts.; 2nd nine: Frank Johnston (11), 16 pts. on last 3. More than 30 miles: Brian Whitaker (2), 33 pts; 3 cards by lot: Cyril Coyle (9), 27 pts.

Solicitors Golfing Society

Officers for 1979/80

President: President Incorporated Law Society.
Captain: Philip Meagher.
Hon. Secretary: Paul W. Keogh.
Hon. Secretary: John R. Lynch.
Committee: Henry N. Robinson, Gerard M. Doyle, David Bell.

The Child and the Law —
The practising lawyer's viewpoint

By Denis Greene, Solicitor

(Paper read to Law Society Seminar on "The Child and the Law" on 15th September 1979).

Though this paper is, for the most part, based on experience of cases in which I have acted as Law Agent to the Eastern Health Board I speak in my personal capacity as a solicitor in private practice and the views expressed are personal ones.

When one hears of violence done to a baby or young child it is easy to react emotionally and feel that the battering parent or other adult responsible should be treated with the utmost rigour that the law allows. Unfortunately, it is a sad feature of these cases that violence in the home can be handed down from generation to generation. One would think that a battered child, when grown up and becoming a parent, would avoid the very thing that caused such suffering to him/her in childhood. Yet experience shows that a battered child can, in adulthood, become a battering parent. One must remember that in these situations we are dealing with problem people and that invoking the sanctions of the criminal law is not the best way of trying to improve the home conditions.

As an indication of the background in many cases of child violence I quote from a book *"Web of Violence"*[1] by J. Renvoize, Ruttledge, 1978, which is a survey of a lot of the research work done by various people and agencies on the subject of violence in the home. The quotation reads:

> "To sum up, most battering parents are inadequate, self-defeating, introverted, immature people who need love but find difficulty in giving it; who want gratification for their impulses *now*, not next week; who often love their children and show great concern for them but whose live is inconsistent and incapable of standing up to the stresses life can inflict; who in a few extreme cases hate their children or are totally incapable of ever rearing a child satisfactorily and from whom the children must be taken. Frequently clinically neurotic or depressed, they usually have a poor sense of identity and very little self-esteem, and live isolated lives (particularly the mother). Although they yearn to behave differently they cannot help inflicting on their own children their own style of upbringing. Finally, frustrated in their life-long desire to be loved and cherished, they nurse bitter anger along with their guilt, hidden from authority with whom they still (how well the lesson has been learned) attempt to appease".

Given that background you will appreciate more fully my point that we are dealing with problem people and that invoking the sanctions of the criminal law is not the best way of dealing with them.

A natural urge to be angry with defaulting parents must not be allowed to displace the necessity to see the parents as human beings who may themselves be problem people in need of help.

The basic Act under which social work agencies and social workers have to act in the interests of children at risk is the Children Act 1908 ("the 1908 Act"). It is primarily concerned with offences against and by children. The social work agencies as we know them today, which are concerned with the social aspects of problem families and the protection of children at risk, did not exist in 1908 so it is not surprising that the steps available under the 1908 Act to protect children are not in accord with modern social work needs. Time does not permit me to analyse the 1908 Act in detail so I will limit myself to touching briefly on three procedures which are the ones most readily available when action is required to protect children.

Procedure under Section 20:

Section 20(1) of the 1908 Act reads:

> "A constable, or any person authorised by a Justice, may take to a place of safety any child or young person in respect of whom an offence under this part of this Act, or any of the offences mentioned in the First Schedule to this Act, has been, or there is reason to believe has been, committed".

The Section then goes on to provide that a child may be detained until he can be brought before a Court of summary jurisdiction. The Section further provides that the Court may make an Order dealing with the child as the circumstances may require until a reasonable time has elapsed for a charge to be made against the person committing the offence and, if a charge is brought, until it has been determined by the conviction or discharge of the person. If the charge is dismissed or is dropped the Order affecting the child then lapses. In brief, therefore, this Section is really only providing for the holding of a child while consideration is given to the bringing of a criminal charge against a person committing an offence against the child and, if a charge is brought, until it is disposed of.

Section 20 of the 1908 Act is of value in providing a means for securing the immediate temporary protection of a child against whom an offence has been committed. But the Section does contemplate that there may or will be a criminal prosecution in respect of the offence. If a parent or guardian is the party who has committed the offence a criminal prosecution may only add to the difficulty of trying to deal with a disturbed home background out of which the offence has arisen so Section 20 provides a remedy of only limited value.

Procedure under Section 24

The next relevant procedure is under Section 24 of the

1908 Act. That Section empowers a District Justice to issue a warrant for the removal of a child to a place of safety where there is reason to suspect that the child has been assaulted, ill-treated or neglected in a manner likely to cause him/her unnecessary suffering or to be injurious to his/her health. You will note that at this stage it is only necessary for the District Justice to be satisfied that there is reason to suspect there was or is assault, ill-treatment or neglect. The warrant may be applied for on an 'ex parte' basis. To support an application for it, a social worker or other person swears an information setting out the facts which justify such belief.

If a child is removed to a place of safety pursuant to such a warrant a summons must then immediately be issued seeking what is known as a Fit Person Order. On the hearing of that summons it must be proved that the child was assaulted, ill-treated or neglected in a manner causing unnecessary suffering or likely to be injurious to health. These are positive terms and the evidence must be sufficient to establish the assault, ill-treatment or neglect. When the 1908 Act was drafted the terms were almost certainly contemplating physical acts towards the child and therefore they do not really allow for a case in which a child may be emotionally rather than physically ill-treated. Fortunately, District Justices accept that a child can be severely damaged by emotional ill-treatment but the proof of this is obviously more difficult than proof of physical ill-treatment, of which there may be evidence of bruising or other more serious injury to the child.

Procedure under Section 58:

The third procedure I propose mentioning is available under Section 58 of the 1908 Act. It provides a number of grounds on which a Fit Person Order could also be made. The ground I customarily use is that the child has been found having a parent or guardian not exercising proper guardianship. That is a more general ground and more apt to cover cases in which children are being ill-treated in a way which would not come within the narrower definitions of assault, ill-treatment or neglect which are the grounds referred to in Section 24.

The Section 24 grounds normally involve wilful acts on the part of the parents or guardians. The Section 58 ground would not necessarily require this. For example, I had the case of a mother who was mentally under-developed. Though she was over 20 years of age she herself only had a mental development of a child about half her actual age. Within her limitations she looked after her child as best she could. In practice she was like a young child playing with a doll. When she was in the mood she looked after the baby reasonably well. But when her interest flagged, as it frequently did, the child was left aside for long periods, unattended to, unfed and even left out in the rain. In that case the Court upheld my contention that the mother was not exercising proper guardianship even though she could not be culpably held in default because of her own under-developed mental state.

Getting a Child to Court:

Under both Sections 24 and 58 it is legally necessary to have the child present in Court when a Fit Person Order is being applied for. That poses a problem when the child is still in the parents' custody and they are uncooperative. The section 24 procedure for applying for a warrant to remove a child to a place of safety has then to be invoked to try to get the child away from the parents and into third party care pending the child being brought before the Court. But that has the limiting effect that the application must be sought on the specific ground of assault, ill-treatment or neglect. If the child has already come into the actual custody of a third party (for example, if detained in hospital as a result of injury or has been voluntarily surrendered into care) the more flexible Section 58 procedure can be followed.

Evidence required to prove ill-treatment of a Child

While it is relatively easy to get a warrant under Section 24 to remove a child to a place of safety, the hearing of an application for a Fit Person Order (whether under Section 24 or Section 58) must be backed up by positive evidence conforming to the Rules of Evidence. This can pose a serious problem. The ill-treatment of a child is seldom done in front of witnesses so there is an obvious difficulty of getting direct evidence. Information may be available from neighbours which clearly points to the fact that a child is being ill-treated but that is hearsay. Neighbours will talk to social workers in the interests of the child but they usually do not want to be involved beyond that. One could compel their attendance at Court through witness summonses but there is the risk that they will then "clam up", to use a colloquialism, and their evidence may not be sufficient.

Public Health Nurses normally get ready access to most households in the course of their normal community care duties. They have a better opportunity than most people of seeing signs within the home indicating a child is being ill-treated. However, even if they are in a position to furnish evidence usable in Court it is preferred to avoid calling them as witnesses. If they are seen to appear as witnesses in support of applications to have children taken away from their parents they will be regarded as part of "the Establishment" and there would be a high risk that doors would be closed against them in the future.

Difficulty can arise even where there is medical evidence of physical injury to a child and the parents themselves have brought the child to hospital for medical attention. The parents may offer a plausible explanation claiming the injuries were caused in some accidental way. The social workers and the doctor concerned in the case may be satisfied in their own minds (having regard to the surrounding circumstances of the case) that the injuries were inflicted on the child. Nevertheless, when he comes to give objective evidence, the doctor may have to acknowledge that genuine accidental cause cannot be completely ruled out. The court then has to weigh up all the evidence and decide whether or not to accept the parents' explanation of accidental cause.

There is also a problem that one cannot ask the Court to anticipate something even though there may be a definite risk that it is going to happen. Let me explain this point by a practical example. I had a case in which I was consulted one September about a child who had been assaulted by his parents. The assaults had occurred in the early part of the year and positive evidence of injury had been found by a doctor in February. An arrangement was then made that the child would be voluntarily placed in the care of grandparents with whom he remained until the time I was consulted.

I was consulted because the parents were then insisting on getting the child back. In view of the past history the social workers were satisfied that the earlier assaults had arisen out of certain inadequacies in the parents. As these inadequacies had not really changed, the social workers were very apprehensive that the child would be assaulted again if returned to the parents. The question was, what could be done to prevent that? I had to advise that I did not think that we could move in September to get a Fit Person Order on the basis of what happened over six months previously. Had action been taken the previous February a Fit Person Order would certainly have been granted. Instead, the parents had voluntarily agreed to place the child in the care of grandparents. Theoretically speaking, the parents may have come to realise the error of their ways so there was no positive proof they would repeat the previous ill-treatment of the child. There was really no option, therefore, but to let the child go back home to the parents on the basis that the home would be kept under the closest possible supervision. We would have to await a further act of ill-treatment (if it was to happen) to provide fresh evidence on which a Fit Person Order could be sought. The child was allowed home and was assaulted once again. Needless to say, we moved in very fast then and got an Order committing the child into the care of the Health Board.

Legal challenges to Fit Person Orders:

In child care cases one has to bear in mind also matters of natural justice and constitutional rights which are so readily invoked these days. A few Fit Person Orders that were obtained in cases with which I dealt were subsequently challenged in the High Court by the parents. I am happy to say that the lawyers acting for the parents were very practical in their attitude. While in duty bound to do what they could on the instructions from their clients, the parents, they were conscious of the potential risk to the children if the High Court proceedings were successful and the children were discharged back to the parents. In those cases the High Court proceedings were compromised without going to final judgment in a way that provided reasonable safeguards for the children.

Duration of Fit Person Orders:

Even though a Fit Person Order is obtained it is not the intention in the cases that I deal with that the child should be kept away indefinitely from the parents. A Fit Person Order is normally granted until the child attains 16 years of age unless the Order is sooner varied or revoked. These qualifying words are deliberately put into the Order. Notwithstanding the making of the Order there is ongoing social work with the parents in the hope that the home conditions can be improved and the child eventually returned to the parents. If that can be achieved then the Fit Person Order can be varied or revoked.

Effect of Fit Person Orders:

The effect of a Fit Person Order is to vest parental custody and control of the child in the fit person. When a health board is named as the fit person, it is free to make such arrangement it considers suitable for the care and maintenance of the child. But the parents are encouraged to maintain contact with the child and all efforts are made to build up a better bond between them. If the child can eventually be returned home, the health board is quite willing to support an application to the Court for a revocation of the Fit Person Order.

Extent of Problem of Children at Risk

I have no statistics of the frequency with which cases involving children at risk occur. If the number of cases I have had to deal with is a reliable indicator, there appears to be a considerable increase in such cases. However, I cannot say whether this is a real increase in absolute terms or whether the frequency of occurrence is no greater than in past years. But more cases are being discovered because of the larger number of social workers now working in the community. Possibly both factors are involved.

It is horrifying to find at times a case in which it turns out that the ill-treatment of a child has been going on over a period. For example, it has happened on occasions that when a child is being X-rayed on examination for one injury that has come to light, evidence is found that bones or ribs had been broken in earlier incidents and left to heal themselves because the child had not received earlier medical attention.

We have all read news reports over the last few years about cases in England in which some children were so badly ill-treated that they eventually died. A sad feature of some of those cases was the people knew what was going on but for one reason or another did not voice their concern to anyone in authority. A reluctance to get involved is a commonplace reaction to unpleasant events. But what a price is paid if it results in the suffering and possible death of a child.

Some of the more notorious ill-treatment and fatal injury cases which have hit the headlines in the last few years have been followed by probing question as to what the child care agencies and social workers were doing. We should not be too quick to jump in with criticism, as people often do. The agencies and social workers work under difficulty. They may be handicapped by not having important information which neighbours and others keep to themselves. The difficulties in the home which put a child at risk in the first instance may be considerable and take a long time to deal with. It is not always easy to decide whether the best interests of the child would be served by keeping him in continuing care or by returning him to the family home in the course of the social work programme.

Conclusion

In concluding my paper I mention two points that I would particularly like to see dealt with.

Firstly, I would like to see a greater public awareness of the fact that there are many children at risk within our midst. Traditionally the word "Informer" has been a dirty one on the Irish scene and it deters many people from reporting things when it could be done in the public interest.

I would hope that when young innocent children are at risk people can overcome their scruples and report cases in which there is serious reason to believe a child may be at risk. Some people will be in a particularly advantageous position to help in this respect. For example, a teacher may observe signs of bruising on a child that might not readily be explained away by a claim of a fall or other genuine accidental cause. Again, a child may appear very withdrawn in school so that abnormal

emotional tensions in the home may reasonably be suspected. Doctors finding marks of injury on children or signs of emotional withdrawal should be alert to the possibility of serious difficulties in the home background. Again, neighbours noticing children being left unkept and unattended to and roaming around the streets might reasonably fear that things are not right within the home. In cases like that it may not simply be the children alone that need attention. The family as a group may be in difficulties and in urgent need of help.

Secondly, I would like to see the present Children Acts updated as soon as possible to facilitate action being taken to protect children at risk. In particular I would like the welfare of children to be dealt with by reference to the social problems involved rather than by reference to offences against or by children in the 1908 Act. A special Task Force is at present working on a review of the Children Acts. It is important that the procedures for taking children into immediate protective care pending their being brought before the Court should be simplified to permit instant removal of a child as a temporary measure from the home in which he is believed to be at immediate risk.

I would also like to see the grounds upon which Fit Person Orders may be granted re-defined in a simpler way so that a child at risk may be more readily protected. I realise one must move with caution when considering statutory interference with parental rights which are so highly regarded in our Irish way of life and which, indeed, are specially recognised in our Constitution. But parents have obligations as well as rights. Where there is a serious breakdown in the discharge of these obligations, and the cases I have been talking about in this paper flow from such a breakdown, we should be quick to recognise that the children have rights also and we should be just as zealous, if not more zealous, in defending their rights when the denial of them leads to the children being physically or emotionally damaged.

The Register

REGISTRATION OF TITLE ACT, 1964

Issue of New Land Certificate

An application has been received from the registered owners mentioned in the Schedule hereto for the issue of a Land Certificate in substitution for the original Land Certificate issued in respect of the lands specified in the Schedule which original Land Certificate is stated to have been lost or inadvertently destroyed. A new Certificate will be issued unless notification is received in the Registry within twenty-eight days from the date of publication of this notice that the original Certificate is in existence and in the custody of some person other than the registered owner. Any such notification should state the grounds on which the Certificate is being held.

Dated this 1st day of November, 1979.

W. T. Moran (Registrar of Titles)
Central Office, Land Registry, Chancery Street, Dublin 7.

Schedule

1. Registered Owner; John Gallagher; Folio No. 1675F; Lands: Killynure or Wilson's Fort; Area: 0.463 acres; County: Donegal.
2. Registered Owner; P. J. O'Hea & Company Ltd; Folio No. 50377; Lands: Ballydahin; Area: 0a. 2r. 12p.; County: Cork.
3. Registered Owner; Timothy O'Riordan; Folio No. 14889; Lands: Island; Area: 2a. 2r. 32p.; County: Cork.
4. Registered Owner; Isaich John Meredith Mackarel; Folio No. 337; Lands: Corback; Area: 30a. 0r. 10p.; County: Monaghan.
5. Registered Owner; James Bourke; Folio No. 14347; Area: Carrigatogher (Ryan) part; Area: 3a. 0r. 0p.; County: Tipperary.
6. Registered Owner; Patrick A. Cramer and Catherine Cramer; Folio No. 16595L; Lands: Lands of 52 Seaview Avenue; Area: —— County: City of Dublin.
7. Registered Owner; Michael McGlynn; Folio No. 4915; Lands: Nevinstown East; Area: 21a. 0r. 37p.; County: Dublin.
8. Registered Owner; Michael Finn O'Driscoll; Folio No. 31397; Lands: Gortlandroe; Area: 1a. 3r. 25p.; County: Tipperary.
9. Registered Owner; John Scott; Folio No. 35936L; Lands: Knocklyon; Area: 0a. 0r. 16p.; County: Dublin.
10. Registered Owner; Dermot Nolan; Folio No. 26075L; Lands: Yellow Walls on the east side of Chalfont Avenue; Area: 0a. 0r. 9p.; County: Dublin.
11. Registered Owner; John Ruigrok; Folio No. 6214; Lands: Rush; Area: 0a. 1r. 21p.; County: Dublin.
12. Registered Owner; Glenealy Estates Ltd., of Harcourt House, Harcourt Street, Dublin 2; Folio No. 6097; Lands: Ballinacooley; Area: 44a. 1r. 5p.; County: Wicklow.
13. Registered Owner; John Lally; Folio No. 45438; Lands: (1) Keeloges West, (2) Keeloges West, (3) Keeloges West; Area: (1) 1)a. 0r. 10p., (2) 4a. 3r. 6p., (3) 10a. 3r. 21p.; County: Galway.
14. Registered Owner; Nora Keelan; Folio No. 21L; Lands: Part of the Land of Bray with the dwellinghouse and premises thereon situate on the South side of Herbert Road in the town of Bray Barony of Rathdown measuring in front to said road 31 feet, in the rere 30 feet 6 inches and in depth from front to rere 121 feet.; County: Wicklow.
15. Registered Owner; Kenneth O'Farrell; Folio No. 1691F; Lands: Annacrivey; Area: 5a. 2r. 34p.; County: Wicklow.
16. Registered Owner; Elizabeth McConnon (McCaul); Folio No. 5145; Lands: Corduff; Area: 15a. 3r. 28p; County: Monaghan.
17. Registered Owner; George David Malone & Loretta Scott; Folio No. 4360F; Lands: Townparks in the Barony of Balrothery East; Area: ——; County: Dublin.
18. Registered Owner; William Joseph Carey; Folio No. 18889 (This folio is closed and now forms the property Nos. 1, 2 and 3 comprised in folio No. 1228F, County Monaghan); Lands: Mullanary Glebe; Area: (1) 4a. 0r. 27p, (2) 12a. 0r. 16p., (3) 0a. 0r. 18p.; County: Monaghan.
19. Registered Owner; Joseph Higgins; Folio No. 6544 (This folio is closed and now forms the property No. 1 comprised in Folio 23336); Lands: Tintagh; Area: 38a. 1r. 0p.; County: Roscommon.
20. Registered Owner; Michael Gilligan; Folio No. 562F; Lands: Lugatemple; Area: 0a. 1r. 3p.; County: Mayo.
21. Registered Owner; Rose Leavey; Folio No. 10312; Lands: Soho; Area: 83a. 0r. 11p.; County: Westmeath.
22. Registered Owner; Hannah Madden; Folio No. 15856; Lands: Bridgetown Lower; Area: 116a. 2r. 16p.; County: Cork.
23. Registered Owner; Michael Francis Leavey; Folio No. 8967; Lands: Lackan (Part); Area: 72a. 2r. 4p.; County: Westmeath.
24. Registered Owner; John J. Flannery; Folio No. 23845; Lands: Milltown; Area: 0a. 2r. 4p.; County: Meath.
25. Registered Owner; Patrick J. Loughnane & James F. Loughnane; Folio No. 38 (Revised); Lands: Falleen; Area: 57a. 2r. 10p.; County: Tipperary.

LOST WILLS

Mr. Daniel Cottor, late of Caragg, Kilkisheen, Co. Clare, died in or around the year 1967. Would any Solicitor having a Will of the above deceased in his possession or handling the administration of the estate of the deceased please contact the undersigned as soon as possible. O'Donnell Dundon & Co., Solicitors, 101, O'Connell Street, Limerick.

John Andrews, deceased, late of Four Knocks, Stamullen, Co. Meath, Farmer, died on the 8th of April, 1978. Will any person knowing the whereabouts of a Will of the above-named deceased please get in touch with Messrs. Smyth & Son, Solicitors, 30 Magdalen Street, Drogheda, Co. Louth.

Mary Delia McCormick, deceased, late of 27 St. Anne's Road, Drumcondra, Dublin. Will any person having knowledge or holding an Original Will in respect of the above-named deceased, please contact Moran & Ryan, Solicitors, 35/36, Arran Quay, Dublin 7. Tel. 725622.

Humphrey Fleming, deceased, late of Barna, Scartaglin, Killarney, Co. Kerry. Would any Solicitor or other person having knowledge of a Will executed by the above named deceased who doed on the 17th day of May 1979 please communicate with O'Neill & Twomey, Solicitors, Castleisland, Co. Kerry.

William Greene, deceased, late of 81 Seville Place in the City of Dublin. Would any Solicitor or other person having knowledge of a Will executed by the above named deceased who died on the 21st day of September, 1979 please communicate with Peter J. Flynn & Co., Solicitors, D'Olier Street, Dublin 2. Tel. 776149.

Mary Josephine O'Connolly, late of "Glenasmole", Dublin Road, Blackrock, Dundalk, Co. Louth, widow, deceased. Will any person having a Will or knowledge of a Will of the above named deceased who died on the 14th day of April, 1979, please contact Messrs. Poe Kiely Hogan, Solicitors, 21 Patrick Street, Kilkenny.

NOTICES

Lost Deed: Lease dated 14th of November, 1973, Educational Building Society, first part, Charles Vaughan, second part, John Fitzgerald and Sheila Fitzgerald, third part, despatched through usual channels during postal dispute to our Town Agents, Pearts, has been misplaced and may have been (mis) delivered to an incorrect address. Would any person having information about such Lease immediately contact Michael Pattwell, Solicitor, 14 Pearse Street, Clonakilty, Co. Cork.

Legal Secretary (experienced) will type at home. Tel. 333555 (Clontarf).

Our Principles, a small but well established city firm of Solicitors are considering their position with a view to taking on Partners or amalgamation. They therefore invite discussion with Solicitors who might be interested in such a project and who have an existing practice or who can provide expertise, skill, capital or premises or can otherwise add to an existing practice. If interested please write in strict confidence to the undersigned: John McElhinny & Co., Accountants, 7, Seville Place, Dublin 1.

Solicitor, (graduate), newly qualified, good working apprenticeship, seeks position — preferably Munster, anything considered. Reply to: W. Fitzgibbon, King's Square, Mitchelstown, Co. Cork. Tel. 025-24253.

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THE INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

OCTOBER 1979 VOL. 73 NO. 8

Annual Report of the Council 1978-79

THE PRESIDENT'S REPORT

1.1 To an increasing extent, the President is required to represent the Society in the international area. This year, it was my privilege to attend the Annual Conferences of the English, Scottish and Northern Ireland Law Societies, and the formal opening of the Legal Year in London. I was also privileged to represent the Society for the first time ever, at the Annual Conference of the American Bar Association, held in Dallas last August. The Society was represented at the opening of the French Legal Year last January, by Mr. Walter Beatty, Senior Vice-President, who has also represented the Society at International Bar Association meetings during the year. To those who would question the usefulness of such activities, might I say that the opportunities afforded by such contacts enable the Society to keep abreast in a detailed way, with developments in, and problems of, legal services in other jurisdictions.

1.2 At the outset of my year in office, I made it clear that my particular concern would be to ensure that all practising solicitors were properly registered, and that their accounts were adequately certified. This function of the Society, imposed upon it by statute, is essential for the protection of the public and the profession. I am pleased now to report that the situation is much improved, and that virtually all firms have accountants' certificates to a current date. Those still in arrears are being pursued vigorously. A regrettable matter which came to light is the failure of some certificates to measure up to close scrutiny by the Society's staff. The accounting firms concerned have been reported to their own Institutes for appropriate action.

The President Gerald Hickey

1.3 As with my recent predecessors in office, I can only record complete dissatisfaction with the outcome of the discussions with the National Prices Commission, and the Ministers for Industry, Commerce and Energy, and Justice, in the matter of adjustment of the statutory level of costs. For the future, it would appear that to an increasing extent, the litigant, even though successful, will have to shoulder a large part of the costs of his action. In the absence of a comprehensive scheme of civil legal aid this will impose a heavy burden on the ordinary person. The question arises as to whether in some way, the insurance industry can establish a legal aid scheme for the ordinary individual or family, analgous to the Voluntary Health Insurance Scheme.

1.4 The profession still has to face the inquiry by the Restrictive Practices Commission into the conveyancing monopoly and the restriction on advertising. Present indications are that the inquiry will take place early in 1980. In the meantime, the

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profession cannot but be encouraged by the recently published Report of the English Royal Commission on Legal Services, which, subject to certain safeguards, recommended the confirmation and strengthening of the solicitors' conveyancing monopoly in England. In talking of conveyancing today, one must appreciate that the conveyancing part of any transaction is now only one aspect of an increasingly complicated matter. The services furnished by the solicitor must of necessity include advice as to taxation, planning legislation, the family situation, the obtaining of long-term and short-term funds and the provision of enforceable undertakings for financial institutions, so that the whole process can operate efficiently. Looked at in this wider context, in which the Society is now endeavouring to educate the public, the profession here well deserves the retention of its monopoly.

1.5 Much comment has been made in recent years over the delays in the legal system. Usually, commentators have pointed fingers at the profession. That there is delay in solicitors' offices cannot be denied. At the same time, little public attention has been focused on the lengthy delays in the Courts and the offices of the Public Service with which the profession has to deal. While individual public servants in the various offices are most helpful, the whole operation appears to be starved of the resources and decision-making ability to give a quick response. Is it too much to ask that the increased charges by the State in respect of Courts and other legal services be ploughed back to give an improved service? The recent and welcome appointment of additional judges and the pending review of Court jurisdictions gives some hope, but the profession must insist on the provision of the necessary back-up facilities.

1.6 The Society in recent years has devoted great attention to the development of the training programme for intending solicitors. This year saw the holding of the first training course under the new system. The seventy-three participants have now commenced their period of on-the-job practical training. I am pleased to say that the response from masters to date has been encouraging. The next course which commences in November, will be modified by the lessons learned in the first course. A practical spin-off to the profession from the investment in training facilities has been the organisation of intensive one-day refresher courses for practising solicitors. The satisfactory support received, indicates the desire on the part of a majority in the profession to keep abreast of the increasing pace of change in legal affairs. For our achievements in this area, I must thank in a particular way, the Chairman of the Education Committee, Mr. John Buckley, the Director of Education, Professor Richard Woulfe, and the Director of Training, Professor Larry Sweeney. Tribute is also due to all others concerned with this activity of the Society, both Committee members and staff.

1.7 In my visits to Bar Associations, and on other opportunities of meeting with members of the profession, I have endeavoured to outline a framework through which the profession can face the future in an era of continuing inflation. This requires an emphasis on effective work methods and the intensive utilisation of staff and facilities. It also requires a realistic approach to charging clients the real cost of providing legal services, the development of interim accounts and the greater use of time-costing. In the absence of such an approach, the solicitor may have to work very long hours for a poor return, and possibly not give as good a service as he might. It behoves all practitioners to review critically, the operation of their practice every three to four years.

1.8 As I have done many times at meetings over the year, I would like to commend the Society's own Retirement Annuity Scheme to members. Started in 1975, it now has almost £1m. in invested funds, and since foundation has shown a very satisfactory growth. Recently, the fund has purchased its first property investment.

1.9 I would like to express my thanks to my fellow officers, the Chairmen of the Committees and members of the Council for the great support they have given me and also to those Bar Associations and members who were my hosts on various occasions during my year of office.

1.10 In conclusion, I think I should refer to the remarkable expansion in the activities at our new headquarters at King's Hospital and the great variety of uses to which it is now possible to put the premises. As you are probably aware, we are at present housing the Bantry Bay Enquiry and there appears to be a considerable market for seminars and functions of all kinds in a historic building, rather than a conventional hotel. In reference to the premises, I think it is fitting that I should pay tribute to the Director General and in particular to Miss Anne Kane who has contributed so much to the management of our

headquarters during the past year. I would not like to conclude without referring to our very excellent and competent gardener, Mr. Tom Barnes, who has done such a magnificent piece of work in relation to the private gardens at the rear of the building.

President

COUNCIL

Gerald Hickey
President
Walter Beatty
William B. Allen
Vice-Presidents

2.1 As with previous years, the year under review witnessed the continuation of much of the work initiated by the Council in earlier years. In this particular year under the direction of the President a special emphasis was placed on the work of the Registrar's Committee in getting Practising Certificates and Accountants' Certificates up to date. During the year, the Standing Committees of the Council met on the evening before, or on the morning of the day of the Council meeting. Decisions were taken by the Council on the basis of the recommendations of the Committees and of *ad hoc* Committees. The Council was sorry to see the retiral of John Jermyn and Tom Jackson, both of whom had given exemplary service over the years.

2.2 *Legal Costs:* Little success was achieved in this area during the year. In September 1978 the Minister for Justice agreed that to expedite matters, the solicitor members of the Court Rules Committees should meet with officers of the Department. This meeting did not take place until 1st March 1979 and it was not until July 1979 that the outcome of the discussions was known. The result was an indication that the Minister would consent to a 75% increase in District Court costs, 25% in the Circuit Court and nothing in the High Court. With the agreement of the Council, the District Court Rules have been revised and are due to come into operation on 1st January 1980. A decision in the case of the Circuit Court was deferred, pending further consideration of the matter, including discussion at the forthcoming General Meeting. In the case of the Criminal Legal Aid Scheme, agreement has been reached on a 15% increase in District Court Costs.

2.3 *Restrictive Practices:* As indicated in last year's report, the Restrictive Practices Commission has given notice that it proposes holding a public inquiry into:

(i) the nature and extent of competition in the carrying on of conveyancing for gain with particular reference to the effects on the competition of legal requirements restricting the provision of this service;

(ii) how the prohibition on advertising by solicitors affects competition by solicitors.

The inquiry is not now likely to take place until 1980. In the meantime, the Committee concerned has been carrying through an intensive review of the position in both the Common Law and E.E.C. countries so as to be fully briefed for the inquiry.

2.4 *Lending Institutions:* A meeting with the Irish Banks Standing Committee took place on 10th November 1978 on the vexed question of the manner in which funds were being debited and credited to accounts under the arrangements adopted by the Associated Banks for processing computerised accounts. A frank discussion took place in which the Banks indicated that procedures were being reviewed so as to overcome, as far as possible, the difficulties which had arisen. At the close of the year, the Council was seeking a meeting with the Irish Building Societies Association with a view to exploring possibilities of alleviating the difficulties in relation to bridging finance.

2.5 *Education:* During the year the Council monitored closely the progress of the Education Committee and the Education Advisory Committee in their endeavours to have the first course under the new system organised. The Council has congratulated both Committees on the success of their efforts to date. The reports from masters who have apprentices under the new system have been good. The Council was pleased to approve of four scholarships from the Society's funds for the particular course. As a spin-off from the investment in the new programme, the one-day seminars for members on matters relevant to everyday practice found a ready response.

2.6 *Public Relations:* This year the Council adopted a more positive stance in its public relations activities. The Annual Conference was covered in depth by all the media,

with satisfactory results. With the co-operation of the A.C.C. and the I.F.A., a seminar on capital taxation was organised for local officers of the I.F.A. This was followed up by discussions at local level, generating a wide degree of interest. To mark the "Year of the Child", a further seminar was organised for special interest groups. Internally, the Committee, through its Publications Committee and Editorial Group, has continued to develop an extensive programme for the publication of legal textbooks and to improve the *Gazette*. To close off the year, it can be said that the use of Blackhall Place as the location for the resumed Bantry Bay Inquiry has brought much in the way of favourable comment to the Society.

2.7 *Premises:* That the Education and Public Relations Committees were able to expand their programmes, during the year, is due to the fact that the Blackhall Place premises became fully operational. To meet the needs of the apprentices, catering services were provided on a limited basis and, with the advent of the Bantry Bay Inquiry, these have been extended to serve the members. At the close of the year, a refurbished gymnasium was brought into use as a lecture hall for the "old system" apprentices. In addition, dressing room facilities were provided for those using the football field and tennis court.

2.8 On 23rd July 1979, the President was pleased to receive an illuminated copy of the 1916 Declaration from Mr. C. J. Haughey, T.D., Minister for Health and Social Welfare, on behalf of the O'Connor family, in memory of the late Mr. John S. O'Connor. It now hangs over the main staircase in Blackhall Place. On 25th July 1979, an Taoiseach, Mr. Jack Lynch, T.D., re-presented to the President the gold key used by him at the official opening of Blackhall Place.

2.9 During the year efforts to improve the facilities available at the Society's premises in the Four Courts continued. Currently, the Society's architects are examining the accommodation to see what further improvements can be achieved. If, as would appear to be the case, structural work is involved, the necessary work cannot be undertaken until the next long vacation.

2.10 *Parliamentary Affairs:* As will be seen from its report, the Parliamentary Committee carried through an active year of dialogue with Government Departments, on pending legislation. Members with interests in particular areas, could help the Committee by submitting comments on draft legislation dealing with the particular interest. The E.E.C. and Company Law Committees involved themselves in a similar way in relation to proposed E.E.C. Directives.

2.11 *Law Clerks:* The review of wages carried out by the Joint Labour Committee early in the year involved the membership of the Society in substantially increased staff payments at a time when it was having no success in improving its own income. The revised rates, which came into effect in August 1979, place a heavy premium on the proper utilisation of staff in solicitors' offices and the elimination of any element of over-manning. It is hoped to strengthen the Society's team on the Committee at the Council meeting in November.

2.12 In May 1979, the President and Director General discussed his proposed scheme of civil legal aid with Mr. G. Collins, Minister for Justice. It was made clear to him that any scheme not involving the private practitioner would find little support throughout the country. This view was reinforced in the recent discussions with F.L.A.C. and with the Presidents and Secretaries of Bar Associations. At the close of the year the Council of the Society was seeking further discussions with the Minister in the context of the introduction of the scheme concurrently with a review of Court jurisdictions.

2.13 *Bar Liaison:* Meetings with the General Council of the Bar of Ireland continued on a regular basis during the year. Progress can be reported in ironing out problems of mutual concern.

2.14 *Members' Services:* During the year the following developments took place:

(i) *Professional Indemnity Insurance:* The arrangements with J. H. Minet (Ireland) Ltd. continued in force although much dissatisfaction was expressed over the 65% increase in the premiums. Nevertheless, the rates charged are still competitive by comparison with those in force in neighbouring jurisdictions. As yet, despite the best efforts of the Council, far too many practices do not carry professional indemnity insurance, oblivious, apparently, of the risks to which they are liable. Many others are covered for sums which are totally inadequate in the context of present-day

claims. In the coming year, it is proposed to make a determined approach to such practices. In the case of new practices the Registrar's Committee is recommending a minimum cover of £150,000.

(ii) *Superannuation Scheme:* The fund now stands at close on £1,000,000. It is satisfying to be able to report that the initial subscribers to the scheme have doubled their investment. The fund is now in the process of acquiring a property investment and once this is achieved it will have a full spread of investments. The brochure detailing the benefits and options under the scheme is being up-dated with a view to a further membership drive next February-March.

(iii) *Company Formation:* Member satisfaction can be gauged from the increased demands placed on the service. Efforts to expand into other service areas did not meet with success.

(iv) *Saleable Forms and Publications:* The Society continues to make available standard forms for Contract, Requisitions and Building Agreements, together with the books published by the Public Relations Committee.

(v) *Employment Register:* The Employment Register was much used during the year. As might be expected, the greater demand came from newly-qualified solicitors, but, in addition, success was achieved in some situations involving more-experienced members of the profession and practice amalgamations.

2.15 *Staff:* Due to increased activity, the staff of the Society was expanded by the appointment of Mr. Patrick Quinn as Training Officer and Miss Mary Buckley as Assistant Librarian. Mr. Nicholas Moore succeeded Mr. Brendan Twomey as Education Officer. Miss Anne Kane was appointed Premises Manager and was succeeded as Personal Secretary to the Director General by Miss Mary C. O'Connor. Though advertised on two occasions, the Society failed in its efforts to fill the post of Director of Professional Services, as recommended by last year's Annual General Meeting. The Society has now sought the assistance of consultants in the filling of the post.

REGISTRAR'S COMMITTEE

Thomas D. Shaw
Chairman
Andrew J. Donnelly
Thomas J. Fitzpatrick
John P. Hooper
Carmel S. Killeen
Patrick O'Connor
Michael V. O'Mahony
Laurence K. Shields
Andrew F. Smyth
Moya Quinlan

Thomas D. Shaw
Chairman

3.1 This year has shown considerable progress in the rationalisation of a system which will enable complaints to be speedily dealt with and which will enable the Society to see that Solicitors' Accountants' Certificates and Practising Certificates are kept up to date.

3.2 The amount of paper coming into the Law Society is undiminished by way of complaints. In the year to date 639 complaints were received. We are deeply indebted to Mr. Basil Doyle for excellent work in sorting out the initial complaints, many of which are of a nature which are not genuine complaints or ones which do not fall within the ambit of the Registrar's Committee. The Interview Board functioned satisfactorily and a lot of the complaints which were not dealt with in initial correspondence were cleared at Interview Board level.

3.3 Complaints were considered by the Registrar's Committee during the year and most of these were satisfactorily dealt with and fourteen complaints were referred by the Registrar's Committee to the Disciplinary Committee for further action. Members will appreciate the vital importance of replying to correspondence received from the Law Society if a complaint is made against them. If they do not, they have only themselves to blame if it subsequently appears at Interview Board or Registrar's Committee level. Again it must be stressed that a number of complaints are generally made against a small number of members of the profession whose names appear again and again before the Committee. The Committee is doing its utmost to impress upon the solicitors the importance of keeping their work up to date and if they are behind, then they should consider as a matter of urgency restructuring their staff so as to bring their work up to date. Having received numerous expressions of thanks from members of the public making genuine complaints, it is hoped that a considerable improvement has now been achieved in the speed in which complaints are handled and again the Society is indebted to Mr. Basil Doyle and Mr. Fintan Burke who are dealing principally with this area of the work of the Committee.

3.4 The Committee has been particularly active in the question of Accountants' Certificates and Practising Certificates. The Committee were disturbed to note that at the 1st March 1979 414 firms out of a total of almost 900 were more than one year in arrears with their Accountant's Certificate. As a result a major drive has been made during the year and members whose certificates have been in arrears have been written to

and where necessary stronger action has been taken to ensure that the certificates are brought up to date. As a result only twenty-two are now seriously in arrears and all these are under active consideration by the Committee. Members are reminded that where an Accountant's Certificate is in arrears, the Society will not issue the Practising Certificate for the current year and this holds very severe implications for members. Members will, therefore, ensure that the fullest steps are taken to see that their Accountant's Certificate is up to date and when their audit is finished they should check with their accountants to see that the certificate has been sent in. Any member experiencing difficulty in this regard should refer to the Society and again the Society is deeply indebted to its staff and in particular the services of Mr. Connolly and Mr. Healy who deal with this area for the Committee and who have both proved most helpful, not only to the Committee but also to people seeking the assistance of the Society with regard to these matters.

3.5 The Committee has also been paying very considerable attention to the up-dating of the solicitors' roll with a view to establishing with certainty the names of all solicitors who are practising in the State. Various difficulties arose because of people changing jobs or getting married or dying and during the year a major effort has been made to up-date the roll. It would be hoped that this work would be completed by early next year and already 178 people have been discovered who did not hold Practising Certificates. All these have been written to and arrangements had been made to collect arrears. It is a popular misconception that a person does not require a Practising Certificate if they are not appearing in Court but merely working in the office. This is not correct and any solicitor who is doing the work of a solicitor is required to take out a Practising Certificate and is liable to prosecution if the certificate is not taken out for the current year.

3.6 The Committee has held numerous meetings during the year and, as Chairman, I am indebted for the assistance and support of my colleagues in the completion of work which is both time consuming and onerous and particular thanks are also to be returned to Mr. Ivers, the Director General, to Mr. Doyle and Mr. Burke, to Mr. Connolly and to Mr. Healy, and to all the secretarial staff which assisted the Committee in their work during the year.

COMPENSATION COMMITTEE

Thomas D. Shaw
Chairman
Andrew J. Donnelly
Thomas J. Fitzpatrick
John P. Hooper
Carmel S. Killeen
Patrick O'Connor
Michael V. O'Mahony
Laurence K. Shields
Andrew F. Smyth
Moya Quinlan

4.1 I am happy to say that progress has been made in the building up of the compensation fund during the year. After payment of the contribution towards the overheads of the Society, the surplus of income over expenditure was £104,980. The fund now stands at £768,654. Claims during the year only totalled £1,937 and refunds achieved the considerable total of £29,936.

4.2 The policy of the Committee is to spend a lot of time and effort both on the part of the members of the Committee and in particular of the officials of the Society in maintaining, protecting, administering the fund. In previous years it was the policy to bring in outside accountants if a solicitor had a financial complaint against him. This work is now dealt with by the officers of the Society and a considerable portion of the time of Mr. Ivers, Mr. Connolly, Mr. Healy, Mr. Burke and Mrs. Fallon are spent following-up the claims, pursuing Accountants' Certificates in arrears, pursuing Practising Certificates in arrears, investigations, daily collection and banking of compensation fund receipts, servicing of the Interview Board, Registrar's, Disciplinary and High Court work and all book-keeping and accounting in connection therewith. The policy of the compensation fund is, therefore, that a section of each of the salaries and the overheads relating thereto should be charged against the fund and the charge this year amounted to 5.2% of the fund or the sum of £40,000. This is a lesser figure than that applied by the Scottish or English Law Societies and is a policy which is endorsed by the Council of the Law Society and having regard to the low level of claims over the last few years has proved very beneficial to the Society and the Committee is indebted for the excellent work carried out by the before-mentioned staff members.

4.3 An item of irritation to members is the feeling of the Council which has lasted for a considerable period that payment will not be made against a solicitor who has defaulted unless all legal remedies have been exhausted. This includes having a judgment marked and having the solicitor adjudicated a bankrupt. It should be stressed that this has proved a very helpful rule from the Society's point of view because of refunds obtained at a later date. However, it is appreciated that this is irritating when there is a small claim against a Solicitor and it is not worth while having the solicitor adjudicated a bankrupt for the

amount involved. The Committee has asked the Policy Committee to review this matter and members will be kept advised as to the up-to-date position.

4.4 The Committee met frequently during the year and I am indebted to the members for their attendance at meetings, for their work and also to the members of the staff for their diligent work in the administration of the fund.

PROFESSIONAL PURPOSES COMMITTEE

Ernest J. Margetson
Chairman
David R. Pigot
Vice-Chairman
John Carrigan
L. Cullen
A. J. Donnelly
G. M. Doyle
Michael Enright
P. Glynn
R. G. D'Esterre Roberts
C. Hogan
M. P. Houlihan
J. Maher
P. Murphy
P. McEllin
Rory O'Donnell
M. M. Smyth

5.1 The Professional Purposes Committee, as members, will be aware, is the successor to the former Privileges Committee and Court Offices Committee whose functions were amalgamated two years ago on an experimental basis on the recommendation of the President of the Society. This, therefore, is the Committee's second year of life and by the nature of the work formerly carried on by the two Committees referred to, it is called upon to deal with a fairly wide variety of subjects. My predecessor, Mr. Michaèl P. Houlihan, got the Committee off to a good start last year and throughout the year under review I am glad to say most of the problems brought to it for consideration were either disposed of satisfactorily, or are in the course of having satisfactory results achieved. Throughout the year the attendance of members at the meetings of the Committee was extremely high and the active interest displayed by all members was evident by the satisfactory solution of most of the problems submitted to the Committee.

5.2 During the year under review, the following were among matters considered by the Committee:

(a) Ethical problems arising from time to time between solicitors.

(b) Proposals for increases in the fees payable to Commissioners for Oaths and a suggestion that all solicitors should be automatically entitled to administer oaths.

(c) A proposal that solicitors should be entitled to practice in the form of limited companies.

(d) A suggestion that there should be a special category of Society membership for non-practising solicitors.

(e) Proposal that in probate cases affidavits concerning English law should be acceptable if made by an Irish solicitor.

(f) Question as to the period for which a solicitor should be obliged to retain papers before disposing of the same by destruction or otherwise.

(g) Continuing difficulties in regard to delays in the Central Office of the High Court.

(h) Difficulties experienced by solicitors obtaining withdrawal of monies lodged in Court, particularly during vacation periods.

(i) Further meetings were held with the Federation of Insurers in Ireland and the Irish Medical Association and the Irish Medical Union, and agreement was reached on a number of matters, such as the exchange of medical certificates, regulation of the fees payable to medical practitioners and the fees payable to solicitors and medical practitioners in relation to Road Traffic Act offences. The meetings with the bodies referred to were found to be fruitful and it is proposed to continue to exchange views with these Associations.

(j) As Chairman of the Committee, I have had a number of meetings with the President of the High Court with a view to obtaining smoother working between the officials of the Courts and the profession, and correspondence has been entered into by the Committee with the Superior Court Rules Committee and the Circuit Court Rules Committee concerning changes that it is thought would be desirable in these Rules.

(k) The Committee was concerned with the increase in the appearance in the newspapers of prominent notices by solicitors intimating opening of new offices, changing of offices, amalgamations and advertisements for staff. The Committee is worried about the frequency and the prominence given to these notices.

(l) Question of payment of search fees between solicitors and clients in respect of client's documents occupied a good deal of the time of the Committee, and of a sub-committee appointed to examine the problem. The Committee has caused a notice to appear in the *Gazette* dealing with the subject but there are still some matters to be considered, such as the safe custody of wills, etc.

(m) The Committee was asked to consider the extent of the information which the Revenue Commissioners inspectors were entitled to receive from solicitors concerning various matters, including the payment of counsels' fees.

(n) The Committee had also to consider a proposition by some members of the profession that solicitors should be entitled to charge percentage fees on recovery of damages, etc. in lieu of ordinary taxed costs.

Ernest J. Margetson
Chairman

5.3 The Committee found itself in a position to assist many members who had problems concerning obligations entered into by them in relation to undertakings or fees chargeable by them in respect of work done. The enquiries are of a continuous nature and deal with the various day-to-day problems that arise in the practice of a busy solicitor.

5.4 The Committee had to decline with regret expressing opinion on certain problems presented to it which required advice on matters of law.

5.5 In conclusion, I would like to record my appreciation of the wholehearted assistance and co-operation given to me by my fellow members of this Committee and by the staff of the Society who so efficiently looked after the Committee's essential requirements.

PARLIAMENTARY COMMITTEE

Donal G. Binchy
Chairman
John Carrigan
Vice-Chairman
Joseph L. Dundon
Thomas J. Fitzpatrick
Robert M. Flynn
S. Carmel Killeen
Brendan A. McGrath
Raymond T. Monahan
Michael G. L. O'Connell
Frank O'Donnell
Brian W. Russell

6.1 During the year under review the Committee studied and made submissions on the following legislation:

(a) *Landlord and Tenant (Amendment) Bill 1979:* This was the third of a series in the landlord and tenant legislation. The two 1978 Acts dealt mainly with the abolition of ground rents and the right to acquire the fee simple. The present is a more comprehensive Bill; it repeals in full the Landlord & Tenant Acts 1931 and the Landlord & Tenant (Reversionary Leases) Act 1958 and makes new and substantially different provisions for the protection of business tenancies, residential tenancies and reversionary leases. A detailed submission was submitted by the Committee to the Department of Justice. Members are advised to study this Act carefully because it affects some very important changes.

(b) *Capital Gains Tax (Amendment) Act 1978:* Submissions were made on this Bill to the Minister for Finance particularly with reference to Section 27 and the Committee can happily report that some of the amendments sought here were incorporated in the Act.

(c) *Succession Act 1965:* A supplemental submission was put in on this Act in relation to Section 90 and arising from the Supreme Court decision in the case of *Rowe v. Law and Others* in January 1979.

(d) *Capital Acquisition Tax Act 1975:* In a submission on this Act the Committee pressed strongly for a change in the law affecting many family settlements, especially in the case of farmers, where an appointment by a life tenant to a child frequently results in the position that the disponer is the grandparent of the successor or donee and, therefore, only enjoys a threshold of £30,000.00. There are many cases in which this could give rise to a very heavy liability for inheritance tax. The Committee regrets to say that this submission was rejected by the Minister but it is the intention of the Committee to press this submission strongly again when the next Finance Bill is being introduced.

(e) The Committee is in the course of preparing a submission on the Sale of Goods and Supply of Services Bill. This is being dealt with for the Committee by former President, Mr. Brendan McGrath, who has put very considerable research into it.

(f) The Committee also has in hand the preparation of a submission on the Tribunal of Enquiry and Evidence Act.

6.2 During the year the 20th Interim Report of the Committee on Court Practice and Procedure was published containing recommendations for substantial increases in jurisdiction. This report was very carefully studied by the Committee and a full submission was made both to the Minister for Justice and the Committee on Court Practice and Procedure supporting strongly the proposals for increased jurisdictions of the Circuit and District Court and urging that more extensive jurisdiction be given to the District Court in family law matters and criminal injury applications. In supporting the proposals for increased jurisdiction the Committee warned, however, that a proper assessment would have to be made of the increased work load that will fall on the Circuit and District Courts; and that adequate provision will have to be made for the provision of additional judges, justices, registrars, clerks and other officials servicing these Courts; also that there will have to be adequate and sufficient Courtoom facilities. The Committee also considered F.L.A.C.'s report on the same subject; their report was considerably at variance with the Committee's views but a meeting has been arranged to discuss same fully with F.L.A.C.

Donal G. Binchy
Chairman

6.3 Various other Bills or Acts were considered including the Redundancy

Repayment Bill 1979, The Gaming & Lotteries Act 1979, the Fisheries Bill 1979 and the Housing Bill 1979.

6.4 Again this Committee would like to assure the profession that representations in relation to any proposed or existing legislation are very welcome and helpful.

6.5 The Committee wishes to acknowledge the considerable help received from other members of the Council not on this Committee. Personally, I wish to thank all my colleagues on the Committee and Margaret Byrne for all the help and co-operation they have given me as Chairman and for their very considerable work on behalf of the profession.

FINANCE COMMITTEE

Maurice R. Curran
Chairman
Bruce St. John Blake
Moya Quinlan
W. A. Osborne
George G. Overend
Peter D. M. Prentice

7.1 In my first year as Chairman of the Finance Committee I am pleased to say that substantial progress has been made on a number of fronts.

7.2 A sub-committee under the chairmanship of George Overend recommended that the operations of the Society should be computerised insofar as this is possible and we have, on the advice of an expert consultant, accepted a system that is based on a micro-processor, etc.

7.3 The results of this will be that:

(a) The information required for the issue of Practising Certificates will be computerised which will mean, amongst other benefits, that those members who are in arrears with Accounting or Practising Certificates can be pursued more rigorously.
(b) The entire accounts of the Law Society will be dealt with in the most modern way possible.
(c) The system includes a word-processing facility which should enable us not only to deal with general word processing requirements in the Law Society, but in particular to deal with the constant requirement to record and update the material required in our Law School.

7.4 As a former Chairman of the Education Committee I am pleased to be able to say that the Law School is operating within its budget, which includes a considerable level of subsidy from the Law Society and therefore from the profession. I think it is fair to say that our new system of education has started up very successfully and I gather that the feedback from the country as to the quality of those who have done the first course in our new Law School is very favourable – long may it continue so.

7.5 We have completed our building programme at Blackhall Place at a total cost of over one million pounds and are now beginning to reap an income from these elegant and distinctive premises upon which many people have made very favourable comment. Anne Kane was appointed during the year as manager of the premises and is doing everything she can to maximise income. Might I say that we have had a number of weddings, cocktail parties and other functions, which have been very successful. To strike a different note, the Whiddy Tribunal is now ensconsed in our premises for the remainder of its term on an appropriate compensation basis.

Maurice R. Curran
Chairman

7.6 Our other main source of income is the company formation service which goes from strength to strength and is responsible for the formation of approximately 30% of all companies formed in the year 1978 in this country.

7.7 Catering has been well looked after by Hugh Robson at different levels. Students are being offered in the canteen, on the basis that the Law Society pays the overheads but not the staffing or food charges, a main course at a price of £1. Members can have a four-course lunch in the members' dining room for £3.75. In addition dinners or other functions can be booked in the evening at very reasonable prices.

7.8 Fund-raising, I believe, is substantially at an end, leaving aside certain firms, particularly in Dublin, that have not contributed at all or have contributed in miserly terms and will be pursued. As someone who was not directly involved in this activity (other than as a contributor) may I say that I am, and will ever be, deeply impressed by the level of support which was given to the Society by the general body of members.

7.9 The present priority of the Finance Committee is to restore the position of

financial stability, which existed before we assumed the massive expenses involved in the very necessary and totally successful move to Blackhall Place. To achieve this it is proposed we keep our accounts on at least a break-even basis, that is to say, we may go into overdraft during the course of a year but there should be no term loans and the assets of the Society should be unencumbered.

7.10 Because of the fine work which has been done by the Registrar's Committee and Compensation Fund Committee under Tom Shaw, with the very able assistance of P. J. Connolly and Martin Healy, the Finance Committee has taken the view that, for the coming year, the compensation fund contribution can be reduced. This has enabled us, without substantially increasing the overall contribution payable to members, to plan to make over the next two years, a significant inroad on the size of the debt overhanging the Society, to such an extent that on projected figures, the Chairman of this Committee in three years' time should be able to say to you that the Society has reached the equilibrium for which we are seeking and that thereafter, assuming our more expansionist Council members can be kept under control, there should be no capital expenditure of any substantial nature in the foreseeable future. This should enable us from that time on to keep subscriptions to a level which will increase only by the inflation index.

7.11 The Retirement Pension Scheme goes from strength to strength. You will receive a circular shortly which will set out the present status of the scheme, but given the tax advantages involved, it seems to me that all of our members who can afford to do so, should be a member of some pension scheme and having analysed the matter from a personal viewpoint, I have come down in favour of the Law Society's scheme: I can say no more!

7.12 Professional indemnity insurance has not been made compulsory but the world-wide movement is in this direction. Any solicitor who practises without professional indemnity insurance is, in my opinion, very foolish. The experience, where compulsory insurance has been brought in, is that the cost to every member goes up substantially. Accordingly, I would suggest, to those members who have not insurance, that they would be saving, not only themselves but all their colleagues, expense if they voluntarily took out insurance.

7.13 I have had the privilege to chair a committee of my mentors: to them my thanks, as also to Jim Ivers, Director-General, and P. J. Connolly, Director of Finance.

DISCIPLINARY COMMITTEE

Gerard M. Doyle
Chairman
Thomas Bacon
James R. C. Green
Patrick C. Moore
Patrick Noonan
Roderick O'Connor
Frank O'Donnell
Brian Russell
Robert McD. Taylor

Gerard M. Doyle
Chairman

8.1 Period: 1st September 1978 to 2nd October 1979:
Meetings held 20

8.2 New applications 34
Dealt with as follows:
(a) No prima facie case found 5
(b) Prima facie case found 22
(c) Cases not yet processed 2
(d) Cases postponed 4
(e) Applications not properly before Committee 1
13 cases from the preceding period were struck out in the period under review.

8.3 At hearing:
(a) Findings of misconduct 10
(b) Findings of no misconduct 9
(c) Withdrawn before hearing 1
(d) Adjourned generally 2
(e) Adjourned 4
(f) Awaiting hearing 2

8.3 Cases presented to High Court 15
The outcome was:
(a) Suspension from practice (to be reviewed) 2
(b) Striking off roll 2
(c) At present before Court 2
(d) Costs awarded to Society 7
(e) Adjourned generally 2

Awaiting presentation to High Court 3
Removed from Roll of Solicitors at own request 1

8.5 During the period under review Messrs Francis Lanigan and Thomas Jackson, long-serving members of the Committee, retired and were replaced by Messrs Frank O'Donnell and Brian Russell. The postal dispute did, to some extent, affect the number of cases coming before the Committee as it slowed down the processing of cases in the earlier stages – at Interview Board and Registrar's Committee level. Attendances at the Disciplinary Committee meetings were not affected. At this stage it would be difficult to account for the reduction of the number of cases coming before the Committee. It could be a greater awareness by solicitors of the efforts of the Society to ensure the maintenance of a high professional standard and the excellent work of the Registrar's Committee and the Interview Board helped by the executive staff of the Society. On my own behalf, and that of the Committee, many thanks to the clerk of the Committee, Miss Mary Lynch, for her efficiency and courtesy.

PUBLIC RELATIONS COMMITTEE

W. D. McEvoy
Chairman
Michael V. O'Mahony
John F. Buckley
Donal G. Binchy
Frank Daly
Charles R. M. Meredith
Peter Murphy
Patrick O'Connor
Frank O'Donnell
Moya Quinlan
Adrian P. Bourke

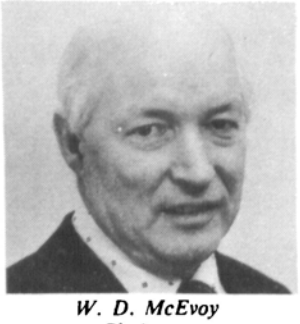
9.1 Last year might be considered as a year which the public and the profession became more conscious of each other and that the intention for 1979-80 should be that this relationship should be further developed. The Committee's policy was to build an awareness and understanding of what solicitors do, and to increase public respect for the beneficial contribution made by solicitors to the community. This can only be done by the continual observance of what is essential, having regard to the standards which solicitors know and realise should be kept and which are essential to gain such goodwill of the community and to perform and contribute as a profession in the development of our Society.

9.2 The Committee during the year has endeavoured to provide and help in this policy and a training officer, Mr. Patrick Quinn, was appointed. His functions mainly evolve around the organisation and continuing education by seminars for the younger and older members of the profession. Symposia conferences for the interested public were organised in various areas. Seminars were arranged in Litigation, Probate, Company Law, Landlord and Tenant, Family Law and in the modern areas of Labour Law, Taxation and Commercial Law. Any who have attended these have undoubtedly been able to perform better having regard to their assistance to the public and from their own efficiency. The Committee would recommend full participation and advancement of this form of education.

9.3 From a public relations point of view, it was indicative from being involved with these seminars and symposia that the profession must meet the demands and challenges which our President so realistically referred to at the general meeting in Galway: "With the greatly increasing prosperity of the country I think that increasing demands will be made on the legal profession and this, in turn, will give the profession the opportunity of greater prosperity than it has ever enjoyed before." This can only be done, by making available the necessary professional expertise to the public from the profession.

9.4 Leaflets giving information in relation to House Purchase, Family Law, Car Accidents, Wills and Taxation were redrafted and examined. These leaflets were distributed to solicitors and into other areas where such would be informative.

9.5 A new Directory of Services showing the availability of services will be published in the near future which will give the public a broad outline of information having regard to what advice and assistance a solicitor can provide and also the availability of individual solicitors or firms of solicitors and the types of work they do.


W. D. McEvoy
Chairman

9.6 It is suggested that more communication and co-operation be arranged with the press, television and radio, very much in an informal manner. The training of spokesmen and specialists to deal with all three areas and to be in a position to give specialised replies and criticism has been arranged. It is suggested that in future we should anticipate more public feeling where necessary and matters should be dealt with beforehand if possible. Give a better image not an image of fees but of services. In the past, it was agreed that there should be as little confrontation with the media as is necessary, but now some members of the Committee feel that a more positive attitude might be adopted towards the publication of constructive and positive ideas as to how the profession can more advantageously be "advertised" in regard to the functions which it performs to the public.

9.7 The Education Committee and staff are again to be congratulated on the manner

in which they dealt with public, press and students, having regard to the problems which arose in this area, and it showed that the development of their education programme and systems over the last two to three years has proved correct.

9.8 To the Chairman of the Registrar's Committee and his Committee from a public relations point of view, there can be nothing but unqualified thanks, as their function is to deal with the members of our profession who are unable to give to the public the proper services and as a result, they leave other members open to justifiable criticism because of individual neglect or default. We should anticipate the future more in relation to public complaints, we should be able to help our colleagues more in this area by assisting them when we realise their difficulties, once it is not to the detriment of any client. Where there are complaints in areas of the country or Dublin, immediate communication should be established with one of the profession in the area to give assistance.

9.9 During the year Margaret Byrne was appointed as librarian and may she have many years of fulfilment in this post.

9.10 John Buckley and the Committee dealing with the *Gazette* must be congratulated on their fundamental contribution to their profession, without which the solicitors would undoubtedly be at a loss of essential information. The publication has improved with each issue.

9.11 Communications have continued to develop with our neighbouring Law Societies and other bodies of mutual interests and our President has here and abroad furthered this.

9.12 This whole area of public relations at the moment is so wide that it might be considered that it should be dealt with by a full-time officer who would anticipate all areas of needs and co-relate them, particularly having regard to the fact that it is being suggested that the monopoly of conveyancing be investigated and that advertising be allowed and we have to meet a Restrictive Practices Inquiry. There are undoubtedly many areas in which the profession is going to come under such investigations in the very near future and it is very important that the attitude of the Societey be fully and properly briefed and informed beforehand to transmit it to the public on behalf of the profession and that it is a specialised job and would be in co-operation with Mr. Maxwell Sweeney.

9.13 The Director General and administration staff have always during the year continued to keep communications open and public relations of a high standard with profession, government departments, media and other areas sometimes under difficulty, and are due sincere thanks. To the members of the Committee, my sincere appreciation for their help during the year.

EDUCATION COMMITTEE

John F. Buckley
Chairman
Frank Daly
Vice-Chairman
Adrian Bourke
Maurice R. M. Curran
W. D. McEvoy
Rory O'Donnell

John F. Buckley
Chairman

10.1 This Committee again spent much of its time dealing with individual applications from apprentices, prospective apprentices and masters. As my predecessor said in the last annual report each apprentice appears to consider himself or herself unique and requires each individual problem referred to the Committee.

10.2 The principal event of the year was, of course, the opening of the Society's new Law School and the commencement of the first professional course. The Committee was delighted that Kevin O'Leary, the Principal of the Training Course at the Australian National University at Canberra, who is one of the founding figures of professional legal training and who has advised the Society in the planning of its course, was able to accept the Society's invitation to attend the opening of the Law School and deliver the John Mathews Memorial Lecture.

10.3 During the year the first of what is hoped will be a regular series of meetings with those responsible for the education of the profession in England and Wales, Scotland and Northern Ireland took place at Chester. The next meeting is scheduled to be held in Dublin in February of 1980. Apart from the useful exchange of views about comparative methods of education for the profession the most interesting development which has come out of the first meeting is a movement towards mutual recognition of qualifications. This object is one which will eventually be covered by an E.E.C. Directive but experience shows that the Commission are usually pleased to adopt existing arrangements as long as they are in accord with the aims of the Commission.

10.4 The prediction contained in the Society's document "Estimated Supply of and demand for Solicitors in 1986 and 1991" appears to be proving accurate. Already there

is evidence of an over supply of recently-qualified solicitors in the Dublin area and indications are that the numbers of positions available outside Dublin are few. The Society was interested to note that the Law Faculty of University College, Dublin, had decided to reduce its intake of students by ten for the academic year 1979-80.

10.5 One matter which came to the attention of the Committee was that of apprentices holding full-time jobs during their apprenticeship, some of them in the public service. The Committee arranged for the publication of a notice in the *Gazette* reminding apprentices and their masters of the need to obtain the consent of the master and of the Society before engaging in any outside employment.

10.6 The Society was successful in persuading the Department of Education to make students grants available to apprentices attending the Society's new professional course. The particular thanks of the Society are due to the efforts of Mr. Seán Calleary, T.D., who first drew the attention of the Society to the anomoly whereby solicitors' apprentices were excluded from such grants while students in similar categoreis were included and who also made representations to the Department in support of the Society's case.

10.7 In the field of public relations the Society once again came under fire from U.S.I. and other groups attacking the Society's decision to limit the numbers entering the new professional courses and the fees for such courses. The Committee enlisted the assistance of a firm of public relations consultants on the occasion of the opening of the new Law School and their work was instrumental in achieving reasonably-balanced coverage of the Society's position.

10.8 Among the other matters which the Committee dealt with during the year were the arrangements under the new system for practising barristers who wished to become solicitors, a computerised survey of the examination results of candidates and the old system was updated, the application of the Unfair Dismissals Act to apprentices who continued in employment after their indentures had expired.

10.9 The Committee expresses its particular gratitude for the work of all engaged in the Law School during the last year.

EDUCATION ADVISORY COMMITTEE

John F. Buckley *Chairman*
Maurice Curran
Claire Cusack
Frank Daly
Ernest B. Farrell
Rory O'Donnell
Michael V. O'Mahony
Harry Sexton
Francis E. Sowman

11.1 This Committee, which could be described as a "think-tank" for the Education Committee, is chiefly concerned with the planning and supervision of the new training system for apprentices.

11.2 The early part of the year was spent in the finalisation of the appointment of consultants and tutors for the first professional course which began in February 1979 and once the course had commenced the Committee through reports received by it from the whole-time staff of the Law School monitored the operation of the course.

11.3 At the conclusion of the course the Committee received the results of detailed surveys of the responses of the students attending the course, the consultants and tutors who had participated in the course and the full-time staff of the Law School to the course. The responses to the surveys which were very detailed have proved of enormous value to the Committee in planning the second professional course which begins in November 1979 and the third course which will follow immediately afterwards.

11.4 The question of financial aids for the students attending the courses has been under constant review and the Committee has recommended to the Council of the Society that approaches should be made by the Society for recognition by the Higher Education Authority as an educational body entitled to receive grants from the H.E.A.

11.5 The Committee has arranged a system of monitoring the service in masters' offices of the apprentices who attended the first professional course. The three parts of the new training system must be properly integrated if the training system is to operate satisfactorily and it is essential that the period of service in the master's office is properly planned to be of benefit both to the apprentice and the master.

11.6 The Committee has invited the University Law Schools to assist the Society in planning for the final examination first part (the entry examination for the Society's Law School) in order to ensure that the syllabi and examination papers do not diverge widely from the courses taught and examinations set in the same subjects in the Law Faculties. The University Law Faculties felt obliged to withdraw from co-operation with the Society when the decision to limit entry to the Society's Law School was reached but it is hoped that the Law Faculties will agree to participate in the proposed new arrangement.

11.7 The Committee being concerned about the continuing reliance of universities on a mechanical points system for entry qualification to Law Faculties has continued to explore the possibility of conducting an experimental programme in aptitude testing for university entrance similar to the American Law School Admission Test which would be used in conjunction with the points system to determine whether a student had a particular aptitude, or signally failed to have a particular aptitude, for a particular course of study.

11.8 The Committee recommended the extension of the Society's continuing legal education programme which commenced in the autumn of 1979 and a training officer, Patrick Quinn, was appointed during the year. Already he has organised a further series of one-day courses in Blackhall Place which have been well attended and it is proposed in 1980 to try to arrange to hold similar courses in venues outside Dublin.

11.9 The major task now facing this Committee is the preparation of the first advanced course which is due to commence in 1981. The experience gained in running the first professional course has been of enormous value to the Committee in planning for this course.

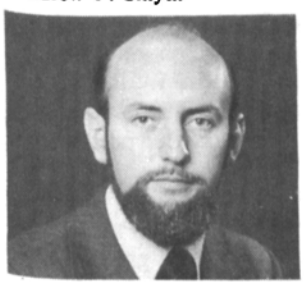
11.10 The great thanks of the profession are due to all the members of the profession and contributors from outside the profession who participated in the first professional course. The willingness with which busy practitioners have responded to requests to participate, on a few occasions at particularly short notice, has been remarkable.

11.11 The full-time staff of the Law School, Professors Woulfe and Sweeney and Misses Hegarty and Pearse, worked extraordinarily long hours to ensure the success of the first course and a particular tribute must be made to Professor Sweeney on whom devolved, during the two-month absence through illness of Professor Woulfe, the burden of carrying through the course. The fact that it was possible to carry on the course successfully in the absence of Professor Woulfe is a tribute not only to the other full-time members of the Law School staff but also to the preparation and organisation for the course which had already been laid down by Professor Sweeney.

11.12 Brendan Twomey, Education Officer, left us during the summer to go into private practice and we wish him success and thank him for his work during the year. We appointed Nicholas Moore as his successor and all indications are that we have been fortunate enough to acquire a worthy successor to Harry Sexton and Brendan Twomey in this position.

E.E.C AND INTERNATIONAL AFFAIRS COMMITTEE

Joseph L. Dundon
Chairman
Raymond J. Monahan
Vice-Chairman
Anthony E. Collins
John G. Fish
Brendan A. McGrath
Gerald J. Moloney
Laurence K. Shields
Andrew F. Smyth



Joseph L. Dundon
Chairman

12.1 *E.E.C.:* The Committee has continued its work of monitoring the progress of Directives of particular interest to the profession and its clients but we note that in many instances progress has been so slow as to be imperceptible. Clearly there are political considerations involved but those of us who are committed to the ideal of greater uniformity in the legal systems of the E.E.C. members cannot but be disappointed at the slow progress being made.

12.2 *Directive on freedom to provide occasional services by lawyers:* This Directive was implemented in this country by S.I. No. 58 made on 1 March 1979. The changes made have not yet had any significant practical repercussions here but will undoubtedly begin to appear over the next few years as lawyers throughout the E.E.C. become aware of their rights.

12.3 *Establishment:* Following on from the Directive on Occasional Services the Commission Consultative has taken up actively the question of a Directive on Freedom of Establishment and considerable progress has been made. While this report is being prepared, the Commission is meeting in Madrid and hopefully will reach an agreed common position on the controls needed to permit full freedom of establishment within the nine countries.

12.4 *Commission Consultative:* During the year Gerard J. Moloney retired from his position as our representative on the Commission and his place has been taken by Raymond T. Monahan. My Committee and I wish to place on record our profound gratitude for the wonderful work done by Mr. Moloney. He has devoted himself unstintingly to the task of representing us on this most important body; it is thanks to him

that our profession is held in such high regard by our colleagues throughout Europe. In view of the importance of Company Law in the E.E.C. context we have appointed Brian O'Connor to represent the Society on the C.C.B.E. Company Law Sub-committee and we are also represented on the Sub-committee on Competition and Intellectual Property by James Dudley and his alternate, John Glackin.

12.5 *U.I.N.L.:* Emphasis on E.E.C. matters has led us to reconsider our continued membership of the Union International du Notariat Latin and we are indebted to Anthony Collins and latterly John Fish who have represented us at meetings of that organisation. A final decision on continued membership has yet to be made.

12.6 *International Bar Association:* Following the conference in Sydney at which the Society was fully represented, I attended the annual general meeting of the I.B.A. at Copenhagen when arrangements for the 1980 meeting in Berlin were discussed. The Berlin meeting promises to be a very interesting one and its relative proximity gives many members of the Society an opportunity to attend. The Society will have further information available at a later date and will be glad to give details to those interested in attending. I have been honoured by the President of the I.B.A., Mr. E. Niel McKelvey, Q.C., with an invitation to chair the Association's Future Planning Committee and subject to the approval of the Council of the Society I hope to be able to accept this invitation.

PREMISES COMMITTEE

Moya Quinlan *Chairman*
Bruce St John Blake
Clare Cusack
Gerald Hickey
John Jermyn
Stephen Maher
Peter D. M. Prentice
Patrick O'Connor

13.1 This has been a year of great activity for the Premises Committee. In November the first group of students taking the course under the new regulations entered the Law School. With this event the school became entirely operational and so the building was fully occupied by the administration, students and members.

13.2 A particular feature of the year was the completion of that portion of the premises which was formerly the chapel and which is now known as the President's Hall. The Council dinner was held there for the first time on March 22nd of this year.

13.3 During the year also there has been a continuous demand for overnight accommodation and in this context our thanks is due to Mrs. Willie O'Reilly who has looked after the needs of the overnight guests so very well.

13.4 Apart from the various meetings and seminars held by the Law School and the Society generally, many other organisations have taken advantage of the facilities available. Amongst these were the Irish Farmers' Association, the Association Internationale de la Boulangeris Industrielle, the International Federation of Agricultural Journalists, Elbana Toast Masters, the McGeorge School of Law, Salzburg, Dublin Arts Council, COGECA/CEPFAR (Agricultural Co-operatives in the E.E.C.), the Dublin Symphony Orchestra, and the Institute of Taxation. In addition to functions, there have been a great many "walk-arounds" by architectural and cultural societies during the Spring and Summer months. Three Northern Ireland groups showed a particular interest, as did two overseas groups. In addition to these events there have been a number of wedding receptions. Members too, are making use of the larger rooms for consultations and arbitrations. The consultation rooms in the Four Courts continue to be in demand. In addition to these, there is now a writing room available there where additional telephones will hopefully be installed in the near future.

Moya Quinlan
Chairman

13.5 The thanks of the Committee are due in particular to Miss Anne Kane for her help during the year. It will be appreciated that the development in Blackhall Place to its present extent requires a great deal of organisation, supervision and indeed an amount of personal dedication. Thanks are due also to our maintenance manager, Mr. W. Reburn, for his help and advice. The Committee appreciates also the efforts of Mrs. Tutty and her assistants and our gardener, Tom Barnes, all of whom do so much to make our premises a place of which to be truly proud.

13.6 On a personal note I would like to thank the members of the Premises Committee who have attended so regularly at meetings and have contributed a great deal of their time and expertise to it.

COMPANY LAW COMMITTEE

14.1 The work of the Committee is divided into consideration of domestic developments in company law and the prospective impact of directives of the European Economic Community as part of the programme of the harmonisation of company law within the Community

14.2 The year opened with Mr. Justice Butler's decision in the Cork Shoe Company case in which he decided that a company could not appoint an attorney to execute deeds on its behalf within the State. One of the most serious effects of this judgment was that the power universally given to receivers in mortgage debentures to execute deeds on behalf of the company was invalid. As a result, the title of those who had purchased through recivers would have had to be regarded as dubious. Furthermore, forms of mortgage debentures would have to be substantially redrafted for the future. Fortunately, this part of Mr. Butler's judgment was appealed to the Supreme Court where it confirmed the widely-held view, that a company had indeed power to appoint an attorney to execute deeds on its behalf in the State and hence, the normal provisions in the mortgage debentures authorising a receiver to execute documents on behalf of the company were valid. Members of the profession involved in this type of work therefore heaved a sigh of relief! It should be noted, however, that Mr. Justice Butler in his judgment had confirmed and made it clear that the receiver could not affix the seal of the company to documents unless he were authorised by the Articles of Association to do so (a rare situation).

14.3 Members of the Committee met with Mr. C. O'Connor, Assistant Secretary, and Mr. S. Cauldwell of the Department of Industry, Commerce and Energy, to discuss with them a number of matters in relation to the Department's responsibility in company law area. Mr. O'Connor thanked the Committee for the help it had been giving to the Department in relation to the various E.E.C. Directives and said he hoped to build on the good relations which had existed between the Committee and his predecessors. The Committee drew his attention to two aspects of the work of the Company's Office which were concerning practitioners. The first of these was the delay in the formation of new companies and the Committee was assured that with the training of new staff it was hoped that this could be accomplished in a minimum of three weeks. Secondly, the members of the Committee said the profession was concerned with what appeared to be new policy in the Company's Office which was resulting in the frequent rejection of names for companies even if they bore no resemblance to the names of the existing companies. It was agreed that this would be looked into.

14.4 It had been expected that a Company's Bill would have been introduced during the course of the year in order to implement the Second E.E.C. Directive relating to the preservation of capital to deal with a number of limited matters, e.g. removing the upper limit of twenty for partnerships in certain instances. It was disappointing, therefore, that no Bill has appeared as of the date of writing this report. Time is beginning to run out in respect of the implementation of the Second Directive. It should, however, be expected in the coming year.

14.5 The past year has given members of the Committee an opportunity to assess the working of the Mergers, Takeover and Monopolies Control Act of 1978. Members' attention was drawn in the *Gazette* to a statutory instrument made under the Act (No. 17 of 1979) entitled Mergers, Takeover and Monopolies (Newspapers) Order 1979. This applied to the merger or takeover involving enterprises, at least one of which was engaged in the printing or publication of newspapers regardless of the turnover or gross assets of either the enterprises concerned. It would seem that in the operation of the Act the Department is clearing most applications reasonably quickly though there have been complaints of very long delays in some instances.

14.6 The pace of the implementation of the harmonisation programme in company law of the E.E.C. is quickening. In addition to the Second Directive on the maintenance of the companies' capital which has to be implemented by June of 1980, the Fourth Directive on annual accounts has to be implemented by July 1980, and this will require further legislation. Although this Directive is of primary concern to the accountancy profession, there are certain areas in which the Committee consider it desirable to make observations and a memorandum has been submitted to the Department of Industry, Commerce and Energy. The Third Directive on internal mergers, and a Directive on the harmonisation of stock exchange listing, have both been adopted and have to be implemented by 1981. It is also expected that the Directive on the contents and supervision and distribution of prospectuses will be adopted shortly.

14.7 Against this background of increasing E.E.C. impact on our company law, the Committee has for the first time this year sent a representative to the Special Committee on Company Law of the Commission Consultative des Barreaux de la Communauté Européenne. This provides a useful direct channel of communication for representative company law practitioners of the Community with the Commission. It is now dealing with the Seventh Directive on group accounts and with insider trading. The development of this contact is very helpful for the work of the Company Law Committee.

CONVEYANCING COMMITTEE

Rory O'Donnell *Chairman*
Eric Brunker
John F. Buckley
Maurice Curran
Patrick Fagan
William Fallon
Ernest Farrell
John Gore-Grimes
John Maher
P. C. Moore
Rory McEntee
Frank Murphy
W. A. Osborne
Moya Quinlan
Brian Russell
Joseph Sweeney

Regular meetings of the Committee have been held during the year.

15.1 *Requisitions on Title:* The Society's new form of Requisitions on Title have been in print for some months. There were a few teething problems but these have now been eliminated. The Requisitions which deal in a comprehensive way with the increasingly complicated areas of planning, capital taxes and Family Home Protection Act have been well received. Specialist Requisitions such as licencing have been omitted and members were recommended to retain a few copies of the old Requisitions for reference in this respect.

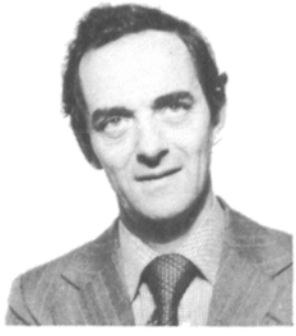
15.2 *Sale of Flats:* The preparation of a specimen set of documents is still in hand. It is hoped to have a report on this complicated matter issued to the profession within the next few months.

15.3 *Construction Industry Federation:* A sub-committee, in conjunction with representatives of the Dublin Solicitors' Bar Association (DSBA) have been meeting with the CIF working on a proposed recommended form of building contract for spec-built houses. About ten working meetings have taken place and very considerable progress has been made. It is hoped that the contract will be launched before the end of the year.

15.4 *National House Building Gauarantee Scheme (NHBGS):* The Committee has been endeavouring to anticipate problems which might arise out of the proposal by the main building societies to lend in general only to builders who are registered under this scheme. The main difficulty foreseen was that mortgagees' solicitors might insist upon the guarantee certificate being available upon completion of the mortgage. It is anticipated that this would be likely to cause delays in view of the fact that the guarantee certificates will not be issued until a final inspection has been carried out by the inspector of the Department of the Environment. It is hoped that solicitors for building societies will be instructed by their cliants merely to satisfy themselves that the builder is a registered builder and that the National House Building Guarantee Agreement has been entered into in respect of the house. A number of different meetings have been held with representatives of the NHBGS and a joint approach has been agreed.

15.5 *New Houses: Architects' Certificates:* As mentioned last year, a specimen form of architect's certificate was proposed for adoption by the solicitors for the main lending institutions and by the Institute of Architects. A form of this was finally agreed and details were published in the November 1978 issue of the *Gazette*.

15.6 *New Houses: Architects' Certificates:* The Committee recommended that it was not reasonable for solicitors acting for a purchaser or mortgagee to require the furnishing of an architect's certificate in respect of a house which was built at a time when it was not general practice to furnish these certificates. The Committee took the view that it became general practice to furnish such certificates in the year 1970 and that it was unreasonable for solicitors to look for certificates in respect of houses built prior to that year.



Rory O'Donnell
Chairman

15.7 *New Houses: Capital Gains Tax:* Enquiries were received by members about the correct procedure in relation to Capital Gains Tax clearance certificates where acting for the purchaser of a new house when the price exceeds £50,000. A note was approved for publication in the *Gazette*, detailing the position, which appears to be as follows. Where there is an agreement for the purchase of a site and that agreement is separate from and unconnected with another agreement to erect a building on a site, a CGT clearance certificate is not required for the protection of a purchaser, unless the price of the site itself exceeds £50,000. If the contracts comprise a combined building agreement and agreement for lease, or if separate contracts are interconnected, then if the total consideration exceeds £50,000 the solicitor for the purchaser must insist on getting a CGT clearance certificate or make the deduction prescribed by the CGT Act 1975.

15.8 *Land Registry and Registry of Deeds:* Regular contact has been maintained over the year with offices of the Land Registry. The steps taken to reorganise the Land Registry by taking on more mapping staff, giving solicitors an option on the type of maps required and the sub-division of the Land Registry into different regions with its own mapping department, seem to have already brought about a further improvement in the standard of service. The "new" requirements of the mapping department as to the marking of maps and the acceptance only of original Ordnance Sheets has also brought about some improvement, even if it is only that the query is raised on the map immediately rather than eighteen months afterwards. It is still a bone of contention that solicitors are required to furnish maps which the Ordnance Survey Office have not in print and that the Land Registry will still not accept their own official copy Land Registry maps for subdivision purposes. The Committee unanimously approved of certain suggested reforms in the Registry of Deeds regarding searches proposed after consultation between the DSBA and the Assistant Registrar of Deeds, Mr. Murphy. These include the charging of a flat fee for the average search instead of having three different stages at which fees become payable. Also searches would be posted out to the solicitor who requisitioned them when they were ready with a closing certificate and solicitors could get them written up to include a closing act at a later stage.

15.9 *Title Insurance:* A working party has had a series of meetings with representatives of CTI Dominion Title Insurance Company and has agreed on the form of policy that would, in its opinion, be reasonable if that company should commence business in Ireland. The broader aspect of what attitude the Society should take to this, is the subject of a report which is in the course of preparation.

15.10 *Building By-Laws: Extension to Residential Houses:* The Committee considered complaints which were received from many different parties arising out of delays occurring due to problems of extensions having been erected without building by-laws approval and the fact that it appeared to be impossible to obtain building by-laws retrospectively. The opinion of senior counsel was sought as to whether there was any time limit after which solicitors need no longer concern themselves with the question of building by-laws approval for an extension and they were advised that there was no time limit. The Committee has recommended that in cases where the extension in question is exempted development under the Local Government Planning & Development Regulations, that it is reasonable for a solicitor for a purchaser or mortgagee to accept a certificate from an architect or engineer or other qualified person to say that in his opinion the extension complies with building by-laws.

15.11 *Consolidation of Landlord & Tenant Acts:* Representations were made by the Committee to the appropriate Department in charge of the consolidation of legislation with a view to having Statutes in this very fragmented area consolidated. The representations were very well received and when the Landlord & Tenant Bill at present before the Dáil is passed, it is hoped to make further progress.

15.12 *Conditions in Loan Approval:* A member referred to the fact that certain loan approvals were issued subject to conditions which the borrower might not be able to comply with. The normal clauses inserted in contracts by a purchaser's solicitors to protect their clients do not usually extend to covering these matters and the Committee issued a recommendation for publication in the *Gazette* drawing the attention of practitioners to this serious matter.

15.13 *Extension of Building Society Vacate System to other Mortgagees:* After hearing at last year's AGM of the efforts by a former President of the Society, Mr. Eunan McCarron, as far back as nine years ago to have this simple reform introduced and the various promises to him to do so by successive governments, the Committee resolved to continue to press for the introduction of this change. Representations have been made to the Department of Justice and others. This is a very topical point as in Dublin at any rate it does account for purchasers spending an extra month or so on bridging finance admittedly in a small number of cases.

15.14 *Undertakings to Banks:* The Irish Banks Standing Committee approached the Society with a view to agreeing a series of standard forms of undertaking. A sub-committee was appointed which has had several meetings. A meeting with representatives of the Irish Banks Standing Committee is proposed. Members who have been encouraged to use the Society's recommended form of undertaking have reported resistance from the banks to acceptance of this form.

15.15 *Positive Covenants and Freehold Land:* A Galway member conferred with the Committee on the difficulties in attempting to create positive covenants which would be enforceable against a subsequent owner of freehold land which was being sold. What he had in mind was a situation frequently encountered of selling a site where the benefit of the enforceability of positive covenants attributed to a building estate scheme would not be available and where the vendor wishes to include a building covenant to build a wall or erect a fence. He himself eventually suggested what the Committee felt was the correct solution, namely that a covenant be inserted in the deed providing that no development was to take place until the wall or fence specified had been erected.

15.16 *Exceptions and Reservations in Transfers and Conveyances:* Arising out of the enforced discontinuance of leases for the sale of new houses, various members have queried the question of easements, exceptions and reservations which are reserved or granted in conveyances or Land Registry transfers of new houses. The sub-committee of the Committee is still investigating the position but the initial view of the Committee was that if the transfer reserves out of the grant various rights, as it should do, that it should go on to grant the usual easements to the transferee for the benefit of the property transferred. A report of the Committee will be published in the *Gazette* in due course on the subject.

15.17 *Issue of Contracts to Auctioneers: Private Treaty Sales:* A number of members have queried the practice of auctioneers, particularly in the country, who press to have contracts issued to them before any sale has been arranged, which in most cases they then proceed to get signed by a purchaser without reference to his solicitor. The Committee were of the opinion that the practice was ill-advised both from the point of view of the vendor and the purchaser and intends to take the matter up at its next meeting with the Auctioneers' Association.

15.18 *Clause in Contract providing for Redemption of Loan after Closing:* The Committee considered the apparently increasing practice of the insertion of a clause in contracts for the sale of property providing that the purchaser should accept an undertaking from the solicitor for the vendor to pay off the vendor's mortgage after completion of the sale. The Committee disapproved of the practice but takes the view that there is no objection to a clause providing that an undertaking be accepted provided that the redemption took place on or before closing.

15.19 *Stamp Duty on VAT:* The Committee considered the practice of the Revenue Commissioners of charging stamp duty on the sale of development property (developed since 1972) where the sale price is inclusive of VAT. This can be particularly significant where the VAT has the effect of rendering the transaction liable for a higher rate of stamp duty. The Committee came to the conclusion that the Revenue Commissioners were correct in regarding VAT being part of the price for the assessment of stamp duty.

15.20 *Law Society Building Contract:* The Committee made certain alterations to update its existing form of building contract. Most of the changes arise out of changes in stamp duty, CRV and housing grants.

15.21 *Bridging Finance:* The Committee has carefully monitored the position regarding the recent furore in the newspapers about bridging finance and some of the allegations made that delays in completion of mortgages were often attributable to solicitors. The Committee took the view that there was nothing to be gained for solicitors in getting involved in the crossfire between the banks, builders and building societies over this contentious matter. The delays in the completion of mortgages take many forms and the Committee does not accept that delays on the part of solicitors are in any way significant in this respect.

15.22 Apart from the specific matters mentioned above, the Committee dealt during the year with many points in relation to practice and procedure. The Committee welcomes comment and queries from members on any matter of practice or procedure, particularly if it is something that may be of interest to the profession in general.

PUBLICATIONS COMMITTEE

16.1 The Committee has continued to arrange for and encourage the publication of legal text books and commentaries and works in close collaboration with the Arthur Cox Foundation.

16.2 During the year two books were published both on Planning Law. *A Guide to the Planning Acts* by Kevin I. Nowlan and *Planning and Development Law* by E. M. Walsh, S.C. The works are complementary, the *Guide to the Planning Acts* being annotated synthesis of the 1963 and 1976 Acts and *Planning and Development Law* being a text book on Planning Law.

16.3 The Committee has currently with the printers a book on Corporation Tax written by A. G. Williams, which should be rapidly followed by a book on Employment Law by Ercus Stewart. It is hoped that a work on Local Government by Mr. Justice Ronan Keane will be ready to go to the printers early in the new year and the Societey has also undertaken the publication of a Case Book on Constitutional Law by James O'Reilly and Mary Redmond which is scheduled for publication later in 1980. A second edition of *Irish Cases on Evidence* by J. S. R. Cole is in course of preparation as is a work on Capital Gains Tax by Kevin Kenny.

16.4 The Committee is hoping to arrange for the publication of a second edition of W. J. McGuire's book on the Succession Act 1965 and is actively seeking an editor for the project and it is hoped that a commission to write a major work on Licensing Law in Ireland will soon be placed.

16.5 A heartening feature of the Committee's work is that it has clearly contributed along with other publishers to the creation of a climate in which prospective authors are aware that the chances of having a book on any aspect of the law published are not remote and the number of applications which the Committee has received continues to increase. Apart from the works mentioned above the Committee has received enquiries from several members of the staffs of the Law Faculties of the Irish universities who are engaged in the preparation of major works on important areas of the law and has indicated support for such works.

16.6 The work of the Committee is unspectacular and while the time scale of each of its projects from initiation to final publication is often a long one the increasing number of Irish published law books is a reward in itself.

LIBRARY REPORT

Margaret Byrne
Librarian

17.1 Since October 1978, with the holding of the Society's lectures (Old Regulations) in Blackhall Place, there has been a great increase in the number of students using the Library. The Library was kept open on an experimental basis two nights a week until 9.30 p.m. from April to August. This arrangement worked well and the Library will be open two nights a week, Tuesdays and Thursdays, until 9.30 p.m., from January to August of next year.

17.2 In September Mary Buckley, B.A., Diploma in Library and Information Studies, was appointed Assistant Librarian. Her appointment is indeed very welcome.

17.3 The total amount spent on the purchase of books and periodicals for the year ending 30th April 1979 was £3,622, and on binding £690.00. Unfortunately, the postal strike curtailed the book-purchasing programme towards the end of the year. Corresponding figures for the previous year were £5,217 and £1,239 respectively.

17.4 I am taking this opportunity of listing for information some of the material received daily by the Library of which members may not be generally aware.

(i) *Unreported Judgments*

(a) All written judgments of the High Court and Supreme Court, which are received within approximately four to six weeks of delivery of the judgments. These are indexed and filed in the order in which they are listed in the pink indices, circulated with the *Gazette*, which are prepared by the Incorporated Council of Law Reporting.

(b) Northern Ireland written judgments received in the form of monthly bound parts.

(c) Unreported English judgments are not kept but if there is a sufficient demand for

particular judgments copies will be obtained or members will be directed as to how to obtain them.

(ii) *Government Publications*

(a) All Bills as issued, Amendments, Order papers and Dáil and Senate Debates.

(b) Under the Statutory Instrument Act 1947, the Library receives a copy of all Statutory Instruments as issued.

(c) Stationery Office and HMSO Catalogues are received and publications of relevance to the profession are obtained.

(iii) *Findings of the Employment Appeals Tribunal and decisions of the Labour Court.*

(iv) *Annual Reports of some State-sponsored bodies.*

(v) *National Daily and evening newspapers.*

17.5 In order to supplement existing holdings the Finance Committee has sanctioned the purchase of the Irish Reports on Microfiche and a Reader Printer. The purchase of a Reader Printer will enable the Library to subscribe to other material available on microfiche, particularly the E.E.C. Official Journal, and will help save valuable space.

INCORPORATED LAW SOCIETY OF IRELAND

Applications are invited for the post of EXECUTIVE EDITOR of the *Gazette*. Persons interested in this part-time, remunerative post should communicate with:

THE DIRECTOR GENERAL
BLACKHALL PLACE
DUBLIN 7

before November 30th.

Christmas Cards

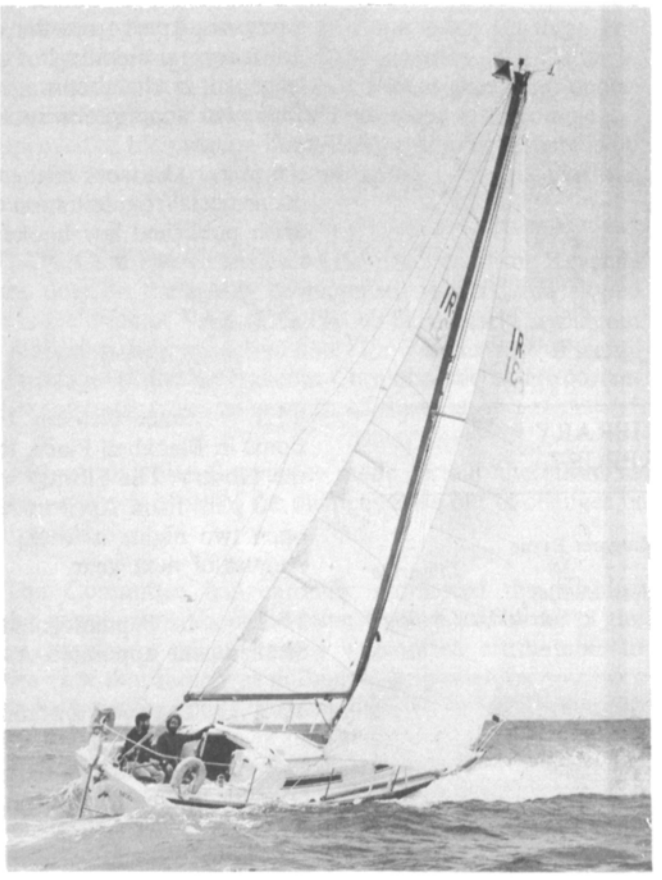
The Society is producing a Christmas Card which will shortly be on sale. The price will be 15p each.

The card will be on good quality white board with the coat of arms of the Society in gold on the front. The left side of the inset will show a line drawing of the Italian corridor in the Society's premises and the right side will carry the greeting.

This card is the first of a series, each of which will have a drawing of some outstanding feature of the Society's headquarters.

As the supply of cards will be limited intending purchasers should make early application enclosing cheque for the appropriate amount, plus 20p for postage. Orders for a dozen or more cards post free.

Any profit from the sale of cards will be donated to the Solicitors' Benevolent Association.



Transatlantic Crossing

Shardana, John Gore-Grimes' yacht, a Nicholson 31, which he sailed in a Transatlantic race from Marble Head (just outside Boston) to Crosshaven in 20 days and 14 hours. The Transatlantic was a race to commemorate the 50th Anniversary of the Irish Cruising Club.

Correspondence

22 Lower Baggot Street,
Dublin 2.

Re: Hotel Licences

Dear Sir,

I wonder if you would bring to the attention of the profession, through the Gazette, the inherent dangers in accepting a licence attached to a hotel premises without proper investigation as to whether it is, in fact, an hotel or an ordinary 7-day Publican's licence.

On the face of it a licence is stated to be "Publican's Licence (Ordinary)" with a caveat on the back of the licence to the effect that the form in respect of both an hotel and a seven-day ordinary Publican's Licence are the same but that there are certain restrictions attached to a "Hotel Licence" which do not attach to a seven-day Publican's Licence.

It seems to me that there are some solicitors, most auctioneers and practically all holders of hotel licences under the impression that they have got a 7-day Publican's licence.

Where a "Hotel Premises" are being sold then it is incumbent upon both the solicitor for the Purchaser and Vendor to check in the District Court Licensing Office as to whether the licence is an hotel licence or otherwise.

If it is an hotel licence, that has been enlarged under Section 19 of the 1960 Act then prospective purchasers should ascertain the following:—

Was the original "Dispense" licence under Section 2 of the 1902 Act granted prior to the passing of the 1960 Act, and if so:—

1. Does the premises have the necessary rooms qualifications i.e. at least 10 apartments, or if situate in a County Borough, including the Dublin Metropolitan District, 20 apartments.
2. That the premises are registered in the register of hotels kept by Bord Failte Eireann.

The Dublin Metropolitan Licensing District Court has adopted the practice of forwarding to Bord Fáilte a list of premises that should be registered with them under Section 20 of the 1960 Licensing Act.

Failure to be so registered in the Register of Hotels disentitles renewal of the licence.

Yours sincerely,

Frank O'Donnell.

Probate Office,
Four Courts,
Dublin 7.

Re: Loss of Wills

Dear Sir,

I have been directed by the Probate Judge to write to you to express his concern about the growing number of original Wills which are being lost, necessitating applications to Court to prove such Wills in terms of a copy or of a reconstructed copy.

In the calendar year 1978 there were eleven applications to the High Court to prove Wills or Codicils in terms of a copy, where the originals had been lost.

In the Calendar year 1979, up to and including 30th July, there have been a further thirteen such applications.

A breakdown of the 1978 applications shows that one Will was lost when a house was burgled, three were lost in the post (one being lost while being transmitted by ordinary unregistered post from a Solicitor to his town agent) and the remaining seven were lost in Solicitor's offices.

A breakdown of the 1979 applications shows that one Will was lost when the Executor threw it into his waste paper basket, one was alleged to have been destroyed in a fire in a Solicitor's Office, one was lost either by the Solicitor acting or his town agent, one was alleged to have been posted by a Solicitor to a client who couldn't recall receiving it, one application arose out of the loss of two Codicils given by a Solicitor to the Testator while the other eight applications arose out of the loss of Wills in Solicitor's offices.

His Lordship asked me to point out that a significant feature in these cases was the inadequacy of the information about the efforts to trace such Wills or about the circumstances leading to the loss of the Wills in the first instance. He feels that the facts, as revealed above, particularly as regards the loss of Wills in Solicitor's offices, should be a cause of concern to your society and to Solicitors generally.

He would be grateful if you would draw the attention of your members to this problem as discreetly as possible. Your Council might also consider giving some guidance in the Matter.

Yours truly,

Ide Cleir,
Probate Officer.

Security Pacific Plaza,
1200 Third Avenue, Suite 1200,
San Diego, California 92101,
(714) 239-3357.

Dear Sirs:

Having been totally inspired by a recent four-month trip through Europe, and having recently completed fifteen years of successful practice as an attorney, I have decided to close my San Diego law office and return to Europe to reside.

Although I could live off investments for a while, I am instead seeking out new challenges and opportunities (in no way limited to law). Perhaps I will find myself involved in management, writing, teaching, journalism, or music.

A little background: basically a hard charging trial attorney; single; age 39; named San Diego Trial Lawyer of the Month by San Diego Trial Lawyer's Association; Superior Court Judge pro tem; Republican nominee for California State Assembly; successful real estate investor; professional musician (trombone, piano, guitar); song writer (Ed Sullivan TV Show); Pomona College, 1961 (BA in Economics); UCLA Law School, 1964 (LLB/JD); Admitted California Bar 1965; Lieutenant U.S. Navy (Law Specialist) 1965-1968; editor of political newspaper; Professor of Law; School Board President; Library Trustee; Director, San Diego Public Defender; Listed in Who's Who in American Law; Board of Directors, Starlight Opera; Arbitrator, San Diego County Bar Association.

Please advise me immediately as to positions available. If you have nothing available, please provide recommendations or suggestions, or refer this letter directly to someone who might be able to assist me.

Very truly yours,

Philip N. Andreen.
Attorney at Law

The One Day Course on Civil Litigation

This seminar was the first of a series of thirteen which are designed to run from the 11th of September up until the 1st November in Blackhall Place. The philosophy underlying this type of educational seminar could be summed up in the phrase "learning by doing". By contrast with courses which employ a mere academic and lecture style approach, the emphasis here is placed on the participation of those who attend. Personal involvement takes the forms of discussion and exercises which involve role playing. Real life situations are simulated. Access to audio visual technology, including Close Circuit Television (C.C.T.V.) contributes significantly to this approach. Problem solving takes place in an environment which ensures that should mistakes occur, as they inevitably will, those who make them are cushioned from the consequences in a way for which real life situations do not allow. Admittedly there is no substitute for experience in legal practice as is the case in every walk of life but it is intended that this type of seminar or refresher course be of a more practical nature than that characteristic of a lecture or talk. In this sense a solicitor is helped in a realistic way to deal with the various areas of law which arise in the course of work.

The function of the Consultants to each course is precisely to help participants to cope in a practical way with the area under review. Their methodology is geared to this end. As experts in the field, they make available their experience to participants.

The justification for continuing this type of "learning by doing" approach in one day seminars for solicitors derives from the response of participants. They are given the opportunity to judge the success or failure of each course on its completion. This takes the form of filling in an assessment sheet. When the results are quantified, we get a picture of how participants have perceived the relevance of the material. To date the response has been overwhelmingly positive and the words of one solicitor sums up the feelings of many. His general comment was "I was vastly impressed and interested".

The one day course on Civil Litigation could be regarded as a good example of what has been written above. It was the first of the present series and took place on the 11th of September in Blackhall Place. Professor Richard Woulfe, the Director of Education opened the seminar. The Director of Training Professor Laurence G. Sweeney, Training Specialist Patrick Quinn, Education Officer Nicholas Moore and tutors Geraldine Pearse and Anna Hegarty were present. The Consultants on this one day seminar were solicitors Bryan Strahan (Gerard Scallon and O'Brien) and Noel Smith (N. T. Smith & Co. and Good and Murray). The areas covered during the day included pursuing a debt by summary summons in the High Court and processing a High Court Action up to the hearing. Thirty participants attended.

As an opening seminar in the present series of thirteen, it was a hugh success in the opinion of those present, an encouragement to those who planned it and to the Consultants involved in giving it. The demand from participants at the end of the day for another seminar on Civil Litigation which was expressed both verbally and in writing consequently came as no surprise.

Inter-Company Transfers: Changes in Stamp Duties

Changes have recently been made in the Stamp Duties which apply to certain inter-company transfers by the "Imposition of Duties (No. 241) (Limit on Stamp Duty in respect of Certain Transactions between Bodies Corporate) Order 1979 – S.I. No. 244/1979. The principal changes made by the Order are:

1 To extend the operation of the concessionary rate of duty to bodies corporate.
2 To extend the operation of the concession to transfers between companies in a group of companies, which would not have been covered by the earlier provisions; and
3 To provide that the relief from duty may be cancelled if the transferor and transferee cease to be associated in the prescribed manner within a period of two years from the date of the conveyance, or if it is subsequently found that any declaration or other evidence furnished was untrue.

The provisions of the Order are both complicated and technical and it is suggested that practitioners should familiarise themselves with its contents as soon as possible.

Criminal Justice (Legal Aid) (Amendment) Regulations 1979

S.I. No. 357 of 1979

These Regulations coming into force on 1st November 1979 provide for increases of 15% in legal aid fees payable to solicitors in attendances in the District Court and for visits to prisons and other custodial centres as well as for an increase in the motor mileage allowance from 15p to 21p per mile.

Bantry Bay inquiry

The Inquiry resumed in Blackhall Place on 8th October, 1979. For the duration of the Inquiry it is regretted that the overnight accommodation available to members will be limited.

With the resumption of the Inquiry members should note that lunch is available daily in the Members' dining room between 12.30 and 2.00 p.m. and coffee and sandwiches are available in the Members' lounge.

The Register

REGISTRATION OF TITLE ACT 1964

Issue of New Land Certificates

An application has been received from the registered owners mentioned in the Schedule hereto for the issue of a Land Certificate in substitution for the original Land Certificate issued in respect of the lands specified in the Schedule which original Land Certificate is stated to have been lost or inadvertently destroyed. A new Certificate will be issued unless notification is received in the Registry within twenty-eight days from the date of publication of this notice that the original Certificate is in existence and in the custody of some person other than the registered owner. Any such notification should state the grounds on which the Certificate is being held.

Dated this 30th day of September 1979.

W. T. MORAN (Registrar of Titles)

Central Office, Land Registry, Chancery Street, Dublin 7.

SCHEDULE

(1 Registered Owner: Michael Devane. Folio No.: 5422. Lands: Rusheennamanagh. Area: 10a. 2r. 30p. County: Galway.

(2) Registered Owner: Maurice O'Mahony. Folio No.: 1206. Lands: Knocknagappagh, Barnaviddane. Area: 44a. 1r. 21p. and 6a. 2r. 37p. County: Cork.

(3) Registered Owner: John Langton. Folio No.: 2600. Lands: Blanchvillespark. Area: 70a. 3r. 7p. County: Kilkenny.

(4) Registered Owner: Bernard Ryan and Veronica Ryan. Folio No.: 11402F. Lands: Ballyphilip. Area: .500 acres. County: Cork.

(5) Registered Owner: John Boyle. Folio No.: 10492. Lands: Corker More (Parts). Area: 41a. 2r. 0p. County: Donegal.

(6) Registered Owner: Thomas McGarvey. Folio No.: 428. Lands: Drummany. Area: 32a. 1r. 4p. County: Cavan.

(7) Registered Owner: Jane Agnes Reynolds. Folio No.: 16469. Lands: Burrenrea. Area: 1a. 2r. 0p. County: Cavan.

(8) Registered Owner: Patrick Harnett. Folio No.: 878. Lands: Rathoran. Area: 31a. 0r. 20p. County : Kerry.

(9) Registered Owner: Peter Mullen. Folio No.: 5549. Lands: Faughart Lower. Area: 6a. 0r. 20p. County: Louth.

(10) Registered Owner: Timothy Mahon. Folio No.: 32298. Lands: Browningstown. Area: 0a. 0r. 39p. County: Cork.

(11) Registered Owner: Thomas Nixon. Folio No.: 349. Lands: Clonmoyle. Area: 4a. 2r. 5p. County: Kildare.

(12) Registered Owner: James McKenna. Folio No.: 9037. Lands: Dromcoo (Brady). Area: 7a. 1r. 8p. County: Monaghan.

(13) Registered Owner: James Reynolds. Folio No.: 3410. Lands: Eaigue. Area: 56a. 0r. 0p. County: Longford.

(14) Registered Owner: Myles Keating. Folio No.: 3438 (this folio has been revised and is now contained in Folio 8110F). Lands: Straboe. Area: 65a. 1r. 0p. County: Carlow.

Notices

Assistant Solicitor required for expanding practice in North West. Experience in Probate and Litigation desirable. Box No. 000.

Wanted: Reports of Tax Cases: (1) Volume I of *Irish Tax Cases* published prior to 1933. (2) Official Reports of the Tax Cases as published by H.M. Stationery Office from 1875. Complete or incomplete. Please reply as soon as possible quoting price. Tel. 763257.

Solicitor - qualified one year with experience in general practice, seeks challenging position; city and country considered. Phone (01) 781806.

Lost Wills

Patrick Dwane, deceased, late of BAllynamuddagh, Kilmallock, Co. Limerick. Will any person having knowledge of a will of the above-named deceased, who died on the 4th day of December 1978 at Ballynamuddagh, Kilmallock, please communicate with Maurice M. A. Power & Son, Solicitors, Kilmallock, Co. Limerick.

Áine Ní Ruiseal, deceased (otherwise Nan Russell). Will any person having knowledge of any will made by the above-named deceased, having an address at 1 Falcarragh Road, Gaeltacht Park, Whitehall, Dublin 9, please contact Lanigan & Curran, Solicitors, Dungarvan, Co. Waterford. Tel. (058) 41085.

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THE INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

NOVEMBER 1979 VOL. 73 NO. 9

Contribution by Irish Permanent Building Society to the Building Fund of the Incorporated Law Society of Ireland at Blackhall Place

In making the presentation on behalf of the Irish Permanent Dr. Farrell said "that normally such contributions were made by way of mortgage on security and repayable by equal monthly instalments over a period; however in this instance the Board was secure in the knowledge that the already high standard of education in the legal profession would be raised even further and all would benefit".

The President, Mr. Hickey, in accepting the contribution expressed his own personal gratitude and that of his Council for the very generous donation. "We believe", he said, "that we have carried out a very worthy work in the restoration of a historic building in the city of Dublin and feel that this achievement coupled with the benefits which we hope our new Law School will bring to the profession over the years is deserving of every support".

★ Picture shows (left to right): Dr. Edmund Farrell, Managin Director of the Irish Permanent Building Society, presenting a cheque to Mr. Gerald Hickey, President of the Incorporated Law Society of Ireland.

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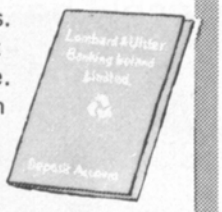

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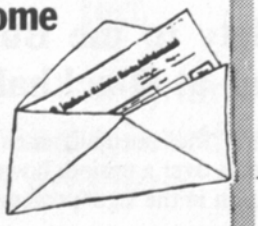

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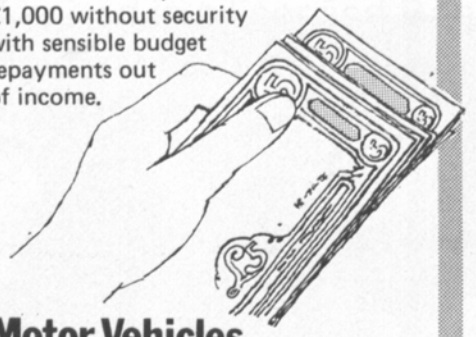

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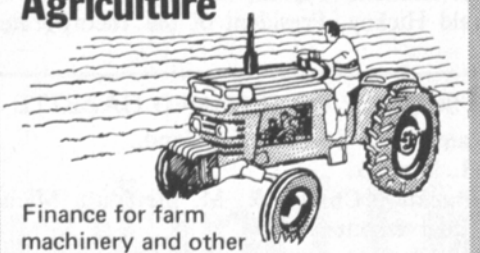

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ads

COMMENT:

The Public Defender: A Useful Concept — somewhere else?

In a recent, but little publicised speech to the Conference of European Ministers of Justice, the Minister of State for the Department of Justice, Mr. David Andrews, referred to the fact that the Tormey Committee on Criminal Legal Aid was considering the advantages of the Public Defender System. While the Minister was careful to indicate in his speech that he did not think it right to express a personal view on the merits of a salaried service it must be taken as very significant that reference was made to the proposals on such an occasion.

While it has been rumoured for some time that the introduction of a Public Defender System, to replace the present Criminal Legal Aid Scheme, was being mooted, it was only in the early summer of this year that any indication was given by the Tormey Committee to outside bodies that the matter was under serious and apparently urgent consideration. It seems unfortunate that the views of the Professions were being sought during what is for many practitioners a holiday period and with peremptory time limits.

The Public Defender System originated in the United States under the Federal Public Defender Services Legislation of 1964 and 1970 which followed the seminal decisions of the United States Supreme Court in *Gideon v. Wainright* and *Miranda v. Arizona* the first of which established that a person accused in the Federal Courts of a felony (an offence for which the penalty is a year's imprisonment or more) has the right to be represented by Counsel and the *Miranda case* imposed an obligation on the Police to a suspect taken into custody of his right to Counsel.

In the United States the control of the establishment of a Federal Public Defender's office is under the control of the United States District Court with the approval of the Judges of the Federal Circuit for the area and there is provision both for the employment of full-time salaried employees in a Federal Public Defender's office and for the establishment of a panel of private practitioners with a statutory proviso that at least 25% of the persons charged with federal offences have to be defended by a panel attorney.

The Federal Public Defender's office has been established in most states and is funded out of the funds provided for the administration of the Courts. There is an interesting statutory provision that the salary of the Public Defender in any district is not to exceed the salary of the United States Attorney for the District and the salaries of lawyers in the Federal Public Defender's System are linked to those in the office of the United States Attorney for the district. It appears that salaries in the Federal Public Defender Service are generally found acceptable by lawyers and it appears to be the position that posts in the Public Defender system are chosen by lawyers who propose eventually to go into private practice as Trial Lawyers as a useful training ground. The same situation does not appear to the panel attorneys where there is dissatisfaction about the level of remuneration and it is suggested that the top 10% of Criminal Practice Firms do not apply for panel membership. It is significant that State Public Defender systems are not at all so well funded.

A recent instalment of the BBC 2 Television series "Circuit 11 Miami" provided a brief insight into the operation of a State Public Defender System, though largely in relation to the operation of the "Plea-Bargaining" practices so common and allegedly so necessary in the overworked Florida judicial system. The Public Defender Attorney shown, appeared to have behaved reasonably and properly within the limits of the "Plea-Bargaining" system but his client expressed himself as being totally dissatisfied and clearly regarded the Public Defender as being an ally of the prosecutor and the judge in "the System". The fact that the "Plea-Bargaining" system operated at all makes it very difficult to assess the operation of a Public Defender Systme but there does appear to be reasonable satisfaction with it.

Whether such a system translated to the Irish scene would work is however a totally different question. There is unfortunately no history of paying top professional people in the Public Service salaries comparable to those which they would earn elsewhere either in private practice or as whole-time employees of commercial organisations. It is well known that great difficulty has been found in filling certain local authority Law Agent and Assistant Law Agents' positions in recent years and it is difficult to avoid the conclusion that this is due to the low status in the Public Service which the Law Agent holds, in spite of the enormous responsibility and wide range of legal problems that he is expected to deal with, and the "dead hand" of the first Devlin Report has left the salaries of Law Agents and Assistant Law Agents well below those on offer in private practice or for salaried solicitors in commercial organisations. The gap between the starting salaries in the Public Service, which are not inadequate and the top salaries which do not compare favourably with outside salaries is far too narrow and must be seen as a deterrent to many prospective applicants.

It is to be feared that if a Public Defender System was introduced in Ireland, particularly if one of the motives for its introduction was the hope of a reduction in the present very modest cost of a Criminal Legal Aid Scheme, no effort is likely to be made to ensure that the top posts in the system are adequately remunerated or carry a suitable status and accordingly while it may prove possible to recruit adequately at lower levels the system is unlikely to attract the calibre of appointee at its top levels to give the system the status which it would need if it were to be seen as a genuine attempt to cope with the needs of accused persons without means and not merely as a sop to public opinion or the European Court of Human Rights.

Practical Aspects of EEC Law

1. **Is your client's Sole Distributorship Agreement valid under EEC Law?**

Did you know that the EEC Commission Notice Concerning Minor Agreements of May 1970 has been replaced by Commission Notice of 29 December 1977. Paragraph II provides that:

> "The Commission holds the view that agreements between undertakings engaged in the production or distribution of goods do not fall under the prohibition of Article 85 (1) of the EEC Treaty if:
>
> —the products which are the subject of the agreement and other products of the participating undertakings considered by consumers to be similar by reason of their characteristics, price or use do not represent in a substantial part of the Common Market more than 5% of the total market for such products, and
>
> —the aggregate annual turnover of the participating undertakings does not exceed 50 million units of account.
>
> The Commission also holds the view that the said agreements do not fall within the prohibition of Article 85 (1) even if the above mentioned market share and turnover are exceeded by up to 10% within two successive financial years."

The Notice goes on to define "participating undertakings".

This Notice is published in the Official Journal of the European Communities of 29 December 1977, No. C 313.

2. **Enforcement of European Judgments and Decisions.** *European Communities (Enforcement of Community Judgments) Regulations, 1972 — S.I. No. 331 of 1972.*

This Regulation provides for "the enforcement in Ireland of judgments of the Court of Justice of the European Communities, and of decisions of the Council of Ministers or the Commission imposing pecuniary obligations on persons other than States". A Community judgment is defined in the Regulation as any decision, judgment or order which is enforcable under or in accordance with Article 187 or 192 of the EEC Treaty. There is also provision for enforcement of decisions, judgments or orders made under certain Articles of the Euratom Treaty and the ECSC Treaty.

An Enforcement Order may be obtained on application to the Master of the High Court.

Practitioners involved in this field should be aware that Article 4 (2) provides that:

> "Where a sum of money is payable under a Community judgment which is to be enforced, the enforcement order shall provide that the amount payable shall be such sum in the currency of the State as, on the basis of the rate of exchange prevailing at the date on which the Community judgment was originally given, is equivalent to the sum payable."

3. **The EEC and Driving Licences.**

The judgment of the Court of Justice in the case of Michel Choquet Case 16/78 should be of interest to practitioners. It held that "it is not in principle incompatible with Community law for one Member State to require a national of another Member State, who is permanently established in its territory, to obtain a domestic driving licence for the purpose of driving motor vehicles, even if he is in possession of a driving licence issued by the authorities in his State of origin. However, such a requirement may be regarded as indirectly prejudicing the exercise of the right of freedom of movement, the right of freedom of establishment or the freedom to provide services guaranteed by Articles 48, 52 and 59 of the Treaty respectively, and consequently as being incompatible with the Treaty, if it appears that the conditions imposed by national rules on the holder of a driving licence issued by another Member State are not in due proportion to the requirement of road safety." (Extract from Information on the Court of Justice of the European Communities 1978, IV, page 25).

How to avoid Professional Negligence Claims

Dennis A. Marshall, Solicitor, Partner Barlow Lyde Gilbert, London, and Vice-President of The Law Society of England and Wales.

(One of the 1979 Blundell Memorial Lectures, sponsored by the Royal Institution of Chartered Surveyors and the Senate of the Inns of Court and reprinted by kind permission of the Bar of England and Wales)

To consider usefully the question of prevention of claims for Professional Negligence, it is necessary to understand how the present situation has developed and why there has been a dramatic increase of claims of this type agains most Professions over the last seven to ten years, and also to review the steps taken by the Professions and their Governing Bodies to face up to the challenge of this changed state of affairs. Connected with this is the whole range of insurance protection and the way in which the Insurance Industry have been prepared to provide insurance cover agains liabilities in all cases of unlimited extent to which professional persons and firms are exposed.

The reason for claims

The consumer-inclined society in which we live today seeks compensation for loss which is believed to have been suffered through acts or omissions of Governments, Local Authorities, and indeed all those who provide goods or services to the public, and unless compensation is forthcoming an outcry is likely to occur. A good example is the "That's Life" programme on television, and in such a climate many feel that limitation or exclusion of liablity for professional services should be the last line of defence of the professional firm. There is the further point which many professionals appear to overlook, that the main purpose of their existence is to provide a service by expert advice and actions for the public engaging their services, and should professional firms be unwilling or unable to back up their engagement with compensation for services negligently provided, then a large question-mark is raised over their usefulness to society as providers of that service. One lawyer employed by a large public company in its legal department remarked not so long since that in his view professional advisers were there to be sued. This may sound singularly unattractive, but it is nevertheless true of the conditions in which we are all living and practising today.

From the point of view of Insurers, professional negligence is not an attractive form of business to many. Insurers regard the Risks of what they term "long tail" insurance as unattractive because of the uncertainty, probably for a number of years after a Policy has been written and a premium paid, as to the ultimate cost to them of settling the claims arising under that insurance. It must be self evident that in this field it is usually impossible when a claim is made to quantify the cost of that claim, even if the question of liability is reasonably clear. With continuing inflation and the uncertainty of the amount involved in claims arising in any particular year, it is perhaps not surprising that Insurers find it difficult to get their calculations right, and tend, therefore, to err on the cautious side by requiring relatively high premiums for the Risks which they believe they are running.

The Professions cannot expect others to bear on their behalf the losses which they incur, and in some way or other the total cost of claims against the members of any Profession has ultimately to be borne by those in practice, merely leaving the allocation of that cost to be agreed by individual firms with their Insurers or with the Professional Body on their behalf.

A further problem is that it has been said on numerous occasions that the realms of negligence are never closed. Looking back over the last ten years or so this is very true of the professional negligence area. Until *Hedley Byrne v. Heller & Partners* it was understood to be the law that a professional firm's liability arose entirely out of the contractual engagement, and that only those in contractual relations had a claim against the firm for damage or loss suffered through negligent performance of its duties. That position was widened by Hedley Byrne establishing for the first time a duty of care to others than those in contractual relations where a duty of care had been assumed, although, of course, that extension was subject to the ability of the firm to give an express disclaimer of responsibility. Furthermore, since it has been understood that the professional firms' liabilities arose out of breach of contract, it was believed, it now seems erroneously, that a limitation defence could be relied on when six years from the date of the breach of duty had elapsed, irrespective of whether or not any loss had then occurred. Subsequent decisions have established that the professional firm has in fact a dual duty in contract and in tort and that accordingly even if in contract a claim may have become time barred it can still be pursued in the event of negligence being established whereupon the limitation period is extended until six years after the date the loss is suffered arising from that negligence. Effectively, therefore, a professional man is on risk to be sued for many years after he has retired from active practice, and he is well advised to ensure that he is protected against late claims arising in this way.

From the foregoing general comments it seems plain that if the cost of claims and of insuring against them is to be reduced from the present figures regarded by some as unacceptably high, there has to be a reduction in the number of claims. These, even though only small in number compared to the total transactions carried through by members of any one Profession in a year, are nevertheless too high.

The purpose of the first part of this talk is directed in purely general terms to attempt an analysis of the cause of claims and to suggest some methods whereby they may be reduced.

The cause of claims

The following comments are based on personal experience of handling claims of this type over a considerable number of years. They may not be universally accepted, and I am sure they are not complete, but they may help to focus on the main problem area.

Many believe that the most serious cause of claims is

ignorance of the law or of changes in the law. Surprisingly statistics show that this is not so, and that the problem lies in other areas. These relate in the main to what is termed incompetence which may be described as a failure to perform an efficient service by taking the correct action at the right time, or for taking the wrong action in a given situation. Connected with this is the failure to observe time limits, thus barring the client's remedy, and finally it is plain that there are a significant number of claims which are largely if not wholly without merit and which arise either from unreasonable behaviour on the part of the client or are due to a lack of communication or explanation to the client by the Profession. Professional persons have tended to specialise in certain subjects in the discipline in which they are trained, and it is worth making the point that one should not be too proud to seek advice from others where a problem beyond the professional man's normal professional competence arises.

It is often overlooked that the professional person is not a guarantor of his performance in any circumstances, and in undertaking an engagement he gives no warranty to this effect. The standard of care he is required to exercise was defined as long ago as 1838 by Tindal C. J. in *Lamphier v. Phipos* in the following terms:

> "Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake if he is an attorney that at all events you shall gain your case, nor does a surgeon undertake that he will perform a cure; nor does he undertake to use the highest possible degree of skill. There may be persons who have higher education and greater advantages than he has, but he undertakes to bring a fair, reasonable and competent degree of skill."

This statement of the law has now stood the test of time for 150 years and recent decisions such as *Duchess of Argyll v. Beuselinck* (1972) 2 Lloyds Reports 1972 (a case against a Solicitor), and *Greaves & Co. v. Baynham Meikle & Partners* (1974) 1 W.L.R. 1261 (a case against consulting engineers), considered whether the professional person holding himself out to be a specialist in some field owed a higher duty than that of the average competent expert. An earlier case of *Bolam v. Friern Barnet Hospital Management Committee* (1957) 1 W.L.R. 582 also considers the point. As I understand the position it is that if the claim is based in tort in negligence, the standard of care upon which a case will be determined is a matter of fact to be decided on the evidence laid before the Court on trial. If, however, the claim is advanced as a breach of an implied contractual duty and thus in contract, then liability is a matter of law to be ruled upon by the Court.

Those other than lawyers offering a professional service are required to have a working knowledge of the law applicable to the service they undertake for their clients, and clearly if they do not possess this they should take appropriate steps to make this clear to their client at the time and tender the appropriate advice to him.

How then apart from an adequate knowledge of the up to date law on a subject, should the professional person safeguard himself and his partners also against an undue exposure to claims for professional negligence?

The following comments may be glimpses of the obvious, but they appear to be by no means universally appreciated

The basis of the engagement to perform a service

A number of years ago Accountants who suffer as much as anyone from claims for alleged negligence, adopted the practice at the outset of the engagement of setting down in writing exactly what service they were undertaking to provide and what would be excluded. For example, in audit work, a written programme would be drawn up and the client would be informed in writing of the terms of the engagement for the avoidance of doubt. This is not in my experience commonplace in other professions, and since many claims stem from misunderstanding between the client and his professional adviser of exactly what the latter is undertaking to perform, I believe there is much in favour of Solicitors, Surveyors and others writing to their clients at the time they accept an engagement indicating what they are undertaking. Quite apart from informing the client, such a written basis of engagement is a useful reminder of what has been undertaken.

By way of example, it is generally known that one of the bigger problems confronting Solicitors arises under Part II of the Landlord and Tenant Act 1954. Notices are not served in time or there is a failure to make application to the Court, and in consequence the client loses and claims that the failure is the responsibility of the Solicitor. No doubt faulty office procedures are responsible in part for dates being missed, but nevertheless numerous cases arise through lack of any clear understanding between the client and his Solicitor as to who is responsible for taking action in due time. Often in connection with Leases the Solicitor has no further obligation after completion of the transaction and yet the client considers that when a Rent Review Clause is coming up the Solicitor automatically should take action, although not specifically instructed to do so.

The performance of the engagement

Under this heading a number of different types of problem arise. In a conveyancing transaction much has been made of the numerous steps involved in, say, the purchase of a house.

How many files of Solicitors indicate for the record that all the numerous possible steps required to provide the client with what he is expecting to receive have been taken, or at least have been given due consideration and decided to be unnecessary? When an auditor is sued he has his audit working papers available to back up his judgment in giving an unqualified report on the accounts he has been auditing. The papers will record the steps taken, the queries that have arisen on various aspects of the account, the explanations received, and finally one normally finds evidence of a review of the work of the audit staff by the partner in charge showing due consideration has been given to all aspects of the work before the report has been prepared and issued to the shareholders on those accounts.

Obviously one does not wish further to increase the heavy burdens on all professional firms, but in their own protection it seems reasonable to suggest the adoption of similar routine systems by Solicitors, Surveyors and others, whereby when subsequently litigation ensues the file contains adequate written records to justify the various steps which have been taken and provide powerful support for the oral evidence which has to be given on the trial. So often files contain inadequate records by way

of attendance notes, and indeed anything to indicate that the partner concerned has applied his mind to all the aspects of the problem and has reached a balanced judgment, even if with hindsight the decision may be wrong.

With some hesitation, therefore, I would like to advocate the use of standard check lists adopted and amended as necessary to form the basis of the file and to show the various steps with dates by which action has to be taken to enable the maintenance of a simple check that each necessary step has been taken. This applies both to contentious and non-contentious work in the legal field, and similarly in connection with, say, valuations, it forms a very helpful piece of evidence to justify the action which has been taken when the matter is considered in Court.

Supervision by Principals

It is quite remarkable how many claims arise when it is discovered that the individual claimed to have been negligent whether admitted or an unqualified assistant is disclosed as being no longer with the firm against whom the claim is made. It seems as if there may be substantial numbers of those who do not achieve practice on their own account or in partnership who go from one firm's employment to another and, for some reason having left, the firm are the legatees of a problem created by some negligence. Sympathetic as one would wish to be, the fact is that since the ultimate responsibility to the client is that of the Principals of the firm, there usually appears to be some lack of adequate supervision which has allowed the assistant to create the situation without it being detected and remedied at the time. Busy practices with ever-increasing workloads do create great problems for Principals who have little time to supervise the work of their assistants as they would wish. However, the obligation is there to see that the task undertaken has been competently performed, and this in my view is yet a further argument in favour of reducing to writing by a detailed engagement letter and use of appropriate check lists which quickly enable a Principal inspecting a file to see what progress has been and that the matter is going ahead in a proper and efficient manner. Accountants seem to manage this almost as a matter of routine, and on the face of it there is no valid reason why other professions should not bring their systems into line. While not wishing to encroach on Mr. Clark's address, it seems to me that Surveyors performing valuations and structural surveys will be much assisted by procedures of this kind.

Having made this comment supervision remains a problem.

Communications with the client

As indicated earlier, breakdowns in communications are a fruitful source of problems. Much complaint and misunderstanding arises from a failure of the Professional to keep the client informed of what is happening. Obviously one can only do one's best, and no assurance can be given that a difficult client's every demand can be fulfilled. On the other hand if he is not told of difficulties that have arisen who can blame the client for thinking that his adviser is falling down on the job? Claims arise for loss, such as loss of interest payable on bridging loans because of late completion of a conveyancing transaction. These are not infrequently blamed on the Solicitor, when a ready explanation to the client at the time of how the problem has arisen may well have diverted wrath and a possible claim.

In litigation of necessity there are delays in forwarding the matter, particularly in personal injury claims, where by reasons of difficulties and medical evidence or the like actions cannot be brought on for hearing as speedily as would be wished. Here again a periodical explanation to the client of the problem will do much to avoid trouble.

An adequate diary system

You may be interested to hear that in one country it has now been made a matter of professional misconduct for a lawyer to fail to maintain in force in his office an efficient diary system to prevent time barred claims arising. That is not the position here, but there is no doubt that lack of an adequate diarying system with early warning dates of time limit periods is an essential part of any practice where time limits are of importance. While a computer system which can easily be devised to give routine timely warning of all dates of importance can be set up, this may be an expensive luxury in a small practice, but however the diarying system is achieved it is essential to have one and one that is under the direct supervision of a partner who can check on each matter to see that dates are not going to be missed and claims caused in consequence.

Specialist advice

The warning here must be that each should accept his own limitations, especially where specialised fields are concerned. For example, in structural surveys if in doubt Surveyors should not hesitate to recommend their client to engage the services of a structural engineer. Equally, Solicitors who should not need to seek the advice of Counsel on normal matters within their own competence should nevertheless never hesitate to advise seeking the expert advice of Counsel, particularly in specialised fields such as Planning Law, Tax and many others, if they are not themselves wholly familiar with what is required.

To conclude, it will be obvious that the foregoing comments are in very general terms.

It may well be thought that nothing that has been said is other than obvious, and this is, of course, true.

Surely in all professional engagements the matter is very largely a matter of common sense and forethought at the time as to the action necessary to provide the client with a satisfactory service. No doubt the conditions in which we live with ever-increasing overheads and similar problems do tend to cause the professional firm to become overburdened with work with the obvious consequential risks of mistakes occurring. This must be a question for the individual Practitioner, but quite clearly the heavier the workload the more he must ensure that the conduct of his practice is systemised as far as possible to avoid the necessity for over-reliance on memory and the risks that this creates.

It will in my view be a sad day if Professional Practitioners are forced in order to protect themselves against claims to take measures which lead to the deterioration of the quality of the service which they provide, but there is no doubt that the escalation of claims in recent years due to many causes is one of serious concern to everyone and that if the position is to improve it is not in the field of more efficient insurance but of fewer claims.

Denis Marshall's paper was one of a series given under the title of *The Blundell Memorial Lectures 1979* arranged by the Royal Institution of Chartered Surveyors and the English Bar. The 1979 series entitled "Current Problems and Property Law" included the following:

THE BLUNDELL MEMORIAL LECTURES 1979
CURRENT PROBLEMS IN PROPERTY LAW

RENT REVIEW—VALUING THE INCOMPARABLE
Ronald Bernstein, Q.C.
J. C. Hill, F.R.I.C.S.

HOW TO AVOID PROFESSIONAL NEGLIGENCE CLAIMS
Denis A. Marshall, Partner Barlow Lyde & Gilbert, Solicitors.
Michael Clark, F.R.I.C.S.

RENT REVIEWS OF INDUSTRIAL PREMISES
Nigel Hague.
John M. Phillips, F.R.I.C.S.

INDUSTRIAL RELATIONS LAW AS IT AFFECTS PROFESSIONAL FIRMS
R. J. Harvey, Q.C.
G. M. Townsend, F.R.I.C.S.

CONDOMINIUMS AND CO-OWNERSHIP: AMERICAN AND ENGLISH IDEAS ON SHARED FORMS OF RESIDENTIAL AND BUSINESS TENURE
Frederick S. Lane.
Derek Wood, Q.C.

Bound copies are available from the Conference Secretary, Royal Institution of Chartered Surveyors, 12 Great George's Street, Parliament Square, London SW1, at £6.00 sterling.

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Reports of proceedings of the Court of Justice can be purchased through Greene & Co., Bookshop, 16 Clare Street, Dublin 2.

Welcome new book on rent restriction

Members of the Legal Profession who have long relied on John R. Coghlan's second edition of the Law of Rent Restriction in Ireland will be pleased at the publication of a third edition, published by the Incorporated Council of Law reporting in Ireland. The code of Rent Restrictions has of course altered considerably since the supplement to the second edition was published and the Rent Restrictions Act 1960 and 1967 brought about major changes in the Law which are now covered by the new work.

It is pleasing to note that after a lenghty period, new books on Irish Law are now being published with increasing frequency.

The new publication is available from the Incorporated Law Society; price £10 plus VAT.

Report of attendance at American Bar Association Annual Convention in Dallas, Texas

GERALD HICKEY, *President.*

In accordance with the Council's instructions I accepted the invitation of Mr. S. Shepherd Tate, President of the American Bar Association to myself and my wife to attend the Association's Annual Conference in Dallas between 8th and 15th August, 1979.

On arrival at Dallas/Fort Worth International Airport, we were met by Mr. Hershel H. Friday of Arkansas, and his wife, who had been named as our host and hostess to look after us during the Conference. They were a very friendly and charming couple, and the level of hospitality to which we were treated throughout, and their kindness and consideration were outstanding.

The size of this American Conference is something that it is difficult for us to comprehend. The number of registered conferees was in excess of 9,000 and, with their spouses and families, there were about 20,000 people in Dallas for the Conference. The Dallas Conference Centre is rather like Dallas/Fort Worth International Airport, and is quite the most enormous Conference Centre I have ever seen. There were literally hundreds of meetings taking place every day — the earliest commencing at 7 a.m.

The entertaining and the social events were on the same sort of scale.

I list for information some of the office bearers of the A.B.A., and some of the other prominent people, with their wives, whom we met:

S. Shepherd Tate — President A.B.A., Memphis, Tennessee, whose term expired at the end of the Conference.

Leonard S. Janofsky, Los Angeles, California — now President, A.B.A.

William Reece Smith, Jnr., Tempa Florida — President Elect, A.B.A.

Herbert H. Sled, Virginia — Hon. Secretary A.B.A.

Arthur W. Leibold Jnr., Arlington, Virginia — Hon. Treasurer A.B.A.

Lewis F. Powell Jnr. and Harry A. Blackmun, both Justices of The Supreme Court of the United States.

Leon Jaworski, and one of his partners, Gibson Gayle, Jnr., both of Houston, Texas — Mr. Jaworski was the final Watergate Prosecutor, and seemes to be one of the most famous Lawyers in the U.S.

Robert Strauss — President Carter's Ambassador for Middle East affairs, who made a very interesting speech at the meeting.

Bert H. Early, Chicago, who is Executive Director and Chief Executive of the A.B.A.

Some of the fellow guests from overseas were:

John Stebbings, President of the Law Society, London.

David Hirst, Chairman of the Bar Council of England and Wales.

Neil McKelvey of St. John, Newfoundland — President of the International Bar Association.

Thomas J. Walsh of Calgary, Alberta — President of the Canadian Bar Association.

Robert D. Nicholson, Melbourne, Australia — President of the Law Council of Australia.

Lawrence H. Southwick — President of the New Zealand Law Society.

Apart from the above named, I have a full list of all persons involved and their addresses, which I will hand on to my successor in due course.

I feel it was useful that my wife and I met these prominent people in legal affairs from the American and other jurisdictions, and I feel that the level of contact made by us on behalf of our profession in this country, was a useful one.

Strangely enough, one of the most interesting meetings that I attended, although the hour was a bit uncivilized, was a Prayer Breakfast at 8 a.m. on Sunday morning in the Hyatt Regency Hotel, Dallas.

The principal non-religious item on the agenda for this meeting was an address by one of the Justices of The Supreme Court of the United States, Mr. H. A. Blackmun, and his address on world affairs and the history of the law in the United States in the last fifty years was really one of the finest addresses I have heard, even though in relation to the landmarks of recent American history, he did appear to overlook a little matter like the atom bomb at Hiroshima, and devoted only a line or two to Vietnam.

One feature that struck me particularly about the American Bar Association was the extremely good relations between members of the Bench, whether Federal or Local, and the members of the A.B.A. I believe, as I always have, that the equality of primary qualification and the fact that, in theory at least, any duly qualified Lawyer in the United States can become a Judge of The Supreme Court, are unifying influences in contrast to the divisive character of our system in which the Bar and ourselves are separated by different qualifications, different institutions and different attitudes. It is interesting to

note in this regard that the equality of primary qualification in no way inhibits specialisation by Trial Lawyers and others.

One of the functions I attended was the Annual Banquet of the American College of Trial Lawyers. This group can only be joined by invitation and is restricted to not more than 2% of the attorneys practising in any State.

It is regarded as a matter of considerable prestige to be invited to join this College, and a number of new invitees were formally inducted on the night in question.

Again, however, there is no sense of separation of the Trial Lawyers or other specialists from the remainder of the Profession, and the general atmosphere between the Bench and the members of the Association appears to be very good.

A further matter of interest in relation to the Bench is the system of nomination of judges which, I understand, now operates in most States. Most States have a Judicial Nominations Commission which nominates a given number of persons, between three and seven, for each judicial appointment over a certain level.

The Judicial Nominations Commission for New York State has just nominated seven persons for the shortly to be vacated post of Chief Judge of New York and the Governor of New York must, between the 1st and the 15th January, 1980, select one from the nomianted list to be the new Chief Judge.

Judges at this level are appointed for a fourteen year term, and are eligible for re-appointment. They must, however, retire at 70 years of age, even if they reach that age before the expiration of their term.

One Seminar which I attended had the interesting title, "Your Clients — Love Them or They'll Leave You". The opening speaker of the seminar made an almost evangelical appeal to those present to love their clients, saying that it was much better for business if one could manage it.

I was a little reminded of my own address at the last Presentation of Parchments at which, while not going as far as suggesting that we should love our clients, I did, at least, urge our newly admitted colleagues to have respect for their clients.

Another Seminar was entitled "Terrorism & Violence — Tools for Legal and Social Change". This meeting was addressed by Leon Uris and Jill Uris the well-known authors of "Ireland — A Terrible Beauty". A young Dublin Barrister called David Byrne was one of the panelists having, apparently, been invited by the American Young Lawyers Society. While there were some oblique references to Ireland, the main discussion was in relation to Arab/Israeli affairs, and some interesting views were expressed.

An interesting feature of the Conference was that it included no less than half a dozen special mini conferences of different kinds of Judges, including an Appelate Judges Conference, a Conference of Administrative Law Judges and Conferences of Federal Trial Judges, Special Court Judges, State Trial Judges and Judges of the National Judicial College.

I attended an open session of the A.B.A. Standing Committee on Lawyers Title Guarantee Funds. The direction in which the A.B.A. is endeavouring to push American Lawyers in relation to Title Insurance is to persuade local Bar Associations to accept what they call Bar Related Title Assuring Organisations. In other words, the Lawyers in each State or district are being urged to establish their own co-operative broking organisation to provide title insurance where clients want it, so as to ensure that as far as possible all such title insurance is provided through the Profession, and not by clients going directly to an outside broker or insurance company.

This operation is working well, and I understand that the view is gaining ground among the public that it is safer to have your Lawyer carry out title insurance for you, even if the cost is somewhat more than going directly to a title insurance company.

I attended a number of other meetings and detailed discussions, but I do not think that there is a great deal of point in setting them out in detail in this report. What I would like to refer to, however, is my overall impression of the Law and its power in the United States, and the way in which the A.B.A. as the principal Legal Organisation in America sees its own future.

The A.B.A. celebrated its Centenary in 1978, and as of the date of the Conference this year, its membership for the first time exceeded 250,000 Lawyers, representing about 55% of all duly qualified Lawyers in the United States.

The A.B.A. has set up a special committee to organise very substantial funds for what they call "The Second Century".

The objective of this special fund is quite openly to promote the Profession, and its power and influence in the community in every possible way, and it appears that an undertaking has been given that any money subscribed to the "Second Century Fund" will not be applied in any way towards the ordinary expenses of running the A.B.A., but will be applied towards a selected number of publicity, promotional and educational projects, with the direct and openly acknowledged objective of increasing the power and influence of the Legal Profession.

It is expected that in the first year of the Fund the Committee will raise $10m. for these purposes.

I feel that, at some stage, we should consider whether any projects could be designed to improve the image and standing of our Profession in Ireland. If realistic projects could be devised, they would certainly deserve the support of the Profession. We have, of course, in the Kings Hospital an important project, and I am convinced that it will make a major contribution in future years to the image and standing of the Profession.

I think that the visit of myself and my wife to the United States and our meeting with all the major men in the American Bar Association and their wives, created considerable goodwill, and certainly helps to establish the Legal Profession in this country in the minds of the principal persons in the American Bar Association.

We found a great deal of goodwill towards Ireland, and interest in its affairs generally. I feel myself that the visit was well worthwhile from our Profession's point of view, and I am very glad that I had the honour of representing our Profession at the Conference. I would like to express my thanks to the Council for sending my wife and I to represent them, and I hope that we did so in a satisfactory way.

Finally, along with the other visiting Presidents, and the Chairman of the Bar Council of England and Wales, I was made an honorary member of the American Bar Association, and I propose to display my certificate proudly in the President's flat.

Conveyancing Notes

The Society have received numerous complaints from country solicitors that correspondence from Government offices rarely quote the solicitors' office reference. The Society made representations to the Revenue Commissioners and the Registrar of Titles, who say that their staff are instructed to quote any reference given but suggest that the problem may be caused by the fact that many of the dealings in question are lodged by hand by the solicitor's town agent and that, normally, there would not be any covering letter giving a reference in such circumstances. If solicitors take care in such circumstances to include a letter, quoting their own reference, this should help to reduce the problem. Similarly, the Land Registry will quote any reference given on a Form 17 in correspondence with the solicitor who lodged it.

Many solicitors type their office reference on the back of deeds and other documents and in the opinion of the Society, this is a good idea and should be adopted more generally.

CAPITAL GAINS TAX

There have been a number of queries to the Conveyancing Committee about the position of a Purchaser where the Vendor argued that a particular property was not liable for Capital Gains Tax by reason of being the Vendor's only or main residence, and declined to furnish a Capital Gains Tax Clearance Certificate.

The legal position is quite clear. The question of whether a particular transaction is or is not liable to Capital Gains Tax is not relevant. A Purchaser is not required to make any enquiries about the Vendor's tax liability nor obliged to consider any information about it that may be given to him. All that is relevant is the amount of the consideration. If it is over £50,000 the Solicitor for the Purchaser must insist on a Capital Gains Tax Clearance Certificate or make the deduction prescribed by the Act from the amount of purchase money paid by him.

A Solicitor should not offer nor accept an undertaking to furnish Capital Gains Tax Clearance Certificate. Solicitors are reminded of the severe sanctions available against them personally if they fail to fulfil the duties imposed upon them by the Statute.

CAPITAL GAINS TAX: NEW HOUSES

Members will have noted the increasing number of new houses where the total price being paid by Purchasers exceeds £50,000.

Doubts have arisen as to the need for CGT Clearance Certificates in such cases. The following appears to be the position:

(1) Where there is an agreement for the purchase of a site and that agreement is separate from and unconnected with another agreement to erect a building on their site, a CGT Clearance Certificate is not required for the protection of the Purchaser unless the price of the site itself exceeds £50,000.

(2) An Agreement for Sale and Building Agreement which are considered sufficiently unconnected by the Revenue Commissioners to enable the Revenue Commissioners to assess Stamp Duty on the Site Value only, should also satisfy the criteria for CGT purposes.

(3) If the Contracts comprise a combined Building Agreement and Agreement for Lease or if separate contracts are interconnected, then, if the total consideration exceeds £50,000, the Solicitor for the Purchaser must insist on getting a CGT Clearance Certificate, or make the deduction prescribed by the CGT Act 1975.

Annual General Meeting of Dublin Solicitors' Bar Association

At the annual general meeting of the Association, held at Blackhall Place on 22 October 1979, the following officers and council were elected for the year 1979/80: President, Mrs. Moya Quinlan; Vice-President, Andrew F. Smyth; Hon. Secretary, Herbert Mulligan; Hon. Treasurer, Miss Clare Cusack. Council members: Michael Farrell, Miss Elma Lynch, Stephen Maher, Vivian Mathews, Charles R. M. Meredith, Rory O'Donnell, T. Finbar O'Reilly, Colm Price, Lawrence K. Shields.

"Any Other Business"

By what may now fairly be described as "tradition", "Any Other Business" is called while the honorary scrutineers count the votes cast for the prospective council members for the ensuing year. And, by the same "tradition", "Any Other Business" has become over the years a forum for the dissemination of views and ideas which, perhaps, might not otherwise be heard.

The recent annual general meeting proved no exception, and the meeting heard an eloquent argument by Mr. Desmond Moran as to the difficulty of securing a criminal conviction in the fact of the "beyond a reasonable doubt" rule, coupled with a plea that an appropriate sub-committee of the association might consider the matter further, with a view to making submissions to the Minister for Justice that the burden of proof be modified.

Mr. Frank O'Donnell argued, equally eloquently, against taking any step which made it more difficult for an accused person to obtain justice.

The general feeling of the meeting appeared to be that it was unlikely that, for whatever reason, the Minister for Justice would consider any change in the law.

Mr. John F. Buckley, immediate past-president, drew the attention of the meeting to the proposals published recently by the Government as to the Civil Legal Aid Scheme, which is apparently to be based on Advice and Assistance Centres, located throughout the country, and serviced by permanent civil service staff. Mr. Buckley is greatly concerned at the lack of argument voiced by the profession against the many obvious weaknesses of the scheme, which he described as "retrograde". Mr. Buckley pointed out that the Civil Legal Aid Scheme seemed to be re-introducing the analogous concept of the old local medical dispensary at a time when the Department of Health was doing its best to abandon the dispensary system and to arrange that every citizen could, within reason, have freedom of choice of doctor. If the Civil Legal Aid Scheme is established in its present form, the public will have to rely upon whatever employed staff serves any particular area, with obvious problems, for example, in matrimonial cases, when one legal officer might well find himself having to represent both husband and wife.

There was considerable discussion as to whether the profession and the Association would voice publicly its concern and, despite views to the contrary, the general feeling seemed to be that the time had come for a statement to be issued. The council of the association will consider the matter further at its next meeting.

Mr. Andrew F. Smyth raised the important and difficult question of investigations going behind Land Registry Folios, with particular reference to that perennial producer of problems — the Family Home Protection Act 1976. Mr. Rory O'Donnell told the meeting that the Conveyancing Sub-Committee of the Association had spent a considerable part of the previous year investigating the matter, including taking counsel's opinion, and said that, while there was still some lack of consensus, the better view (at least it was hoped that it was the better view!) was that it was most unwise to search behind Folios.

Mr. Desmond Moran introduced yet another radical topic by suggesting that the level of fines coming within the broad scope of the Summary Jurisdiction legislation should be increased, the present minimal level of fine having long been outpaced by inflation.

The Council of the Association wishes to thank the Incorporated Law Society for its kindness in making available to the Association the Council Chamber at Blackhall Place for the Association's various meetings. In particular, the Council thanks the Director General of the Law Society, Mr. James Ivers, for his kindness in attending many council meetings during the year and in attending the recent annual general meeting, to which he contributed an invaluable progress report on the history to date of the Civil Legal Aid Scheme and the various representations which had already been made upon it.

Dublin Solicitors' Bar Association

Joint Symposium with the Royal Institution of Chartered Surveyors (Republic of Ireland Branch)

Under the title "When is a Contract . . .", members of the Institution of Chartered Surveyors and of the Dublin Solicitors' Bar Association met in T.C.D. on Thursday, 1st November, 1979, to hear a paper read by John F. Buckley, solicitor, on the various recent decisions on this subject.

Mr. Buckley's paper, together with the essence of subsequent questions from the floor and his replies thereto, will be presented as an article in a forthcoming issue of the Law Society's *Gazette*.

The symposium was considered by all concerned to have been of immense value and the Association is very grateful to the Institution of Chartered Surveyors for its prominent part in making the symposium possible.

The Child and the Law

—The Child Psychiatrist's viewpoint

Dr. Jerry O'Neill, Child Psychiatrist, Warrenstown House Residential Centre

Warrenstown House Residential Home

I am talking to you today from my own experience as a Child Psychiatrist in a community setting for the past ten years, and I would like to share with you some practical clinical problems which I have experienced in child psychiatry in regard to the law over this period. I am not sure of the answers to these various problems and will probably be asking more questions than giving a solution. As one of the earlier speakers in this conference I thought it might be appropriate to present some factual clinical material as I anticipate later speakers will be talking more expertly about the law and its implications in regard to children.

Placing a child in care:

The first problem I would like to deal with is the difficulties I have found in trying to place a child into care. Child guidance clinics, social workers, childrens' hospitals, and many other agencies dealing in child care often have to make this extremely difficult decision. It arouses in those involved in the decision much heart-searching, as none of us went willingly into child care viewing our role as one of taking children away from their parents. Secondly it is sometimes extremely difficult to find a suitable placement for these particular children and the paradox exists that the most difficult and most needy children are the hardest to place yet these are the ones that need the most help. Thirdly, parents are usually extremely sensitive to their children obviously progressing satisfactorily away from them, being cared for by other people and may tend to sabotage these placements, expecially if foster placements. Residential care may be much more acceptable because of its more impersonal in nature. You may say, quite rightly, that surely one should first of all try and work with the family to try and improve the unsatisfactory situation; that we should make every effort to give support to deprived parents, who themselves were possibly battered and deprived, and try and break the vicious circle of deprivation and prevent another generation of damaged adults emerging. This certainly sounds fine in theory but in practice may prove to be an exhausting, time consuming, task for a clinic, social worker, or various caring personnel, and over a long period the mothering or fathering qualities of the parent concerned may only improve marginally. It is also true to say that if one particular worker in the field of child care has to deal with or handle too many of these extremely difficult unrewarding cases, that it can be very hard to maintain an optimistic, positive approach to one's work. I feel much more frequently we should see the writing on the wall in time and consider alternative measures, such as a group home placement, foster care, or some good residential setting etc., before it is too late. Irish tradition, culture and religion have in the past very much emphasised the importance of family life and of families staying together at all costs. How often has a submissive, ill-treated wife, or a totally dominated, hen-pecked husband been advised to turn the other cheek and offer it all up. I wonder has it ever occurred to people who give this sort of advice to ask them what is happening to the children of the marriage in the meantime.

We all know that physical evidence of abuse, neglect, or deprivation has been needed in the past to safely secure a child care order and less importance has been attached to psychological factors, although I am sure we would all agree that these can be as damaging to a child if not more so. I believe and hope that this is now changing.

Pointers to Psychological Damage

What sort of pointers might suggest a child was living in a psycholgically damaging situation whether from neglect, deprivation, rejection or abuse. Of course any symptoms of emotional disturbance or delinquency may be relevant but there are more specific indicators worth watching for.

(a) Excessive clinging behaviour suggesting fear of abandonment.
(b) Frozen watchfulness: A very specific sign, where the child remains extremely still and quiet in the abusing parents presence never taking his eyes off his parents; looking for the slightest and earliest sign of the parents wriath so as to take quick avoiding action.
(c) Failure to thrive with ravenous appearance, but thrives when away from home.
(d) The child who seems to be constantly provoking adults to punish it.
(f) The young child with very shallow superficial attachments, who is instantly extremely friendly to everyone, with the whole world as his parent.
(f) The child who is cruel to animals. He is behaving to animals as his parents behave to him.

The Law is weak

The biggest dilemma and the greatest frustration can arise in our sort of work when it is known a child is living in an ongoing, damaging situation, yet we are aware that we can do very little intervening to improve the situation. This can be due to lack of co-operation from the parents concerned or lack of firm evidence available to secure a

child care order in a courtroom situation. To my mind the laws of this country are very weak in giving support to social workers or other workers in the child care field who are trying to protect the physical and mental health of abused and neglected children. I know in many instances we are reduced to bluffing to try and protect a child knowing in fact that there is little in law to back us up. Naturally social workers and others concerned feel very insecure in these circumstances, and may tend to defer decisions unnecessarily long because of the daunting experience of having to forcibly remove a child from its home against its parents' wishes. I know, from my own point of view, I am reluctant to fulfill the role of the much threatened doctor who puts children away. It is also not particularly helpful to the image of a community based child guidance clinic which is trying to overcome many of the deeply rooted fears and resistence to psychiatry and particularly child psychiatry.

It may be that what is needed most of all is some interim step between the place of safety order, which only lasts for a short period and a child care order which tends to be very final and drastic. Although I am not an expert on the alternative possibilities, I would feel some sort of supervisory order, which tends to operate in England, may be very helpful. As well as this I do not see why children cannot be removed from their homes from assessment and decision-making as now applies to cases of delinquents who come before the Courts, and in fact are sent to the Assessment Centre in Finglas, Co. Dublin.

Probably the most difficult situation of all is where you strongly suspect one parent is seriously disturbed. (e.g., hidden psychiatric illness; psycopathic personality; Incestuous parent).

The more normal parent has often given up and is often afraid to take action or maybe is caught up in the distrubed parent's delusioned system. The disturbed parend is never seen and the malignancy in the family is usually skilfully concealed from the outside world. This is in contrast to the battering alcoholic parent about whom the whole world knows. These cases can present in very ordinary ways such as bedwetting in a child or failure to learn, or more rarely through a sudden dramatic gesture such as an overdose in a family member. Often clues are gradually picked up from a chance remark of a child or an attending parents' slip of the tongue or possibly calculated leaks to the doctor or social worker. When sufficient evidence is accumulated to suspect the non-attending parent, efforts are then made to see him/her. You then come up against a blank wall. If you push too hard the family is withdrawn from therapy. Somehow or other access is needed to determine if more drastic steps should be taken such as seeking a child care order.

Warring parents

Another common problem seen frequently in child guidance clinics is the child torn between two separated, divorced and warring parents, both often seeking exclusive rights to the child to the detriment of the other marital partner. The child's needs often receive low priority and a need to hurt one another seems much more paramount, and the child is often used as a weapon in this war. Court cases can drag on, visiting rights can be haggled over, and court decisions concerning custody and access are appealed. Both solicitors and doctors line up on either side of the fence determined to win the case for their client or their patient. Sometimes the real needs of the child may be lost in the midst of all this.

These children frequently love both parents and become very confused when they hear conflicting stories from the warring parents about one another and do not know who or what to believe. If this tug of war situation continues over a longer period they have great difficulty in identifying clearly with one parent or another and deciding which parent they would like to grow up to be like. As so often in these sort of situations, I have found myself trying to carry out a holding operation to prevent the children involved becoming very disturbed or even psychotic. I feel strongly, as recommended by the excellent book 'Beyond the Best Interests of the Child', written by Goldstein, Annafroyd, and Solnit, that these sort of cases should be resolved quickly and finally in favour of one parent or another, than be allowed to drag on over a long period of time. The same book recommends that the parent given custody should have the right to make all decisions pertaining to the child concerned, including allowing visiting by the other parent or not. This is, I am well aware, against routine practice and may in some ways seem unfair to the other partner. It depends very much whether you view the needs of the adult or the child as being more important. If you consider that the child's needs are more important, he is much more likely to settle down, readjust and develop normally if he is not subject to a tug-o-war situation between the two parents. This may mean of course he will be brought up entirely by one parent, but this parent will have the confidence that he or she will not be harrassed and will have been given a vote of confidence to carry on unhindered the job of parenting.

Reports to Solicitors

I would like to mention a word about reports to solicitors about these sort of cases. Doctors, child psychiatrists, and other workers in the field of child care are often asked to submit reports to solicitors stating their views about suitable custody arrangements, and visiting rights for the child. Copies of these reports are often requested by the solicitors acting for the other party. This sort of situation has placed myself, and I know many of my colleagues, in a dilemma on several occasions. If one gives a totally complete report it is very likely to jeopardise any further working relationship with one or both parents. I understand in fact these reports are often shown to the parents concerned. It would seem to me a much more satisfactory arrangement, as happened to me recently, of sending the report direct to the Judce concerned knowing that it would be kept in confidence and would be for his eyes only. This then leaves the doctor or the social worker concerned free to work on with the family concerned without fear of damaging their mutual relationship.

I would like to say a word about the time element involved in these sorts of Court cases. To an adult a week is a week, a month is a month, a year is a year. To a child living in an unhappy, stressful situation, each day is barely tolerable. A week is a very long time and a month can feel like eternity. This then has obvious implications for quick resolution of Court cases mentioned above.

Another situation which commonly arises in the field of child care is the decision confronting a doctor, social worker, solicitor or marriage counsellor etc. whether or

not to advise and support a break-up of a marriage whether by separation or divorce. I am sure you all know a typical sort of situation. The mother concerned often reports that the father is probably drinking too much, giving her insufficient money, avoiding his responsibilities as a father, a provider, and a husband, and maybe terrorising his family on week-ends during his drunken bouts. The wife may be a virtual prisoner in her home and subject to unreasonable suspicion about any contact with the opposite sex. In fact she may be accused of being promiscuous and having illicit love affairs quite unreasonably. The children involved are frequently disturbed, suffering from nightmares, bed wetting and other symptoms of emotional disturbance and may often prove to be failing at school and finding it hard to get along with their own age groups. Many of them may be showing some of the father's aggression in every day dealing with other people, whether it be their own age group, teachers, etc. There are of course multiple variations to this picture which I am sure you know too well. It would as if I am talking about the father as always the villian and certainly this is the way it commonly presents itself to community social workers and to child guidance clinics. If, however, you eventually do get to see the ogre, you often get a mild surprise. You are very likely to find a lonely man suffering from low self esteem, who often comes from a deprived background and often still overtly dependent on his mother. He frequently feels excluded from his own family and he feels he is filling a role half expected of him, and half encouraged which has been handed down from generation to generation. ("What do you expect of him his father was just the same"). He may have sought out the pub in the first place as a refuge from a nagging, over-powering dominant spouse, just as she for her part may have run to the priest, the family doctor, or the social worker to seek support for her difficulties and point of view. In spite of this however, in time alcohol tends to take its toll and the typical Jeckel and Hyde personality begins to emerge, and the father then does seem in the eyes of the world to be the villian of the piece. So often in the past wives in this intolerable situation seem unaware of any way out. Sometimes with great encouragement and support from social workers and other caring personnel they can be guided on the dangerous road towards seeking barring and maintenance orders or may even have the house put in their own name. If this can be concluded successfully it can often have a dramatic effect on a situation to the benefit of wife, children and even the father. The mother for the first time can experience a sense of strength and an increase of her own self-worth and can discover that she has the ability after all to control her husband's behaviour and influence the quality of her life and that of her children for the better. This is something she never dreamed remotely possible before. Surprisingly enough many fathers also seem to welcome these controls placed on them and their abusive drinking by such Court orders.

A period of waiting for a Court case for a barring order can be a dangerous time or felt as such by the wife concerned. She can be placed under fairly severe physical and mental pressure by her husband to change her mind during this period. Eventually this pressure does prevent many cases reaching Court. Again it seems to me that this danger should be recognised and these cases resolved quickly, if at all possible. Unfortunately my experience has often been that they tend to be delayed and adjourned for an unduly long time. So often have I seen a frightened wife brace herself with considerable courage to face the dreaded day in Court only to find at the last minute it is adjourned or the decision of the Court postponed. If a barring order is refused in this type of situation it can convince the abused wife or her powerlessness and worthlessness and she may retreat to the prison of her marriage never to re-emerge. The position of the bullying alcoholic father is consolidated and his damaging effect on his family perpetuated.

From what I have said you may feel I am somewhat biased in favour of the child. I admit this is probably true but I make no apology for it. The Year of the Child gives me some excuse for this. However, a much more valid reason is that as a child psychiatrist I see myself as an advocate or spokesman for the child. Children do not tend to protest and complain like adults. This may be because they do not know any better, or that they do not have the verbal ability, or it may be too dangerous. Put another way, children may be the unwilling partners in a conspiracy of silence. I have found that what children do not say is important and revealing as what they say.

Should then a child's rights have priority? To this question I would answer yes. Very often there is little we can do to change the damaged adults of this generation but there is a lot we can do for the adults of the future by ensuring the present generation of children receive the optimum environment in which to grow.

Presentation of Parchments

31 October 1979

The following were presented with parchments by the President, Mr. Gerald Hickey, in the Lecture Hall, on 31 October: Anthony, Denise, 14 Hyde Park, Terenure, Dublin; Bradley, Brendan G., "Summerlea", Menloe Gardens, Blackrock, Cork; Carroll, Christian M., 12 Kenilworth Square, Rathgar, Dublin; Carter, Martha, Church Street, Kanturk, Co. Cork; Carton, Hélène O., "Los Angeles", Stillorgan Park, Blackrock, Co. Dublin; Carty, Owen M., Arcadia, Athlone, Westmeath; Cashin, Mary, "Aisling", Shannagh, Mohill, Co. Leitrim; Cloonan, Stephen P., 74 St. Helen's Road, Booterstown, Co. Dublin; Conway, Bernadette, 31 Lelia Street, Limerick; Corr, Niall G., 69 St. Lawrence Road, Clontarf, Dublin; Cosgrave, Liam T., Beechpark, Templeogue, Dublin; Costello, Fidelma, 29 St. Kevin's Gardens, Dartry, Dublin; Creedon, Dominic, Inchigeelagh, Macroom, Cork; Crowley, Patrick A., 162 Carnlough Road, Cabra, Dublin.

Receiving his parchment was LIAM T. COSGRAVE (centre) with his parents, Mr. and Mrs. Liam Cosgrave.

Daly, Donal, Crotabeg House, Crota Park, Glasheen Road, Cork; Delahunt, Katherine, Seafield House, Wicklow; Dempsey, Dermot M., 14 Mill Street, Monaghan; Donoghue, Barry, 29 Emmet Road, Dublin; Dowling, Elizabeth, St. Anthony's, Newtown Park, Waterford; Dunne, James B., 67 Kincora Avenue, Clontarf, Dublin; Egan, William J. P., 132 Merrion Road, Ballsbridge, Dublin; English, Mary I., Avallon, Willmount, Cobh, Cork; Fahy, Lucille, "Beaupre", Cong, Mayo; Farrell, James E., 2 Hollywood Road, Clontarf, Dublin; Finlay, Peter, Park House, Booterstown Avenue, blackrock, Dublin; Gilvarry, Emer, Villa Maria, Killala, Mayo; Harrington, Vincent P., "St. Judes", Boyle, Roscommon; Horgan, Daniel V., "Arvonia", Garryduff, Rochestown, Cork; Horgan, Rosemary N., "Viannee", Ballintemple, Blackrock Road, Cork; Kenny, Denise, 29 Elton Court, Leixlip, Kildare; Keogh, Matthew G., 13 Plassey Avenue, Corbally, Limerick; Kiely, Joan, "Ard Mhuire", Lotabeg, Tivoli, Cork.

CLODAGH McEVOY was presented with her parchment, also. She is pictured with her parents, Mr. and Mrs. Des McEvoy.

Leeman, Deirdre A., 8 Sandyview Drive, Riverside, Galway; Linehan, Philomena, 256, Sea Park, Malahide, Dublin; Lombard, Niall, 29 Mather Road North, Mount Merrion, Dublin; Love, Joseph Clayton, Clanricarde, Blackrock Road, Cork; Lydon, Elizabeth M., Upper Dublin Road, Tuam, Galway; Lysaght, John A., 3 The Haggard, Howth, Dublin; Macklin, Patrick, 41 Dublin Road, Monaghan; Madden, Thomas K., Kilsallagh, Mostrim, Longford; Maguire, Cliona, 4 Vergemount, Clonskeagh, Dublin; Mahon, Anne-Marie (nee Reidy), "The Cottage", Mullacash, Naas, Co. Kildare; Manny, Patrick J., Austin Friars Street, Mullingar, Co. Westmeath; Monahan, Patrick, "Ashville", Sandyford Road, Dundrum, Dublin; Morris, Kenneth D., "Mountainview", Ballybride Road, Shankill, Co. Dublin; Murphy, Edith, 41 Windmill Road, Cork; Murphy, John G., Kilmurry, Lissarda, Cork; MacBride, Edward, Derrybeg, Letterkenny, Co. Donegal; MacEvilly, Walter, Sharon-Vale, Blackrock, Cork; MacKenzie, Stephanie, Waymark, Stepaside, Co. Dublin; McCarthy, Nora, Monea House, Ardmore, Waterford; McEvoy, Clodagh, Westcliffe, Enniscorthy, Co. Wexford; McGonagle, Patrick W., Brackenstown Road, Swords, Co. Dublin; McMyler, Patrick J., Forster Park, Salthill, Galway.

Ní Shuibhne-Hynes, Maire, 168, Clonkeen Road, Blackrock, Co. Dublin; O'Brien, Mary G., "Backwoods", Ministers Cross, Model Farm Road, Cork; O'Connell, Brian, 15 St. Margaret's Avenue, Kilbarrack, Co. Dublin; O'Connell, Padraig J., "Artiglen", Ballincollig, Cork; O'Donnell, Eleanor, Killaloan, Clonmel, Co. Tipperary; O'Regan, Redmond D., 27 The Dunes, Portmarnock, Co. Dublin; O'Reilly, Michael J., 28 Clarinda Park East, Dun Laoghaire, Co. Dublin; O'Riada, Philip M., 28 O'Connell Street, Ennis, Co. Clare; O'Rourke, Dermot J., 35 Eden Park Drive, Goatstown, Dublin; O'Sullivan, Timothy P., 106 Sunday's

PETER D. FINLAY, one of those recently qualified who received his parchment, is seen here with his parents, Mr. and Mrs. William D. Finlay. Peter was until recently Executive Editor of the *Gazette*. He is taking up employment with a law firm in New York: we wish him all the best for the future.

Well, Cork; Petty, Marian J., Lisdoonvarna, Co. Clare; Quirk, Jacqueline, Mount Richard, Carrick-on-Suir, Co. Tipperary; Regan, Ursula, Crofton Airport Hotel, Whitehall, Dublin; Rohan, John G., 9 Leinster Lawn, Clonskeagh, Dublin; Stapleton, Susan, "Vandyke", Leixlip Gate, Leixlip, Co. Kildare; Sweeney, Manus, 88 Marlborough Road, Donnybrook, Dublin; Tierney, Celine M., 152 Mount Anville Park, Mount Merrion, Co. Dublin; White, Kevin J., 10 Thomas Street, Midleton, Cork; Wrafter, Agnes A., New Road, Tullamore, Co. Offaly.

Tomorrow's world?

Shoppers at a New York department store now can purchase everything from toothpaste to a television to a will.

Between the postage stamps and the appliance sections in the Times Square Store in Levittown, Long Island, is the law office managed by attorney Richard Reiben, 29, a 1974 graduate of New York University Law School. Reiben, who leases floor space, admitted the location is not "dignified", and explained that the site was chosen "because life today revolves around malls and department stores".

The law office, claimed by Reiben as the first inside a department store, created some controversy when it opened last December. Edwin Freedman, president of the Bar Association of Nassau County (N.Y.) said one area of concern expressed by some members was the "very low" prices charged by Reiben's firm. The fees are $45 for a single will, $75 for dual simple wills, $150 for an uncontested divorce, $225 for purchase or sale of a home, $250 for adoptions and $150 for incorporations. Reiben said the fees make his services affordable to working middle class people.

Freedman, speaking in general terms and not about Reiben's firm, questioned whether any lawyer charging such low prices could afford to give the client the time necessary to consult with him. The undesirable result may be the client diagnosing his own problem and then telling the lawyer the remedy he needs, Freedman said, "For example, a man may say he wants an uncontested divorce, but how does he know until you have sat down with him and informed him of his rights, about custody and other things. Only then can that man make a knowledgeable decision".

Reiben replies: "We spend the amount of time needed with each client, even if it means we lose money", He said referrals the firm was getting from other lawyers and from a governmental agency indicated to him approval of the quality of work being done.

He said it was idealism which led to his locating a law firm in a department store. "There are a lot of unrepresented people, and I wanted to try to reach them and give them legal services for a fee they could afford". Also, the hours of the firm are geared toward working people. Besides being open weekdays, it is open evenings and weekends. At the present time the office handles about 10 clients per day.

Reiben believes some shoppers stop in the law office on impulse, but mot do not, Many pick up a brochure explaining the types of cases the firm will take and the fees, and come back another time, he said. "A lot of people learn about us through word-of-mouth. We've only run one ad, and that was just before we opened".

However, Reiben says that there are plans to change that policy after the firm opens offices in the Times Square Stores in the Long Island communities of Babylon and Oceanside.

— *condensed from "American Bar Association Journal".*

Society of Young Solicitors Transcript Service

The Scripts of the Company Law Seminar held in Waterford on the 10th/11th November 1979 are now available from 94 Grafton Street, Dublin. These are as follows:

Lecture 117
The Financial and Tax Considerations for Incorporation of a Business
£2.10, by post £2.35

Lecture 117
Agreements between Shareholders relating to the operation of a small company
£1.55, by post £1.75

Lecture 119
Remedies Available to Minority Shareholders
£2.35, by post £2.60

Lecture 120
Some recent Legislation affecting Companies
£2.80, by post £3.05

Lecture 121
Methods of Company Financing
£2.65, by post £2.90

From the Spring Seminar on Leasehold Property, the lectures available are:

Lecture 113
Effecting proper and adequate insurance cover on leasehold property interests
£1.60, by post £1.80

Lecture 114
Drafting Insurance and Rent Review Clauses in Leases
£2.75, by post £3.05

Lecture 115
Tax implications with special reference to VAT arising on the creation of leases
£1.20, by post £1.40

Lecture 116
Recent Case Law relating to Landlord and Tenant
£2.20, by post £2.45

The safekeeping, particularly in an orderly manner, of scripts can present problems especially between the ravages created by apprentices borrowing the scripts for exam study purposes and their being put in a case file for reference purposes saying "I will remember where I put it" you never do remember.

It is suggested that the scripts are bound into a series of hand book volumes labelled "Society of Young Solicitors", "Volumes", "Lectures", and firms names on the spine, the price list could be used as an index. The thickness of the volumes should not be more than two inches. People like Library Binding in Dublin can do the necessary. For general work reference, it is suggested that a spring back folder(s) should be used or a file cover with a pocket in it holding the scripts available on a particular subject say Motoring Offences, they could have with them the relevant Acts, Bills with Explanatory Memoranda, Statutory Instruments and any excerpts from reported cases, these would of course be an unavoidable duplication of some of the scripts in the bound volumes. Scripts are available from Norman Spendlove, Switzers Building, 94 Grafton Street, Dublin 2.

Correspondence

re: **CIVIL LIABILITY ACT**

Sir,

I wish to write to you in connection with the Civil Liability Act of 1961 and in particular that part of the Act which deals with fatal injuries.

Nowadays with the growth of commerce in Ireland, there has been an increasing number of deaths in industrial life. In addition to this, there have been a growing number of deaths on our roads. Among the deaths on our roads, there have been an increasing number of deaths affecting children up to the age of 21.

According to the Civil Liability Act, 1961, the amount of damages which a judge or jury may award to the dependants of the deceased is limited to £1,000 in relation to mental distress.

In my opinion, this figure of £1,000 has not kept pace with inflation and you will appreciate that this Act has been on the books since 1961 and the amount has never been increased to date. I would suggest to the Government and to the Law Reform Commission that the amount of £1,000 which is presently being awarded by the Courts is totally unrealistic in the present age and should be increased as soon as possible to at least £10,000.

The position is this, that under the present Act if a young child of say, 12 years of age is killed on the motorway, the amount which the next of kin can claim is the sum of £1,000 towards mental distress plus funeral expenses and other small incidentals.

One could argue that the parents' loss in terms of money, time, care and love could easily be measured in the sum of £12,000.

Accordingly, until such time as the Act is properly amended I would suggest to parents that they adequately insure their children; otherwise, if any of their children are killed in a road accident, they could suffer a very large loss indeed.

Yours faithfully,

John J. Madigan.

6 Woodlawn Crescent,
Churchtown,
Dublin 14.
20 November 1979.

re: **LOSS OF WILLS**

Dear Sir,

With reference to the Probate Officer's letter in the October *Gazette* would it be an idea to establish (either in the Probate office or in Blackhall Place) a repository for copy wills? The procedure would simply be that, having drawn a will, the solicitor would place a photocopy in a sealed envelope and send it to the repository, retaining the original in his own strong room, safe or whatever.

The purpose of the exercise would be that, should the original will be inadvertently destroyed, lost, stolen, or in some other way become permanently mislaid, proof of the will would at least be facilitated.

Revocation of wills, or addition of codicils, would not necessarily pose any problems. Given an adequate register in the repository it would be a simple matter for the solicitors to withdraw a copy will and substitute therefor a copy of the new will (if any). Nor would secrecy be breached since copy wills would be kept in properly sealed envelopes.

The Probate Officer's letter breaks down the 1978 and 1979 applications. In all the cases cited, production, from some such official repository as is suggested, of a photocopy of the will in question would surely be of assistance to the Probate Judge when considering the application.

Doubtless snags can be found in this suggestion but in view of the increasing number of Lost Will cases illustrated by the Probate Officer — not to mention the concern of solicitors whose offices may have been burgled or gone on fire — some such system would be at least a help in such fatalities.

Yours truly,

C. P. Crowley.

C. P. Crowley & Co., Solicitors,
9 Eyre Square, Galway.
27 November 1979.

Table of Counsels' Fees in the Circuit Court

APPROPRIATE FROM 1 DECEMBER 1979

(1) Contract and Tort

1. Fee on Brief:
   (i) Plaintiff's Counsel: where the amount, or value of chattels recovered, or
   (ii) Defendant's Counsel: where the amount or value claimed:
   (a) exceeds £250 but does not exceed £500.. £34.65
   (b) exceeds £500 but does not exceed £1,000 £47.25
   (c) exceeds £1,000 but does not exceed £1,500 £59.85
   (d) exceeds £1,500 but does not exceed £2,000 £71.40
2. Fee on settling Civil Bill or Defence where the amount at (1) above:
   (a) does not exceed £1,000 ..... £12.60
   (b) exceeds £1,000 ..... £15.75
3. Fee on settling Counterclaim in addition to that for Defence £3.15
4. Fee on Consultation where the amount at 1 above:
   (a) does not exceed £1,000 ..... £12.60
   (b) exceeds £1,000 ..... £15.75
5. Fee on advising Proofs where the amount at 1 above:
   (a) does not exceed £1,000 ..... £12.60
   (b) exceeds £1,000 ..... £17.85

Fee on settling Notice for Particulars or Reply thereto £8.40

(2) Actions in Ejectment (including Ejectments for non-payment of Rent, on the Title, or for overholding).

1. Fee on Brief:
   (a) where the rateable valuations of the lands does not exceed £25 and the annual rent, if any, does not exceed £700 ..... £34.65
   (b) where the rateable valuation exceeds £25 but does not exceed £50 and the rent, if any, exceeds £700 but does not exceed £1,400 £47.25
   (c) where the rateable valuation exceeds £50 but does not exceed £75 and the rent, if any, exceeds £1,400 but does exceed £2,000.. £59.85
   (d) where the rateable valuation exceeds £75 but does not exceed £100 or the rent, if any, exceeds £2,000 ..... £71.40
2. Fee on settling Civil Bill or Defence, or consultation
   (a) where the valuation or amount comes within 1 (a) or 1 (b) above £12.60
   (b) in all other cases £15.75
3. Fee on advising Proofs where the valuation or amount comes within 1 (a) or 1 (b) above £12.60
   (b) in all other cases £17.85

(3) Equity Suits:

For the purpose of calculating the value of the subject-matter of a suit (save in suits for Specific Performance) the value of lands shall be deemed to be fifty times the Rateable Valuation. In suits for Specific Performance the value of the subject-matter shall be deemed to be the value in money of the consideration mentioned in the alleged contract.

1. Fee on Brief where the value of the subject matter (including land)
   (a) does not exceed £1,500 ..... £34.65
   (b) exceeds £1,500 but does not exceed £2,500 £47.25
   (c) exceeds £2,500 but does not exceed £3,500 £59.85
   (d) exceeds £3,500 ..... £71.45
2. Fee on settling Civil Bill or Defence:
   Fee on Advising Proofs:
   Fee on Consultations:
   Where the value of the subject matter (including lands)
   (a) does not exceed £2,000 ..... £12.60
   (b) exceeds £2,000 ..... £16.80
3. Fee on settling Counterclaim in addition to that for Defence £3.15

(4) Probate

1. Fee on brief where the value of the estate:
   (a) does not exceed £2,000 ..... £34.65
   (b) exceeds £2,000 but does not exceed £3,000 £47.25
   (c) exceeds £2,000 but does not exceed £4,000 £59.80
   (d) exceeds £4,000 but does not exceed £5,000 £71.40
2. Fee on settling Civil Bill or Defence:
   Fee on Advising Proofs:
   Fee on Consultation:
   Where the value of the estate:
   (i) does not exceed £2,000 ..... £12.60
   (ii) exceeds £2,000 ..... £16.80
3. Fee on settling Counterclaim in addition to that for Defence £3.15

(5) Motions:

Fee on Brief:
(i) Motion ex parte £12.60
(iii) Motion on consent £12.60
(iii) Motions for Judgment £12.60
Motions for Summary Judgment £12.60
Motions for Interlocutory Relief £12.60
   (a) where the Brief fee on an action would come in category 1, 2, 3, or 4 (a) or 1, 2, 3, 4 (b) above £14.70
   (b) in other cases £21.00
(iv) All other motions £12.60

(6) District Court Appeals:

Fee on Brief:
(a) in contract or tort where the amount recovered or claimed:
   (a) exceeds £100 but does not exceed £175 ..... £24.15
   (ii) exceeds £175 ..... £28.35
(b) in any Ejectment £24.15
(c) Fee on Consultation £10.50

(7) Malicious Injuries:

1. Fee on Brief:
   On taxation of an Applicant's costs where the

amount recovered by the Applicant or on taxation of a Respondent's costs where the amount claimed does not exceed £50 ..... £12.60
exceeds £50 but does not exceed £200 ..... £18.90
exceeds £200 but does not exceed £600 ..... £29.40
exceeds £600 but does not exceed £1,000 ..... £38.85
exceeds £1,000 but does not exceed £2,000 ... £49.35

2. Fee on advising Proofs and on Consultation where the amount:
does not exceed £200 ..... £5.20
exceeds £200 ..... £12.60

(8) Landlord and Tenant Acts:

Applications for new tenancies.
Note: For the purpose of this scale of fees "the rent" shall be the rent agreed by the Parties or fixed by the Court under part 3 of the Landlord and Tenant Act, 1931, or the gross rent as so agreed or ascertained by the Court under the Landlord and Tenant (Reversionary Leases) Act, 1958. In any case in which the application is dismissed, or in any case in which no rent is required to be fixed or ascertained, a sum equivalent to twenty-five times the Rateable Valuation.

1. Fee on Brief, where the rent:
(a) does not exceed £50 .....
(a) exceeds £50 but does not exceed £100 .... £12.60
(c) exceeds £100 but does not exceed £200 .. £19.95
(d) exceeds £200 but does not exceed £400 .. £32.55
(e) exceeds £400 but does not exceed £600 .. £49.35
(f) exceeds £600 but does not exceed £1,000 £58.80
(g) exceeds £1,000 ..... £71.40

2. Fee on Notice of Application to Court or Notice of Dispute £8.40

3. Fee on Advising Proofs or Consultation..... £12.60

(9) Hire Purchase

Fee on Brief
On taxation of a Plaintiff's cases, where the amount recovered, or in the case of an action for the specific recovery of a chattel, the amount of the instalments due and upaid under the agreement at the date of the commencement of the proceedings

or

On taxation of a Defendant's costs, where the amount sued for or, in the case of an action for the specific recovery of a chattel, the amount of the instalments due and unpaid under the agreement at the date of the commencement of the proceedings
(a) does not exceed £250 ..... £25.20
(b) exceeds £250 but does not exceed £500 .. £34.65
(c) exceeds £500 but does not exceed £1,000 £47.25
(c) exceeds £1,050 but does not exceed £1,500 £59.89
(e) exceeds £1,500 ..... £71.40

Fee on Civil Bill, Defence, Advising Proofs or Consultation:
where all cases within (a) (b) (c) above..... £12.60
All other cases £16.80

SEARCH FEES:
It is the duty of a solicitor to keep his client's valuable documents entrusted to him for safe custody.

Wills:
(1) A Register of Wills should be kept so that quick reference will show if the Solicitor has custody. Information given from the Register should be charged for.
(2) If a Will is being taken up by a client, Executor or other Solicitor, a fee under Schedule 2 to cover attendance, correspondence and preparation of receipt may be charged.

Deeds:
(1) It is desirable that a Register of Documents should be kept containing full particulars of the documents held. This list would normally be a copy of the Schedule prepared when the transaction was completed. Three copies of the Schedule, it is advised, should be made.
(2) An inquiry about the documents that is answered by reference to the Register should not in general be charged for.
(3) Documents being taken up by the client, his Bankers, Agents or new Solicitor, depending on the circumstances and duration, may be charged for under Schedule 2 as an attendance.

Files:
Documents which only come into existence during the currency of the retainer and for the purpose of business transacted by the Solicitor pursuant to the retainer, fall into four broad categories:
(1) Documents prepared by the Solicitor for the benefit of the client and which may be said to have been paid for by the client, belong to the client.
(2) Documents prepared by the Solicitor for his own benefit or protection, the preparation of which is not regarded as an item chargeable against the client, belong to the Solicitor.
(3) Documents sent by the client to the Solicitor during the course of the retainer, the property in which was intended at the date of despatch to pass from the client to the Solicitor, e.g. letters belong to the Solicitor.
(4) Documents prepared by a third party during the course of the retainer and sent to the Solicitor (other than at the Solicitor's expense), e.g. letters, belong to the client.

Clients' papers should be retained for a period of six years from completion. An indexed system is desirable.
(a) Papers required by the client on completion of the case should be furnished without charge.
(b) Depending on the length of time elapsed and the circumstances it is permissible to seek an attendance fee under Schedule 2 in handing out the file.
(c) Files over six years old may be charged for under Schedule 2. If not readily available a special search fee should be negotiated.

The Register

REGISTRATION OF TITLE ACT, 1964

Issue of New Land Certificate

An application has been received from the registered owners mentioned in the Schedule hereto for the issue of a Land Certificate in substitution for the original Land Certificate issued in respect of the lands specified in the Schedule which original Land Certificate is stated to have been lost or inadvertently destroyed. A new Certificate will be issued unless notification is received in the Registry within twenty-eight days from the date of publication of this notice that the original Certificate is in existence and in the custody of some person other than the registered owner. Any such notification should state the grounds on which the Certificate is being held.

Dated this 15th day of December, 1979.

W. T. MORAN (Registrar of Titles)

Central Office, Land Registry, Chancery Street, Dublin 7.

(1). Registered Owner: James Power; Folio No.: 268 Revised; Lands: Clogga; Area: 45a. 2r. 30p.; County: Kilkenny.

(2). Registered Owner: Joseph O'Connor; Folio No.: 34181; Lands: Tyone; Area: 0a. 1r. 31p.; County: Tipperary.

(3). Registered Owner: Robert Burns; Folio No.: 36041; Lands: (1) Mullaghglass, (2) Mullaghglass (two undivided 46th parts); Area: (1) 13a. 1r. 13p., (2) 527a. 1r. 29p.; County: Galway.

(4). Registered Owner: Michael Cleary; Folio No.: 2253 (This folio is closed and now forms the property No. 1 comprised in folio 21193); Lands: Lissadonna; Area: 14a. 3r. 21p.; County: Tipperary.

(5). Registered Owner: Michael Cronin; Folio No.: 4624 (This folio is closed and now forms the property No. 1 comprised in folio 11449F); Lands: Lyre; Area: 10.438a. 0r. 0p.; County: Cork.

(6). Registered Owner: Martin Kerins; Folio No.: 2986; Lands: Cloneen; Area: 20a. 0r. 29p.; County: Galway.

(7). Registered Owner: Denis Horgan; Folio No.: 12742; Lands: Tooreennascarty; Area: 124a. 2r. 4p.; County: Kerry.

(8). Registered Owner: John S. Sirr; Folio No.: 9671; Lands: Davagh; Area: 17a. 1r. 20p.; County: Monaghan.

(9). Registered Owner: James Carey; Folio No.: 4113; Lands: Aghnamullen; Area: 17a. 1r. 35p.; County: Monaghan.

(10). Registered Owner: Michael Looney; Folio No.: 12576; Lands: Erry; Area: 45a. 1r. 27p.; County: Tipperary.

(11). Registered Owner: Thomas Murphy and Bridget Murphy; Folio No.: 35221; Lands: Killeenrevagh, Killeenrevagh, Killeenrevagh; Area: (1) 9a. 3r. 20p., (2) 7a. 1r. 35p., (3) 0a. 1r. 0p.; County: Mayo.

(12). Registered Owner: Patrick Neill; Folio No.: 2656; Lands: Ballymaghroe; Area: 63a. 2r. 6p.; County: Wicklow.

(13). Registered Owner: Thomas Brady; Folio No.: 4444; Lands: Wateraghy; Area: 41a. 0r. 0p.; County: Cavan.

(14). Registered Owner: John A. Cullinane; Folio No.: 17028 (This folio is closed and now the property No. 1 comprised in folio 11817F); Lands: Cashel Commons; Area: 20.156a. 0r. 0p.; County: Cork.

(15). Registered Owner: William Carey; Folio No.: 49272; Lands: (1) Derreens, (2) Derreens (one undivided 5th part), (3) Derreens Island (one undivided 5th part), (4) Derreens (Island adjacent to Derreens, one undivided 5th part); Area: (1) 21a. 2r. 24p., (2) 1a. 2r. 24p., (3) 8a. 2r. 20p., (4) 1a. 3r. 31p.; County: Mayo.

(16). Registered Owner: Edward Madden and Joan Madden; Folio No.: 1947F; Lands: Raynestown; Area: 0a. 2r. 16p.; County: Meath.

(17). Registered Owner: James Anthony McLoughlin; Folio No.: 32974; Lands: Ballylosky; Area: 0a. 2r. 0p.; County: Donegal.

(18). Registered Owner: Seamus Peyton; Folio No.: 22447; Lands: Cloonskeeveen; Area: 1a. 1r. 30p.; County: Roscommon.

(19). Registered Owner: William Feely; Folio No.: 19996, 19999 (Those folios are closed and now form the property Nos. 1, 2 and 3 comprised in folio 28055); Lands: (1) Enagh, (2) Bunreagh, (3) Bunreagh; Area: (1) 6a. 2r. 25p., (2) 2a. 3r. 30p., (3) 5a. 1r. 10p.; County: Roscommon.

(20). Registered Owner: John Madden; Folio No.: 1344; Lands: Aghnacliff; Area: 2a. 2r. 27p.; County: Longford.

(21). Registered Owner: Peter Cawley; Folio No.: 27874; Lands: Snugborough in the Barony of Carra containing 30 perches; County: Mayo.

(22). Registered Owner: Thomas Johnston; Folio No.: 25166; Lands: (1) Part of the land of Pollnacroaghy situation in the Barony of Costello containing 3 perches situate on the west side of Knox Street in the town of Ballyhaunis, (2) Part of the land of Carrownluggaun in the Barony of Costello containing one perch situate on the west side of Knox Street in the town of Ballyhaunis; County: Mayo.

(23). Registered Owner: John McGurk; Folio No.: 8810; Lands: Crossreagh; Area: 8a. 1r. 15p.; County: Monaghan.

(24). Registered Owner: Katherine Sexton, May O'Meara, Nancy Nolan; Folio No.: 3946; Lands: Barnageeragh; Area: 0a. 2r. 0p.; County: Dublin.

(25). Registered Owner: Kathleen McCabe; Folio No.: 8418; Lands: Gortnasna; Area: 23a. 1r. 21p.; County: Cork.

(26). Registered Owner: Kathleen McCabe; Folio No.: 26024; Lands: Drummullen; Area: 2a. 0r. 16p.; County: Cavan.

(27). Registered Owner: John Ridge; Folio No.: 20356; Lands: (1) Carranstown Little, (2) Killaconnigan, (3) Kilmur, (4) Killyon; Area: (1) 1a. 0r. 25p., (2) 3a. 2r. 37p., (3) 14a. 1r., 10p., (4) 16a. 0r. 20p.; County: Meath.

(28). Registered Owner: Conor Hand; Folio No.: 18047; Lands: (1) Ross More West (part), (2) Lisnagard (part); Area: (1) 24a. 1r. 29p., (2) 0a. 0r. 17p.; County: Roscommon.

(29). Registered Owner: John P. Kerr; Folio No.: 10673; Lands: Ballinascarney Lower; Area: 0a. 3r. 33p.; County: Dublin.

(33). Registered Owner: Matthew O'Dwyer; Folio No.: 5077; Lands: Ballynaclogh; Area: 11a. 1r. 11p.; County: Limerick.

(31). Registered Owner: Colm M. Rodgers; Folio No.: 43655; Lands: Killynure or Wilson's Fort; Area: 2.638 acres; County: Donegal.

(32). Registered Owner: William O'Brien, Plant Hire Ltd.; Folio No.: 27134; Lands: Ballykeeffe; Area: 15a. 2r. 27p.; County: Limerick.

NOTICES

Assistant Solicitor with considerable experience in Conveyancing coupled with Building Development seeks position in city. Salary negotiable. Apply Box No. 001. Tel. No. 803059.

RECEIVED AT ÁRUS AN UACHTARÁIN

On 30 October 1979 the President of Ireland, His Excellency, Dr. P. J. Hillery, received Mr. Gerald Hickey, President of the Incorporated Law Society of Ireland, and the Director General.

Christmas Cards

The Society is producing a Christmas Card which will shortly be on sale. The price will be 15p each.

The card will be on good quality white board with the coat of arms of the Society in gold on the front. The left side of the inset will show a line drawing of the Italian corridor in the Society's premises and the right side will carry the greeting.

This card is the first of a series, each of which will have a drawing of some outstanding feature of the Society's headquarters.

As the supply of cards will be limited intending purchasers should make early application enclosing cheque for the appropriate amount, plus 20p for postage. Orders for a dozen or more cards post free.

Any profit from the sale of cards will be donated to the Solicitors' Benevolent Association.

Bank of Ireland Finance Limited

Bank of Ireland Finance Limited is a licensed Bank under the Central Bank Act, 1971 and is wholly owned by Bank of Ireland. It has full Trustee status under the Trustee (Authorised Investments) Act 1893.

Bank of Ireland Finance is included in the list of approved Banks within the meaning of the Solicitors Accounts Regulations.

A leading Irish Finance House, it provides a wide range of financial services, including the provision of instalment credit to the commercial, industrial, agricultural and private sectors. A comprehensive range of leasing facilities and of short and medium term loans is also provided.

In addition domestic and export factoring facilities are made available through its subsidiary company, International Factors (Ireland) Limited.

Bank of Ireland Finance offer an attractive range of rates for Deposits and quotations are available daily for amounts of £500 and upwards.

Information on the Bank's full range of services is available from any Bank of Ireland Finance Branch or any Bank of Ireland Branch.

Bank of Ireland Finance

Bank of Ireland Finance Head Office, 6 Burlington Road, Dublin 4 (785122) and branches in Dublin at Blackrock (885221), Fairview (331816) and Merrion Square (689555) and throughout Ireland at Athlone (2234), Belfast (27521), Cork (507044), Derry (61424), Dundalk (31131), Galway (65101), Kilkenny (22270), Limerick (47766), Sligo (5207), Tralee (22377) and Waterford (3591).

THE INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

DECEMBER 1979 VOL. 73 NO. 10

Officers of the Incorporated Law Society of Ireland 1979/80

The President

MR. WALTER BEATTY, Solicitor, has been elected President of the Incorporated Law Society of Ireland for the year 1979/80.

Mr. Beatty was educated at Xavier's School, Donnybrook, and obtained a B.A. Degree in University College, Dublin, in 1953. He was admitted in Easter Term 1955 and has been practising since with the firm of Vincent and Beatty. He was auditor of the Solicitors' Apprentices' Debating Society in 1953/54. He was first elected to the Council in 1967 and was appointed a notary public in 1969.

The Vice Presidents

MRS. MOYA QUINLAN, the newly elected Senior Vice-President, is the only daughter of the late Joseph Dixon. Educated at the Dominican College, Sion Hill, Blackrock, and at University College, Dublin, Mrs. Quinlan was admitted in Easter Term 1946. Mrs. Quinlan is Principal of the firm of Joseph H. Dixon & Co. She has been a member of the Council since 1969, has served on the Society's Public Relations and Registrar's Committees and is a former Chairman of the Premises Committee. Mrs. Quinlan is President of the Dublin Solicitors' Bar Association.

MR. MICHAEL P. HOULIHAN has been elected Junior Vice-President for the year 1979/80. Mr. Houlihan is Principal of the firm of Ignatius M. Houlihan & Sons, 10/11 Bindon Street, Ennis, Co. Clare, and is the eldest son of Ignatius M. Houlihan and Oona Treacy-Houlihan, both solicitors.

Educated at Ennis C.B.S., Cistercian College, Roscrea, and U.C.D., Mr. Houlihan was admitted in 1963 and has been a member of the Council since the year 1970. He is a former Chairman of the Society's Privileges, Professional Purposes, and Insurance Committees, and was the Society's representative on the Superior Court Rules Committee. Mr. Houlihan is currently President of the County Clare Law Association.

G. v. An Bord Uchtála— the best interests of the child and constitutional rights in adoption

Gabriel J. McGann, B.A. (Mod) (Dublin), LL.M. (Yale), Barrister-at-Law, Legal Assistant to the President of the Law Reform Commission. This article is written in a personal capacity.

THE FACTS

The plaintiff gave birth to a baby girl on 14 November 1977. She was unmarried and the child was illegimate. Upon giving birth to the child, the plaintiff informed only one person, a married sister, of the fact.

The plaintiff decided to place her daughter for adoption on 6 January 1978 and for this purpose she signed a form of consent to the placing of her child for adoption. The plaintiff did not inform her parents until a time in late January 1978. They told her, among other things, that if she wished to keep the child they would help and support her. As a result, the plaintiff wrote to the adoption society expressing a wish to keep her child. The adoption society informed the applicants for adoption of the plaintiff's change of mind but they refused to give back the child. The plaintiff brought an action by special summons claiming from the defendants, An Bord Uchtála, the return of her child.

ANONYMITY OF THE PARTIES

It appeared to the President of the High Court, Finlay P., that it was "vital for the welfare of the infant concerned" that the parties to the proceedings should not be aware of each other's identity. Accordingly, the President directed the plaintiff and the Board to adopt the procedure which he had already laid down for the bringing of applications under s. 3 of the *Adoption Act 1974*.

The procedure was as follows:[1]

1. The Board filed an affidavit exhibiting in a sealed envelope the names and addresses of the persons applying for adoption;
2. The relevant adoption society was added as a defendant;
3. The appropriate officer of the adoption society enquired from the persons seeking adoption (who had actual custody of the infant) whether they wished to appear and be represented at the hearing.
4. The persons in whose custody the infant was, wished to appear and were to be represented by solicitor and counsel and accordingly, were added as notice parties.
5. The learned President gave the following directions
   (a) he fixed a date for the hearing of the plaintiff and her witnesses in the absence of the notice parties but in the presence of their solicitor and counsel;
   (b) he fixed a separate date for the hearing of the notice parties and their witnesses in the absence of the plaintiff but in the presence of her solicitor and counsel.
6. Reserved judgment was delivered in the absence of the plaintiff and the notice parties[2] and copies of the written judgment were made available to them immediately.

The President of the High Court heard the case during the long vacation and, in a judgment delivered on 19 September 1978, ordered the return of the custody of the infant to her mother.[3]

JUDGEMENT OF THE PRESIDENT

Statutory Rights[4]

The learned President set out the statutory rights given to the natural mother and her illegitimate child under the *Guardianship of Infants Act 1964* and the *Adoption Acts 1952-1976* and gave special attention to section 3 of the *Adoption Act 1974* which was, in his view, "vital to the proceedings before [him]".

Section 3 provides as follows:

1. In any case where a person has applied for an adoption order relating to a child and any person whose consent to the making of an adoption order relating to the child is necessary and who has agreed to the placing of the child for adoption either—
   (a) fails, neglects or refuses to give his consent, or
   (b) withdraws a consent already given,
   the applicant for the adoption order may apply to the High Court for an order under this section.
2. The High Court, if it is satisfied that it is in the best interests of the child so to do, may make an order under this section—
   (a) giving custody of the child to the applicant for such period as the Court may determine, and
   (b) authorising the board to dispense with the consent of the other person referred to in subsection (1) of this section to the making of an adoption order in favour of the applicant during the period aforesaid.

Contributors to this Issue:

Gabriel J. McGann, B.A. Mod. (Dublin), L.L.M. (Yale), Barrister-at-law, Legal Assistant to the President of the Law Reform Commission.
Joseph B. Mannix, former Editor of Gazette.
B. S. Russell, M.A. Barrister (courtesy of Editor of English Law Society's Gazette).

3. The consent of a ward of court shall not be dispensed with by virtue of a High Court order under this section except with the sanction of the Court.

The learned President noted that "[t]his section clearly extensively enlarged the possibility of the making of an Adoption Order notwithstanding the absence of consent on the part of the mother of an illegitimate child".[5] He continued:

> "Up to its enactment an Adoption Order could only be made by the Board in the absence of such consent if the mother was rendered incapable by incapacity of giving or refusing her consent or could not be found" [see s. 14 (2) of the Adoption Act 1952]. "A new jurisdiction was now conferred upon the High Court entitling it, notwithstanding the active opposition of the mother or her failure to make up her mind or to communicate or deal with the problem arising, to dispense with her consent thus not, it should be emphasised, making itself an Adoption Order but permitting the Adoption Board to consider the entire matter in the absence of such consent."[5]

However, it has been pointed out by Mr. Alan Shatter in *Family Law in the Republic of Ireland* that section 3 of the 1974 Act does nothing to solve "the problem of the child who is placed in an orphanage or fosterage for all or most of its infancy but whose mother will not permit it to be placed for adoption, the whereabouts of the mother being known". The author submits that

> "if a person unreasonably refuses to agree to the placing of a child for adoption, the [Adoption] Board should be empowered to dispense with the requirement of that person's consent to the making of an adoption order, if it is for the child's welfare that it be adopted".[6]

Constitutional rights

The learned President approved of the statement of Walsh J., in *The State (Nicolaou) v. An Bord Uchtála*[7] that the natural personal rights of the mother of an illegitimate child do not come within the ambit of articles 41 and 42 of the Constitution. Mr. Justice Walsh had stated in that case, in relation to the mother of an illegitimate child that "[h]er natural personal right to the custody and care of her child, and such other natural, personal rights as she may have, (and this court does not in this case find it necessary to pronounce upon the extent of such rights) fall to be protected under article 40, section 3 and are not affected by article 41 or 42 of the Constitution.

Following that decision Mr. Justice Finlay held that the plaintiff had a "constitutional right to the custody and to the control of the upbringing of her daughter". He was also of the opinion that the illegitimate child had "a constitutional right ... to bodily integrity[8] and also an unenumerated right to an opportunity to be reared with due regard to her welfare, religious, moral, intellectual, physical and social."

The learned President pointed out that

> "[t]he defence and vindication of these interrelated but not necessarily conflicting rights may, in many instances, require the law to strike a balance between them, but it cannot as a general proposition be satisfied by the upholding of one set of rights to the total or virtual exclusion of the other".[9]

The balance to which Mr. Justice Finlay referred is struck in the provisions of the *Guardianship of Infants Act 1964*[10] which empowers the High Court to make an order for the production of an infant and to have regard to the conduct of the parent when deciding whether or not to make an order.

The learned President said of the provisions[11] setting out the powers and duties of guardians that they "would appear to be no more than a statutory expression and declaration of the constitutional rights of the mother of an illegitimate child to its custody and to the control of its upbringing".[12]

The learned President placed particular emphasis on the safeguards created in the Adoption Acts to prevent the mother of an illegitimate child from surrendering her constitutional rights by placing it for adoption without "full knowledge, complete understanding and mature judgment".

Section 3 of the Adoption Act 1974

Counsel representing the notice parties (i.e. the applicants for adoption) contended that once the mother of an illegitimate child had agreed to the placing of that child for adoption then, upon an application being made by the prospective adopters to the High Court pursuant to section 3, the only issue to be decided by the High Court was *the welfare of the child.*

> "In other words that if upon such application it appears to the High Court, disregarding the reasons which the mother may give for her refusal to give her consent or the reasons which may surround her original consent to placement, that on balance the welfare of the child would be better served by remaining with the prospective adopters that the Court should make an order under the section at least leaving the child in the custody of the prospective adopters for such period as will enable the Adoption Board to reach a conclusion as to whether or not to make an adoption order".[13]

Mr. Justice Finlay rejected this interpretation in favour of that which was advanced on behalf of the plaintiff, *viz*, that

> "having regard to the constitutional rights of the mother of an illegitimate child; to the provisions of the Guardianship of Infants Act 1964 and in particular to sections 14 and 16 thereof the Court should not exercise its discretion to make an order under Section 3 unless either the refusal of the mother to consent to adoption is unreasonable or the welfare of the child overwhelmingly demands the making of an order under Section 3 in the sense that to restore it to the custody of its mother would deprive it of the reasonable possibility of securing and preserving its bodily integrity and its opportunity to be reared and educated with due regard to its welfare".[14]

The learned President was satisfied that to put the first construction on s. 3 would be by reason of the agreement of the natural mother to the placement of her illegitimate child for adoption, to uphold the constitutional rights of the child to the total or virtual exclusion of the constitutional rights of its mother. Accordingly, he held that

> *"the Court should not intervene unless the mother has capriciously and irresponsibly refused or withdrawn her consent or by her conduct, abandoned*

or deserted the child or unless she has failed to establish to the Court that she is a fit and proper person to have custody of the child or unless the overwhelming interests of the welfare of the child require that it should not be restored to her custody[15] *but that subject to the approval of the Adoption Board it should be left in the custody of the prospective adopters"* (italics supplied).

Applying this construction of Section 3 to the facts the learned President *held* that:

1. (a) the plaintiff had not abandoned or deserted her child.
   (b) the plaintiff was a fit and proper person to have custody of the child.
2. the welfare of the child did not in any sense overwhelmingly require that she should remain in the custody of the applicants for adoption.
3. the child should be returned to the plaintiff.

THE SUPREME COURT DECISION

The Supreme Court (O'Higgins C.J., Walsh, Henchy, Kenny and Parke JJ.) delivered judgments on 19 December 1978 and, by a majority of three to two, dismissed the appeal of the notice parties.

The sole issue to be decided was whether "in pursuance of s. 3(2) of the Adoption Act 1974, the Adoption Board should be authorised to dispense with the consent of the mother in the making of an adoption order in favour of the couple ... to whom the child was given for adoption".[16]

The Chief Justice and Mr. Justice Parke delivered dissenting judgments and it is proposed to examine these judgments first before examining those of the majority of the Court.

The Chief Justice was of the opinion that the President had applied the wrong test when deciding that the plaintiff should have custody of the child. In his view section 3 could not apply

> "if the constitutional rights[17] of the mother continued to exist because legislation could not affect or prevail over these rights".

The Chief Justice continued

> "Accordingly, the section could only be operative in circumstances in which the agreed placing of the child for adoption constituted a consensual abandonment of constitutional rights and an acceptance by the mother of the provisions of the Adoption Acts in so far as her rights were concerned".

It should be stated parenthetically that this would also appear to be the view of other members of the Supreme Court.

It will be recalled that the President, being of the opinion that the constitutional rights of the mother continued in existence after her clear and definite agreement to place for adoption, construed s. 3 so that the Court could not intervene *inter alia*, unless the "overwhelming interests of the welfare of the child require[d] that it should not be restored to her custody".

The learned President had dealt with the welfare of the infant, having regard to the circumstances of each of the parties, but, in the view of the Chief Justice and of the other members of the Court, he had not considered "the one question which [arose] under section 3, namely, what was "in the best interests of the child".

In the opinion of the Chief Justice the plaintiff agreed to the placing of her child for adoption with full knowledge of the consequences, one of which was the loss of her constitutional rights. In his opinion the President should not have taken into consideration the mother's constitutional rights and should have had regard only, to the child's age, its relationship with the plaintiff and the probable home circumstances which the plaintiff could arrange. The Chief Justice noted that the making of an order "in the best interests of the child" involved considerations such as, the circumstances of the mother, her reasons for refusing or withdrawing her consent and the prospects of the child's future when affected by the order. The learned judge commented that

> "[i]n suggesting matters to be considered [he was] doing no more than that and many other matters which [he had] not adverted to [might] have to be considered in assessing "the best interests of the child".[18]

The Supreme Court as a court of appeal, he remarked, could not perform this task and accordingly, the Chief Justice, "with very much regret" concluded that the case should be remitted to the High Court to have the issue under s. 3 determined in accordance with what was in the best interests of the child".[19]

Mr. Justice Parke agreed with the Chief Justice that the case should be remitted to the High Court to have (it is presumed)[20] the issue of what was in the best interests of the child decided without having regard to the constitutional rights of the mother.

In his view that "fundamental question" was "the ascertainment of the rights of the mother in respect of her illegitimate child".[21] He determined that the mother's rights were "among the Personal Rights which the State guarantees in its law to defend and vindicate under article 40.3.1 of the Constitution".[22] He was satisfied that "the mother waived or abandoned her [constitutional] rights so as to leave the matter to be decided under section 3 unless by so doing she infringed or injured the constitutional rights of her child".[23]

The learned judge also considered the rights of the child and he was of the opinion that the child had personal rights which were recognised under article 40 of the Constitution.[24]

A majority of the members of the Supreme Court, *viz*, Walsh, Henchy and Kenny JJ., affirmed the order of the High Court, but for different reasons.

Mr. Justice Henchy agreed with the Chief Justice and Mr. Justice Parke that the President of the High Court, because of the incorrect view he took of the law, "did not in terms make any finding as to where the best interests of the child [lay]" but he differed from them on the disposition of the case. In his view there was nothing in the transcript of evidence which was available to the Supreme Court which would permit a finding adverse to the mother on that issue.

In his opinion the mother of an illegitimate child had no constitutional rights in relation to her child. However, he stated that the rights of the child under article 42 of the Constitution were available equally to legitimate and illegitimate children. He remarked that "the mother's rights in regard to the child, although deriving from the ties of nature, are given a constitutional footing only to the extent that they are founded on the constitutionally

guaranteed rights of the child".[25]

Mr. Justice Henchy observed that, if contrary to his opinion, it could be held that the mother of an illegitimate child has a constitutional right to the custody of her child, a consent to the placement of a child for adoption could never in itself amount to "an extinguishment of that right, for it amounts to no more than a consent by the mother to putting her rights in temporary abeyance".[26]

Mr. Justice Henchy stated that it was "difficult to see how s. 3 could be operated to defeat the mother's unforfeited and abandoned constitutional rights, when the test is what is in the best interests of the child rather than the effectuation of the child's constitutional rights, which rights may be satisfied whether the adoption order is made or not".[27] In his view,

> "[t]he objective to be attained is not simply the effectuation of the rights of either mother or child, but the attainment of a result which will be in the best interests of the child, by either granting or not granting to the mother a power to veto the adoption".[28]

He stated later:

> "A judge hearing an application under s. 3 is not necessarily concerned with the resolution of conflicting rights, legal or constitutional".[29]

He noted that the question to be resolved was "not whether an adoption order should be made in favour of the adopters ... but whether it would be in the best interests of the child to dispense with the mother's consent". He observed that it was for "the adopters to show that it would be in the best interests of the child" to dispense with the mother's consent, and they had failed to do this.

Mr. Justice Kenny was of the opinion that the best interests of the child would be better served by refusing to dispense with the mother's consent. The learned judge referred to the natural tie that exists between mother and child:

> "The blood link between the applicant and the child means that an instinctive understanding will exist between them which will not be there if the child remains with the adopting parents. A child's parent is the best person to bring it up as the affinity between them leads to a love which cannot exist between adopting parents and the child".[30]

It is submitted that the views of Justice Kenny are not well supported by the facts. No reason is advanced for the view that the love a child has for its natural parents cannot exist betweeen adopting parents and a child. It is also submitted that the blood link between a natural mother and her child does not automatically produce an instinctive understanding between them. This fact is highlighted by Goldstein, Freud and Solnit in *Beyond the Best Interests of the Child.*

> "Biological parents are credited with an invariable, instinctively based positive tie to the child, although this is frequently belied by evidence to the contrary in cases of infanticide, infant-battering, child neglect, abuse and abandonment".[31]

It should be noted that the law relating to custody of children in the United States of America has, in recent years, undergone comprehensive restatement, the "best interests of the child" criterion replacing the concept of "parental rights".[32]

In the United States, the presumption in favour of parents over third persons has been displaced by section 402 of the Uniform Marriage and Divorce Act. In the opinion of one writer[32]

> "[t]his change is the result of research which has indicated that, as far as children are concerned, psychological rather than biological parenthood is what counts".[33]

Mr. Justice Walsh was of the opinion that the appeal should be dismissed. The learned judge was satisfied that on the evidence the decision of the High Court not to authorise the Adoption Board to dispense with the consent of the mother was correct. But the manner in which the learned judge arrived at this conclusion, based largely on the facts of the case, is interesting as it differs fundamentally from the manner in which the other members of the majority arrived at their decisions. Mr. Justice Walsh was of the opinion (along with O'Higgins CJ. and Parke J.), that the mother of an illegitimate child had "an alienable constitutional right to its custody"[34] and other alienable personal rights that are guaranteed protection under article 40.3 of the Constitution.[35] So far as the constitutional rights of the mother were concerned, Mr Justice Walsh was of the opinion that the findings of the President "[did] not indicate that she had surrendered or abandoned her constitutional rights by a fully informed, free and willing surrender and abandonment of these rights, or at all, nor did the President so find". The learned judge continued:

> "Before anybody may be said to have surrendered or abandoned his constitutional rights it must be shown that he is aware of what the rights are and what he is doing. Secondly, the action taken must be such as could reasonably lead to the clear and unambiguous inference that such was the intention of the person who is alleged to have either surrendered or abandoned the constitutional rights" (p. 47).

The learned judge concluded that the facts of the present case did not support a finding that the mother's constitutional rights were validly surrendered or abandoned.[36]

In his opinion the question of "the best interests of the child" only fell to be considered when the mother had surrendered or abandoned her rights.[36a] However, he opined that on the evidence in the case the learned President would be justified in holding that the best interests of the child would not have required him to authorise the Board to dispense with the mother's consent. Mr. Justice Walsh's view of "the best interests" of the child was in line with that of Mr. Justice Henchy and Mr. Justice Kenny, being of the opinion that "the rights of the child [were] not in any way exposed to danger and much less likely to be damaged by being brought up in the manner contemplated and planned by the mother". He was of the opinion that the mother [had] not in any way surrendered or abandoned her own constitutional rights to both the guardianship and the custody of her child" and that the position of the applicants for adoption was not "comparable with that of the natural mother of the child".[37]

Finally, Mr. Justice Walsh carried out "a detailed analysis of the duties and obligations of the Adoption Board and the manner in which it discharges its functions" and of the categories of persons who may be adopted. The other members of the Court expressly

refrained from commenting on these matters as, in their view, none of them was directly relevant in the case. But these matters are of general importance and should be examined briefly.[38]

Powers and Functions of the Adoption Board

Mr. Justice Walsh noted that "the essential feature of the system established by the *Adoption Act 1952* was the fact that no adoption was possible without consent". In his view, *the Adoption Board did not exercise powers of a judicial nature*. The learned judge continued:

> "Thus adoption in our law is essentially a consent or voluntary arrangement. The Adoption Board is in effect a ratifying agency and a safeguard. It ensures that the particular adoption is made in accordance with the Acts of the Oireachtas and that the prospective adopters are suitable. It also preserves the anonymity of the parties to the procedure . . . The Board has no function to settle disputes as to the custody of a child. Neither does it have a jurisdiction to adjudicate upon anything that could be said to be in controversy or dispute between parties . . . The Board is simply concerned with what I am satisfied is the administrative function of seeing that the steps being taken are not contrary to the adoption legislation, are not inimical to the welfare of the child, and that everybody concerned has had a full opportunity of considering the matter carefully".[39]

It is respectfully submitted that this is the correct view of the powers being exercised by the Board. However, this view is not binding[40] and has since been rendered largely academic by the *Sixth Amendment of the Constitution (Adoption) Act 1979*.[41]

The Adoption of Legitimate Children

It is possible to glean from Mr. Justice Walsh's judgment some support for the view that "the State may be justified in taking measures by statute such as the enactment of adoption legislation, or otherwise, to protect the rights of the [legitimate] child where there is a complete abandonment of the parental right and duty". The learned judge pointed out "that some inalienable rights are absolutely inalienable while others are relatively inalienable".[43]

Accordingly it would appear to be still open to the government to pass legislation providing, in certain cases, for the adoption of legitimate children but the "constitutionality of legislation to this effect would, however, be uncertain".[44] The other members of the Supreme Court (O'Higgins CJ., Henchy J., Kenny J. and Parke J.) did not consider this question and the distinction which was made by the Supreme Court in the *Nicolaou case* between rights which derive from articles 41 and 42 (which are inalienable) and those recognised by article 40 (which are alienable) was accepted without comment.

Mr. Justice Walsh would now appear to be saying that the former rights may also be alienated in certain cases, and it will indeed be interesting to see whether this idea is developed in later cases.[45]

CONCLUSION

G. v. An Bord Uchtála is an important decision in an area of law that has been under constant scrutiny since the early seventies. Its authority is clouded somewhat by the diverse views of the majority of the members of the Supreme Court.

The judgments in the case are illustrative of the difficulties that may arise under s. 3 of the 1974 Adoption Act when there is attempt to apply a "best interests" criterion in situations where the constitutional rights of persons other than the child will be adversely affected. It appears that these difficulties were not conceived of as a problem when the Bill was being considered by the Oireachtas.[46] Much of the focus in the debates was on other aspects of s. 3, *viz.* the power of the High Court to award custody of the child to the applicant and the consent of a ward of court in such proceedings.

It is not easy to resolve the difficulties created by s. 3 of the 1974 Act. Legislation might be enacted deleting "the best interests of the child" criterion from a s. 3. Alternatively the constitution might be amended so as to remove from the adoption process any consideration of the rights of the natural mother and her child (or for that matter, the prospective adoptive parents). In the latter case a political decision i.e. one which adjusts the balance between the parties, would have to be taken.[46a]

Not much support can be given to the latter course which would deny the natural mother and child their constitutional rights relating to custody and upbringing. Apart from the obvious injustice that a constitutional amendment would work on the natural mother and her child there are also practical objections to such amendment. It is submitted, that, unless it is absolutely necessary, the constitution should not be tampered with. Furthermore, an amendment removing from the adoption process any consideration of the rights of the natural mother and her child would constitute a bad precedent that might lead to the ultimate atrophy of the constitutional rights of the natural mother and her child.[47]

The inclusion of the "best interests of the child" criterion in the *Adoption Act 1974* is an attempt by the law to deal with the dilemma that results from the collision of parental rights with those of children in adoption situations. Its presence in our adoption law creates the type of problems of interpretation that were encountered in the *G. case* and it is submitted that it should be deleted altogether from s. 3. This would not, it is submitted, endanger the welfare of the child in adoption cases as the courts would be bound to respect the child's constitutional rights.[48] It would have the benefit, however, of clearing up the conceptual morass which has developed as a result of s. 3, and of paving the way for a better inquiry into the rights the child of an unmarried mother has under the Constitution.[49]

FOOTNOTES

1. This matter was adverted to in the Dáil by the Minister for Justice at the second stage of the *Adoption Bill 1974*. He remarked as follows:

> "It will, of course, be necessary to consider whether rules of court can be devised to enable such applications to be heard in such a way as to preserve the anonymity of the parties".

See *Dáil Debates*, vol. 273, col. 482.

"The President of the High Court having regard to the reality of the issue which had arisen concerning the future of the child and to the absolute necessity that the identities of those concerned should not be disclosed, put into operation the procedures set out at the commencement of his Judgment. These procedures, as one would expect from him, were devised with great care and concern both for the preservation of this essential secrecy and in the interests of justice" *per*

O'Higgins CJ. at p. 5 of his judgment.

"I thoroughly approve of the practice adopted by [the President] of hearing the applicant in the absence of the adopting parents, whose counsel are present and hearing them in the absence of the applicant but in the presence of counsel" *per* Kenny J. at p. 4 of his judgement.

2. The adoption society made available to the Court their file of correspondence and documents, and with the permission of the President, took no further part in the proceedings.

3. The aspiring adoptive parents had had the custody of the child for the previous nine months.

4. Section 6 (4) of the *Guardianship of Infants 1964* provides as follows:

> "The mother of an illegitimate infant shall be the guardian of the infant".

Section 10 provides as follows:

> "(1) Every guardian under this Act shall be a guardian of the person and of the estate of the infant unless, in the case of a guardian appointed by deed, will or order of the court, the terms of his appointment otherwise provide.
>
> (2) Subject to the terms of any such deed, will or order, a guardian under this Act—
>
> (a) as guardian of the person, shall, as against every person not being, jointly with him, a guardian of the person, be entitled to the custody of the infant and shall be entitled to take proceedings for the restoration of his custody of the infant against any persons who wrongfully takes away or detains the infant and for the recovery, for the benefit of the infant, of damages for any injury to or trespass against the person of the infant; . . ."

Section 14 provides as follows:

> "Where a parent of an infant applies to the court for an order for the production of the infant and the court is of opinion that that parent has abandoned or deserted the infant or that he has otherwise so conducted himself that the court should refuse to enforce his right to the custody of the infant, the court may in its discretion decline to make the order".

Section 16 provides as follows:

> "Where a parent has—
>
> (a) abandoned or deserted an infant, or
>
> (b) allowed an infant to be brought up by another person at that person's expense, or to be provided with assistance by a health authority under section 55 of the Health Act, 1953, for such a length of time and under such circumstances as to satisfy the court that the parent was unmindful of his parental duties,
>
> the court shall not make an order for the delivery of the infant to the parent unless the parent has satisfied the court that he is a fit person to have custody of the infant".

Section 3 provides as follows:

> "Where in any proceedings before any court the custody, guardianship or upbringing of an infant . . . is in question, the court shall regard the welfare of the infant as the first and paramount consideration".

Section 2, *inter alia*, defines "welfare" "in relation to an infant, as comprising the religious and moral, intellectual, physical and social welfare of the infant".

5. *Per* Finlay P. at pp. 18 and 19 of his judgment.

6. A. Shatter, *Family Law in the Republic of Ireland*, 162-182, 170. However, in the opinion of the present writer such a proposal would involve the exercise of judicial powers and would be in violation of the Constitution. See the argument of Walsh J. in *G. v. An Bord Uchtála* where he remarked that "adoption in our law is essentially a consent or voluntary arrangement" (27). See Margaret L. Egginton and Richard E. Hibbs, "Termination of Parental Rights in Adoption Cases: Focusing on the Child" (1975-76) 14 Univ. of Louisville Journal of Family Law 547 in which the authors demonstrate how certain states in the United States have given courts the power to dispense with the consent of a parent(s) in the best interests of the child.

7. [1966] I.R. 567, 644. See M. Staines, "The Concept of 'The Family', under the Irish Constitution" (1976) 11 *Irish Jurist* 22.

8. In the Supreme Court Henchy J. expressly reserved his opinion on this question. The right of bodily integrity was first recognised in *Ryan v. Attorney General* [1965] I.R. 294, 313.

9. *Per* Finlay P. at p. 21 of his judgment.

10. Sections 14 and 16 of the 1964 Act.

11. Section 10 of the 1964 Act read in conjunction with s. 6 (4) which provides that "[t]he mother of an illegitimate infant shall be guardian of the infant".

12. *Per* Finlay P. at pp. 21 and 22 of his judgment.

13. *Per* Finlay P. at p. 26.

14. *Per* Finlay P. at pp. 26, 27.

15. The President was "clearly satisfied . . . that the welfare of [the] child [did] not in any sense overwhelmingly require that she should remain in the custody of her present custodians and not be returned to the custody of her mother" (p. 30). One commentator has noted that the courts will award custody "only in exceptional cases" to third parties over married persons but that custody awards in favour of third parties "have been far less exceptional in the case of unmarried parents". See W. R. Duncan, "Supporting the Institution of Marriage in Ireland" (a paper which was presented at the Third World Conference of the International Society on Family Law in Uppsala, Sweden, on 6 June 1979).

16. *Per* Henchy J. at p. 1 of his written judgment.

17. "[T]he plaintiff is a mother and as such she has rights which derive from the fact of motherhood and from nature itself. These rights are among her personal rights as a human being which the State is bound under article 40.3.1 of the Constitution to respect and defend and vindicate" *per* O'Higgins CJ. at p. 8. See pp. 7-9.

18. *Per* O'Higgins CJ at p. 15.

19. It should be noted that the Chief Justice was of the opinion that Mr. Justice Finlay might have come to the same conclusion had he used the test of what was "in the best interests of the child". However, Mr. Justice Finlay had at p. 29 of his judgment indicated that

> "[i]f the issue in this case was analogous to that arising where contending parties who have separated are each seeking the custody of a child of a marriage then I would be forced to the conclusion that the welfare of the child would be marginally better fitted by remaining with her present custodians in the event of their obtaining an Adoption Order concerning her than it would be by being returned to the custody of her mother and into the family home consisting of her grandmother, her grandfather and her aunt".

20. The judgment of Parke J. is unclear at p. 6 where he remarks that "there is no decision at first instance on the point".

21. *Per* Parke J. at p. 1 of his judgment.

22. *Per* Parke J. at p. 2 of his judgment.

23. *Per* Parke J. at pp. 4 and 5 of his judgment.

24. "The child, of course, has personal rights, which are recognised by article 40 of the Constitution to life, to be fed, to be protected, reared and educated in a proper way, but in my view a child has no constitutional right to have these obligations discharged by his or her natural parent, and that if there are other persons able and willing to satisfy such requirements, then a child's constitutional rights are sufficiently defended and vindicated", *per* Parke J. at p. 5 of his judgment. See also O'Higgins CJ. at pp. 9 and 10. "In relation to illegitimate children and certain others the State has by the Adoption Acts endeavoured to discharge [the] obligation to defend and vindicate their natural rights in its laws", *per* O'Higgins CJ. at p. 11 of his judgment.

Since the decision of Gavan Duffy P. in *In re M., an Infant* [1946] I.R. 334 it is clear that the illegitimate child possesses the same "natural and imprescriptible rights" that are recognised as reposing in legitimate children under Article 42 of the Constitution. This was reasserted on a number of occasions by members of the Supreme Court acting either in a judicial or extra-judicial capacity. For examples of the former, see the judgments of Walsh J. in *State (Nicolaou) v. An Bord Uchtála* [1966] I.R. 567 at 642 and of Henchy J. in the *G. case* at p. 11. The Chief Justice remarked recently at a public lecture that there is no concept of *filius nullius* in Irish law — the illegitimate child being possessed of the fundamental rights of children under the 1937 Constitution. Remarks made at a lecture delivered by Professor Spiros Semitis on "The Rights of the Child in European Countries" at St. Patrick's, Drumcondra, 15th November, 1979.

25. In *The State (Nicolaou) v. An Bord Uchtála* [1966] I.R. 567 Mr. Justice Walsh observed (at p. 644) that the mother's right to the custody and care of her child was given constitutional protection by article 40.3 of the Constitution. The President of the High Court followed the decision and, accordingly, held that the plaintiff had a "constitutional right to the custody and to the control of the upbringing of her daughter". Mr. Justice Henchy and Mr. Justice Kenny did not share this view, stating that they were not part of the *ratio decidendi* of the case (as in that case the alleged rights of the father of an illegitimate child were in issue). In Mr. Kenny's opinion the mother of an illegitimate child had a statutory right under the Guardianship of Infants Act 1964 to the custody of her child but not a constitutional one."

26. *Per* Henchy J. at p. 16 of his judgment. The Chief Justice and

Mr. Justice Parke took a different view. In the view of the Chief Justice, "in agreeing so to place her child for adoption in the circumstances the plaintiff dispensed with her constitutional rights to insist on the custody of her child and agreed to its custody being decided in accordance with the statutory provisions of which she was made fully aware", *per* O'Higgins CJ. at pp. 17 and 18 of his judgment.

27. *Per* Henchy J. at p. 16. Mr. Justice Finlay clearly would have regarded the withdrawal by a court of the mother's rights as justified under s. 3, where the "overwhelming interests of the welfare of the child require that it not be restored to her custody but that . . . it should be left in the custody of the prospective adopters". *Per* Finlay P. at p. 28 of his judgment.

28. *Per* Henchy J. at p. 16.

29. *Per* Henchy J. at p. 20. Mr. Justice Henchy's view appears to differ fundamentally from that of the President of the High Court who was of the opinion that the fundamental rights of the mother and her illegitimate child had to be balanced when deciding to grant or refuse an order under s. 3 of the *Adoption Act 1974* to dispense with the consent of the mother.

30. *Per* Kenny J. at pp. 14 and 15. Mr. Justice Henchy quoted the following statement of Lord Esher M.R. in *Re McGrath* [1893] 1 ch. at p. 148 with approval:

> "Prima facie it would not be for the welfare of a child to be taken away from its natural parent and given over to other people who have not that natural relation to it. Every wise man would say that, generally speaking, the best place for a child is with its parents".

31. Joseph Goldstein, Anna Freud and Albert J. Solnit, *Beyond the Best Interests of the Child* 17 (1973). See also J. O'Reilly, "Custody Disputes in the Irish Republic: the Uncertain Search for the Child's Welfare?" (1977) 12 Ir. Jur. 37.

32. William Binchy, "The American Revolution in Family Law" (1976) 27 N.I.L.Q. 371, 412. See also Frank Bates, " 'Beyond the Best Interests . . .' in the American Courts" (1978) 8 Family Law 46; Richard Edelin Crouch, "An Essay on the Critical and Judicial Reception of 'Beyond the Best Interests of the Child' " (1979) 13 Fam. L.Q. 49.

33. See section 402 of the *Uniform Marriage and Divorse Act*.

34. *S. v. Eastern Health Board and Others*, 28 February 1979, unreported, High Court, per Finlay P. at p. 15, reaffirming such a right.

35. See pages 13-26 of Mr. Justice Walsh's judgment for an examination of the question of the "natural rights, or human rights" — the fundamental rights — of the mother and her illegitimate child.

36. Mr. Justice Walsh was much influenced in his decision by the "isolated position" of the plaintiff and he remarked that the plaintiff was a "lonely young girl" who had been rushed into adoption without being "made aware of the possibilities which exist for aiding persons in her position or of the several excellent societies which exist for the purpose of enabling a woman who finds herself in the position she did to retain her child and at the same time carry on her life as normally as is possible in the circumstances" (p. 48).

36a. It should be noted that the effect of the placement of a child for adoption was regarded differently by Mr. Justice Walsh and Mr. Justice Henchy, the former judge being of the opinion that it could result in the surrender or abandonment by the mother of her constitutional rights, the latter judge being of the opinion that it could never amount to an extinguishment of the mother's right of custody and that it amounted to "no more than a consent by the mother to putting her rights in temporary abeyance".

37. *Per* Walsh J. at pp. 51 and 52 of his written judgment.

38. If a judge thinks it desirable to give his opinion on some point that is not necessary for the resolution of the case it will, of course, not have the binding weight of the decision but it will be important for judges when that point arises for their decision in future cases. One commentator has remarked as follows:

> "Many protests against arguments found on irrelevant *dicta* have come from the Bench; on the other hand, it is a mistake to regard all *dicta* as equally otiose and therefore equally negligible. Much depends on the source of the *dictum*, the circumstances in which it was expressed, and the degree of deliberation which accompanied it".

See C. K. Allen, *Law in the Making* 261 (7th ed., 1964); *Flower v. Ebbw Vale Iron Steel & Coal Co.* [1932] 2 K.B. 132 *per* Talbot J.

39. *Per* Walsh J. at pp. 27 and 28 of his written judgment. See also the speech of the Minister for Justice in the debate on the Adoption Bill 1974 in which he made the following remarks:

> "I think that it is well to make the point during the debate of this Bill that adoption in our law is a voluntary arrangement, which is, so to speak, ratified by An Bord Uchtála, the effect of the ratification being that the legal relationship of the child to the other parties is changed. The board's function is not to settle disputes as to custody but only to ensure that the adoption is in accordance with the Acts and that the adopters are suitable".

40. See *M. v. An Bord Uchtála* [1977] I.R. 287, 297. O'Higgins CJ. with whom Griffin and Parke JJ. agreed, did not think it "necessary or proper for the Court to express any opinion on the submission that certain provisions of the Adoption Act 1952 are invalid having regard to the provisions of the Constitution.

41. The Act amended article 37 of the Constitution by the addition of a second section stating that no lawful adoption taking effect pursuant to an order of authorisation given by a person or body of persons lawfully designated to exercise such functions was or shall be invalid by reason only of the fact that such person or body of persons was not a judge or a court appointed or established as such under the Constitution.

42. See M. Staines, "The Concept of 'the Family' under the Irish Constitution" (1976) 11 Ir. Jur. 223.

43. *Per* Walsh J. at pp. 45 and 46 of his written judgment.

44. W. Binchy, "New Vistas in Irish Family Law" (1976-77) 15 Univ. of Louisville Journal of Family Law 637, 672.

45. The decision in *G. v. An Bord Uchtála* has recently been followed in a case that came before the High Court. In *S. v. Eastern Health Board* Mr. Justice Finlay received much assistance from the judgments of the Supreme Court on the test to be applied when determining whether the mother of an illegitimate child had agreed to place her child for adoption within the meaning of s. 3 of the *Adoption Act 1974* so as to bring the provisions of s. 3 into operation.

46. However, the problem was recognised in a related area. In reply to an amendment which Senator E. Ryan moved (providing for the inclusion of the natural father in the list of persons entitled to be heard by the Adoption Board on an application for an adoption order) the Minister of Justice (Mr. Cooney) remarked as follows:

> "There is a further difficulty. In a situation where a case is pending before the Adoption Board if the father had a right to come in to be heard co-equal with the right of the mother we could have a situation where there could be a conflict of interests between the father and the mother. If we give him an equal status the legislation would be in a difficult position. The direction and emphasis in the legislation is that the good of the child is the paramount consideration".

See *Seanad Debates* (1974) vol. 78.

46a. See Vivienne Ulrich, "The Politics of Adoption" (1979) 8 New Zealand Universities Law Review 235 – an attempt to approach adoption from a child-centred point of view. The authoress' thesis is that where the interests of the child conflict with the rights of natural or adoptive parents the child's interests should be preferred. However, it should be noted that the function of the adoption law is not to provide for the best interests of the child alone but to balance the interests of the child and the natural parents.

47. One member of the Supreme Court in the *G. case* opined that the mother of an illegitimate child had no constitutional rights in relation to her child. See judgment of Henchy J. at p. 11.

48. Occasions may arise, however, where the recognition and enforcement of an illegitimate child's constitutional rights *vis-a-vis* its mother will not conduce to the child's best interests and it will be imperative that a purposive inquiry into the child's constitutional rights be made with a view to promoting the welfare of the child in adoption and other areas of law. The best interests of mental patients are often served by committal to a mental institution and such committals take place under the *Mental Treatment Acts*. It has not been suggested that the exercise of this power is a violation of the patient's right of personal liberty. However, it should be pointed out that Mr. Justice Walsh in *The People (Attorney General) v. O'Callaghan* [1966] I.R. 501 regarded as "quite unsustainable" the proposition put forward by Mr. Justice Murnaghan (in the High Court) that "the likelihood of personal danger to [a] prisoner" was in itself a ground for refusing bail. See also *Connors v. Pearson* [1921] 2 I.R. 51 which may be cited in support of the proposition that "there is no power to arrest and detain a person merely because it is apprehended that he may be in danger at some time in the future". See R. F. V. Heuston, *Salmond on the Law of Torts* 131 (17th ed., 1977). Nevertheless, the best interests of a child may still be promoted by the courts where he has no rights at all. One writer has noted that the wardship jurisdiction of the High Court may be invoked in certain circumstances where the infant has no enforceable legal rights *per se* i.e. where the infant is unborn: "Since [the] jurisdiction exists in order to protect not so much the strict legal rights

[Concluded on page 221]

Service for the Opening of the Michaelmas Law Term

St. Michan's Church, Dublin, Monday, 1st October 1979
(The Archbishop of Dublin, DR. HENRY McADOO)

The ultimate context of this Service for the opening of the Law Term is that of a society whose presuppositions are Christian. Yet it is a society very much *in via;* a society in a state of becoming; a society in which the effort to express its Christian presuppositions in practice is in continuing conflict with human greed, envy and violence; a society in which the quest for justice takes many forms and encounters hydra-headed opposition. It is a society seeking not to be become a Utopia but a society groping through countless setbacks after the realisation of its best self while at the same time recognizing that its very structures are open to radical criticism and can even lend themselves to injustice.

Social settings change: yesterday's economic dogma becomes to-day's economic heresy. Emphases in politics change in their distribution and vary in the manner of their application, but justice in its essence does not change and moulds and controls the forms and instruments of its own administration.

I was forcibly struck by this when last week I turned up a sermon delivered to the magistrates at Grantham in Lincoln in the year 1623. It was delivered by a famous Anglican, Robert Sanderson, a victim of the Cromwellian overthrow of the English Church, later in happier days to become Bishop of Lincoln and one of the outstanding moral theologians of the Anglican Church. He courageously applied the principles of justice to the social abuses of his own time. Nor did he shrink from condemning the contemporary oppression of the rural poor by nobles and rich men, and doing so publicly to their faces when preaching before the Court.

The sermon he preached to the magistrates on that June day three hundred and fifty-six years ago illustrates the essentials which do not and cannot change if imperfect men are to administer justice to and for their imperfect brethren. It must have taken three quarters of an hour to deliver, so I suppose that seventeenth-century hearers were endowed with a stamina matching that of their clergy in the pulpit.

Things are different now – so, recognizing that our society provides the ultimate context, may we for a few minutes allow Sanderson's theme to set the tone and to provide the immediate context for the work of this distinguished gathering whose members, at the different levels of the administration of justice, are continuously serving their fellows as individuals and serving the nation as a whole.

Sanderson took a superb passage from the Book of Job (29:14-17) and made of it a brief guide for the interpreter and administrator of law and justice: "I put on righteousness, and it clothed me: my judgment was as a robe and diadem. I was eyes to the blind, and feet I was to the lame. I was a father to the poor: and the cause which I knew not I searched out. And I brake the jaws of the wicked, and plucked the spoil out of his teeth."

And so let Sanderson preach to us in his paragraph summing up what he sees as the Christian basis of law-administration, and we shall see that some things do not change and must not change if we are to contribute to achieving a measure of the just society for our own time and place.

These verses from the Book of Job, he says, spell out four duties for all in positions of authority "and more especially for those that are in the Magistracy, or in any office appertaining to Justice."

And he continues "Those duties are four. One, and the first, as a more transcendent and fundamental duty. The other three, as accessory helps thereto. ... that first is, a care and love and zeal of Justice. A good Magistrate should so make account of the administration of Justice, as of his chiefest business, making it his greatest glory and delight: v. 14 *I put on righteousness, and it clothed me: my judgement was as robe and diadem.* The second is a forwardness unto the works of mercy, and charity, and compassion. A good Magistrate should have compassion of those that stand in need of his help, and be helpful unto them: v. 15 and 16 *I was eyes to the blind, and feet was I to the lame: I was a father to the poor.* The third is diligence in examination. A good Magistrate should not be hasty to credit the first tale, or be carried away with light informations; but he should hear, and examine, and scan, and sift matters as narrowly as may be for the finding out of the turth: v. 16 *And the cause which I knew not I searched out.* The fourth is courage and resolution in executing. A good Magistrate, when he goeth upon sure grounds, should not fear the faces of men, be they never so mighty or many; but without respect of persons execute that which is equal and right even upon the greatest offender: v. 17 *And I brake the jaws of the wicked and plucked the spoil out of his teeth."**

Four necessary qualities then he sees – a zeal for justice and fair play, the steady exercise of charity and compassion, the careful uncovering of the truth of the situation and a courageous impartiality.

As in a mirror, a mirror cast centuries ago, we see the face of our own times and their needs reflected. We see more, for we discern things that do not change; principles which bear on human needs and situations and which remain valid and essential for the man of the atomic era just as much as for the man who endured the political and economic upheavals of civil war in seventeenth-century England.

More still, we can descry the features of a great truth, the great truth for the members of "the household of faith," (Gal. 6: 10), the truth which explains why these principles of justice and charity cannot alter or be affected by time's corrosion or by changing fashions. It is because they are themselves reflections on that central and living truth – Hensley Henson used to call it "the great text" – "Jesus Christ is the same yesterday, to-day, and for ever." (Heb. 13:8).

*Sermon I *Ad Magistratum* (L.A.C.T. ed Vol. II pp 173-4).

Conveyancing Notes

CERTIFICATES OF COMPLIANCE WITH PLANNING PERMISSION

It is at present the universal practice for Builders and Vendors of new houses to furnish evidence of compliance with the conditions of the Planning Permission for the erection thereof. The normal evidence furnished is as follows:-

(1) Compliance with conditions requiring financial contributions is normally proved by furnishing copy letters from the Planning Authority confirming compliance. In passing, it should be said that this is not always as simple as it might seem on a large estate with a variety of different Planning Permissions.

(2) Compliance with the other conditions is proved by furnishing a Certificate from an Architect or Engineer, confirming that the Planning Permission (and usually also the Building Bye Laws Approval) relates to the house in question and that the house was completed in at least substantial compliance with the conditions thereof. The Law Society have agreed a form of Certificate with the Royal Institute of Architects and the Solicitors for the main Lending Institutions *(Gazette* – November 1978).

Many Solicitors have enquired as to correct requirements of a Purchaser's Solicitors or a Mortgagee's Solicitor dealing with the sale of a second-hand house built since 1st October 1964.

The Conveyancing Committee feel that it is unreasonable for Solicitors to insist now on being furnished with documentation which it was not the practice to furnish at the time. They have caused enquiries to be made as to when the practice of getting these Certificates of Compliance became general conveyancing practice and have been advised that it became so in 1970. The Committee accordingly advise members of the society that in their opinion, the Solicitors should only insist on such Certificates on second-hand houses built since 1970.

In considering the matter, the Committee discussed the frequently stated belief that Solicitors need not concern themselves with any of these matters if the house had been built for over five years. The Committee were of the opinion that this theory does not have any basis in law.

CONDITIONS IN LOAN APPROVAL

Most Building Societies satisfy themselves fully about all matters the subject of their security before issuing a written letter of approval. If the loan exceeds 75% of the cost of the property, it is not unusual however for the loan to be made conditional on the Borrower taking out a Mortgage Protection Policy. Other lending institutions approve loans subject to survey or, in the case of loans by Life Insurance Companies, subject to the Borrower taking out an additional Life Assurance Policy.

The normal condition that Solicitors acting for the Purchaser insert in the Contract for the protection of their client is a Clause to say that the Contract is subject to a loan approval being obtained. It is not usual to go on to provide that the Contract is subject to compliance with any of the conditions mentioned above, even though their compliance may be outside the power of the Purchaser. The Mortgage Protection or Life Assurance might be refused or approved on terms that would be extremely onerous to the Purchaser. Solicitors giving undertakings to Banks and completing purchases without protecting their clients against such risks may well be negligent. It is suggested that Solicitors acting for a Purchaser should use a standard type of clause and the following is suggested as a reasonable wording:-

> THIS CONTRACT shall be subject to the Purchaser obtaining approval for a loan of £ from on the security of the premises PROVIDED ALWAYS that if this loan has not been approved in writing within weeks from the date hereof either party shall be entitled to rescind this Contract and in such event the Purchaser shall be refunded his deposit without interest costs or compensation.
>
> (If the loan approval is conditional on a Survey satisfactory to the Lending institution or a Mortgage Protection or Life Assurance Policy being taken out or some other condition compliance with which is not within the control of the Purchaser the loan shall not be deemed to be approved until the Purchaser is in a position to accept the loan on terms which are within his reasonable power or procurement).
>
> *(Delete as appropriate).*

In the opinion of the Conveyancing Committee, this is a reasonable Clause to use to make a Contract subject to loan. The Committee advise strongly against a Solicitor giving an undertaking to a Bank to obtain bridging finance unless and until he is certain that all conditions of the loan can be complied with.

G. v. AN BORD UCHTÁLA

Continued from page 210]

of an infant but his interests in a rather wider sense the absence of merely legal rights would not, it is submitted, remove from the sphere of potential wardship the infant whose interests are at stake; and indeed might not the fact that the infant has no legal rights to protect him make the court all the more eager to exercise its jurisdiction in the knowledge that it alone stands between the infant and the erosion of his welfare". See Jeremy Phillips, "Wardship and Abortion Prevention" (1979) 95 L.Q.R. 332, 333. Of course, the exercise of the court's theoretically unlimited wardship jurisdiction has been suspended by the Adoption Acts which provide for the protection of the child (who must be not less than six weeks old: section 8 of the Adoption Act 1974) in adoption.

49. Of course, in Mr. Justice Henchy's view, no problem arises under s. 3. The learned judge was of the opinion that a judge hearing an application under s. 3 is not necessarily concerned with the resolution of conflicting rights, legal or constitutional, but is concerned only with the attainment of a result which will be in the best interests of the child.

A day in the life of Two Consultants, Six Tutors and Ninety-Seven New Apprentices

Joseph B. Mannix

Date: Thursday, 15 November.
Subject: Probate and Administration (Day 2).
Objective: To be able to take instructions after death of Testator, to complete Inland Revenue Affidavit and all other papers and matters to lead to a grant of probate.
Consultants: Eamonn Mongey, Probate Officer; Peter Quinlan, Solicitor.
Tutors: Joan O'Mahony, Paul Foley, Emer Gilvarry, David McMahon, Fintan Clancy, Geraldine Pearse.

A Quartz or Seiko is almost certainly required by anyone involved in the second Professional Course under the New Regulations. The morning breaks at 9.30 a.m. sharp and there is no room for argument, accident or absence by a mere minute. Christies of London, when they hold auctions, announce boldly to the world: "Auction begins at 11.00 a.m. *precisely*". The Professional Course begins at 9.30 a.m. *precisely* and that's that.

At the top table from left to right: Eamon Mongey and Peter Quinlan, consultants for the Probate Course.

It is not adulation to time-keepers that this is so. Punctual attendance is deemed important because the most and the best of a Consultant's tuition can only be acquired by being present. There is the further important aim of avoiding disruption of the training sessions and ensuring courtesy to the teaching teams. It was therefore found necessary to have a certain and definite starting-time and anybody who failed to make it by then suffered the consequences i.e. being locked out until the first break in the morning and being marked absent. This seems harsh in not taking into account ordinary features of life such as early morning traffic jams, the possibility of a puncture on bike or car, illness etc. and is not greeted with enthusiasm or endearment by apprentices in general. One apprentice – Northern Irish, in origin – praised the tight schedule for introducing and disciplining people to office hours.

Peter Quinlan supervising a group of Apprentices at work.

The day's programme began with an introduction by Eamonn Mongey and a demonstration, pre-recorded on closed circuit television, of the taking of instructions to extract a grant of probate. Then, the first exercise of the day (there were three in all) took place. These exercises, by way of explanation, are the best representation of the learning-by-doing philosophy behind the Professional Course. For the first one, apprentices paired off in twos, the one acting as solicitor, the other as client in an attempt to take, or give, instructions towards extracting a grant of probate. Each tutor – the student: tutor ratio strived at is 12:1 – after checking his or her particular group reported satisfactory results. Indeed, it is obvious without really pursuing it that all apprentices deeply appreciate this feature of the course. A "couple of star performers" were put in front of the camera and their effort was later relayed, with much amusement, on the closed circuit television. The level of imagination displayed and the trick questions and answers given brought delight to all.

At 11 o'clock there was a twenty minute coffee break after which the first exercise was reviewed. Then, the function and filling out of the Inland Revenue Affidavit was explained and demonstrated. This was later to be put to its practical application in the second exercise but now, at fifteen minutes past mid-day, an adjournment for lunch was called. Time, ladies and gentlemen, time.

After lunch, the second exercise was undertaken in the tutorial rooms. A surgical review was later carried out, back in the lecture hall. Again, reports from tutors were good. The over-all impression, shared by Consultants and Tutors alike, was, in respect to the intelligence and interest of the apprentices, that questions were lively and incisive and on a couple of occasions, went outside the scope of the subject.

Next, apprentices were shown other relevant Probate forms namely, Schedule of Lands and Buildings (for Capital Acquisition Tax purposes), the ordinary Notice of Application for Grant of Probate and the Oath for Executor. Afternoon tea break intervened between this demonstration and the final exercise, results from which were as before. Each person on the course was supplied for the day with all required papers and copy forms and at this stage, the complete probate file of a fictitious deceased person was examined. The final items on the day's agenda were the statutory notice to creditors and the calculation of probate fees. A general summary of the day's work was then given and this concluded the session. This day is part of a 9-day programme on Probate and Administration and in order to check competence and application, apprentices will from time to time be subjected to assessment tests.

* * *

The reactions of the participants on the second Professional Course are not out of place at this early stage in its running. For one thing, the new regulations rely to a great extent on practising solicitors and others working in different capacities in the legal system giving up their offices for a day or a couple of days so that their expertise and experience would be available for the benefit of the graduates on the course. In this regard, it is not inappropriate to quote a paragraph from the annual report for 1978/79 of the Chairman of the Education Advisory Committee, John F. Buckley "The great thanks of the profession are due to all the members of the profession and contributors from outside the profession who participated in the first Professional Course. The willingness with which busy practitioners have responded to requests to participate, on a few occasions at particularly short notice, has been remarkable." (para. 11.10, p. 163 October 1979 *Gazette).* It is not envisaged that the willingness and co-operation of practitioners will be any less strong the second time round.

For another thing, because it is early days yet in the second Professional Course the reactions of apprentices might perhaps be stronger and more critical. That this was so will be plain. "We'll be great Civil Servants at the end" said one with the unusual background of having worked two days a week in a solicitor's office while an undergraduate. She was honest enough to admit that her reaction was strong and maybe, exceptional. It certainly was exceptional when gauged against the average comment from the fifteen or so apprentices interviewed. All were happy that the course was very good and foresaw that when their integrated apprenticeships expired, they would be truly qualified solicitors. Eamonn Mongey made a strong point in this regard: "In terms of confidence and capacity, these people have the best of training and will be very well equipped to undertake and have delegated to them a lot of work and responsibility, when they go back to their offices."

That there were no suggestions for improvement or criticisms would be a bad misrepresentation. Their range was in fact enormous. Practical problems posed were: would not the instalment of lifts facilitate going from lecture hall to tutorial rooms, two floors above, and vice versa? and, could the closed circuit television sets be fixed so that they are operational when required? Another point raised, particular to the second Professional Course due to the larger than normal numbers taking part, was that those sitting at tables on the wings in the lecture hall had not a good view of the closed circuit T.V. screens and are out of focus of the Consultants sitting at the table. A more substantive criticism of the course expressed was that there was a lack of uniformity in treatment and tuition from subject to subject. This manifested itself in some subjects with tuition being too academic, printed directions and forms not being standard in quality and quantity, or instructions for tutorials not being adequate.

These aside, all are impressed. The course is demanding and tiring, being from 9.30 to 4.30 or 5.00, five days a week. In the end, all hope that the labour and struggles down the quays to make it to Blackhall Place by half past nine every morning will have been worth it.

The Perils of Destruction

B. S. RUSSELL, M.A., Barrister

[Reproduced from English Law Society's Gazette 28.11.1979]

It is not often that one has the pleasure of reading such an elegant and comprehensive judgment as that of Oliver J. in *Midland Bank Trustee Co. v. Hett Stubbs and Kemp* [1978] 3 All ER 571. It deals in masterly fashion with an important aspect of the duty of a solicitor and, indeed of the duties of all professional men who have to advise other persons.

This case (and to understand it in full you should also read its immediate predecessor in the reports, *Midland Bank Trustee Co. v. Green* [1978] 3 All ER 555) sets out a simple, but sorry, story. The profession does not come out of it very well. A small error by a very experienced conveyancer has taken a total of twelve days in court, ten years of litigation and the citing of 93 cases; the costs involved must be stupendous. However, it has at least produced a judgment that, if it can evade the Scylla of the Court of Appeal and the Charybdis of the House of Lords, could properly be described as the leading case on negligence of solicitors and, by inference, of other professional persons as well. It is no longer safe to rely upon the Limitation Act 1939; six years from the time of the advice being given is no longer the time to destroy files. It is clear that no papers should be destroyed until the possibility of any action for negligence arising has passed. The only safe course is to microfilm such records before they go to destruction; or else keep them for many years. (A comprehensive schedule of suggested document retention periods, together with a detailed brochure for solicitors *How Microfilm Can Help Me,* is available free from Oyez Services Ltd., Microfilm Division, 70-74 City road, London ECI 2DX, Tel: 01-253 0444).

What led to all this *sturm und drang?* Walter Green owned a farm, Gravel Hill Farm, in Lincolnshire. He also appears to have owned a number of other farms, one of which had the name (which would have pleased P. G. Wodehouse) of 'Shifty Nocking'. He had sold one to his younger son, but when his elder son, Geoffrey, wished to purchase Gravel Hill, Walter was reminded of the death duty advantage of the possession of agricultural property and, instead, Geoffrey was given an option for a period of ten years, in consideration of the payment of £1 on 24 March 1961, to purchase the farm at a set price of £75 an acre. During the next few years Geoffrey occasionally consulted the defendant firm of solicitors about the desirability of exercising the option, but nobody noticed that the option had not been registered as an estate contract.

The result was that, after Geoffrey had seriously quarrelled with his father in 1967, Walter went to another firm of solicitors seeking to defeat the option and they advised him to sell the farm to his wife, which he did for £500. They ought also to have advised him that this would have been a breach of the contractual option, but, as they said rather primly in a letter '... Whether he should have done so or not was a matter upon which we were not asked to advise'. The client on the Clapham omnibus might have a different view as to the propriety of that inaction. Anyway, the die was now cast; the farm was sold, with the startling inclusion of the usual certificate in the conveyance that the amount or value of the consideration did not exceed £5500 (the judge took a merciful view of this palpable undervalue), on 17 August 1967 and Geoffrey heard about it in September. An attempt was then made to register the option and to exercise it; but it was too late.

Proceedings were started on 25 November 1968 and were subsequently complicated by the deaths of practically all those concerned in the matter. In the first case, the *Green* case, Oliver J. gave judgment against Walter's estate for damages for conspiracy (to be assessed) but the action against that of his late wife failed because it had not been commenced within the limitation period and she was a purchaser for valuable, if not adequate, consideration.

There followed the action against the defendant firm of solicitors for damages for negligence or breach of contract. These were parallel claims. The solicitors contended that their failure to register within a reasonable time was a breach of contract only, and so statute-barred. The judge's view of that was 'the plea of limitation is an unattractive plea at the best of times ...'. However, he went on '... it is the familiar experience in cases such as this that solicitor defendants are not, practically, entirely free agents in the matter of the defences which may be raised on their behalf'. The inference is obvious and led to a majestic and complete review of the cases, which had to include consideration of whether the court was bound by *Groom v. Crocker* [1938] 1 KB 194 (where the Court of Appeal held that the relationship of solicitor and client was purely contractual) or whether there was a general, supervening duty of care under the principle of *Hedley Byrne v. Heller & Partners* [1964] AC 465. Having held that there was such a duty, it therefore followed that its breach took place when the farm was sold to Mrs. Green in 1967.

It was also held that there is no general duty on a solicitor to consider all aspects of his client's interest generally when consulted on a particular problem, so the defendant solicitors were not under a duty to consider the option's registration and enforceability when consulted about its exercise (a ruling that might surprise the client on the Clapham omnibus or even, as the judge put it, in the company car.). Secondly, if the duty owed was purely contractual, the duty to register was continuous until it became impossible to perform on the day that the farm was sold.

Thus, having neatly rolled up all the possible loose ends, we are left with the situation that almost any mistake now lies in wait until damage results from it. This will not only apply to solicitors, but also to any person, primarily professionals, upon whose advice or action people rely. It will, equally, not matter whether the advice or action is gratuitous or paid. It is therefore very important that insurances cover this in full (even purely formal advice given at parties!) And that such insurances cover the personal estates of the solicitors who are partners in the firm, salaried solicitors and legal executives; and there should be cover for advisers, whether lawyers or otherwise, in business. But it is even more important that full records should be kept of all advice given and that these should be retained either in their original form, or, if space is lacking or too expensive, in microfilm form acceptable to the courts.

BOOK REVIEWS

The Case for Divorce in the Irish Republic by William Duncan. Published by the Irish Council for Civil Liberties, Liberty Hall, Dublin, 1979. 80 pp., £1.50 (+20p p+p).

The Case for Divorce in the irish Republic, written by William Duncan and commissioned by the Irish Council for Civil Liberties, "the I.C.C.L." was introduced and launched as a publication on Monday, 12 November 1979. The book, as the Chairman of the Council quite rightly says in his Foreword, is "the first major publication on this vital subject, offering a thorough and far-ranging examination of the problem." The I.C.C.L. hopes that the Report will provide the impetus for serious public discussion, and that on the basis of such informed debate, the Oireachtas and the Irish people will informed debate, the oireachtas and the irish people will initiate the changes necessary – constitutional amendment by referendum and legislation for divorce – to bring what the I.C.C.L. say "relief and hope to hundreds of families."

The study assesses the scale of marital breakdown in the Republic. The extent of the problem is difficult to under-estimate: "It is reasonable to assume, on the basis of the latest information, that there are at present in the Republic between five and eight thousand deserted wives, with a minimum annual increase of about 500." (p. 12). Divorce and annulment are compared as techniques for dealing with broken marriages. The one is a clear-cut and honest remedy, the other, even given reforms that might be enacted at the suggestion of the Law Reform Commission, is quite limited in its scope and does not purport to accommodate marital breakdown. The arguments for divorce are very well examined, on the basis of individual liberty, changing social attitudes and practices in relation to marriage, the need to provide for minorities, equality of treatment under the law, and improving the quality of family life.

Their treatment and the examination of a number of arguments against divorce is also admirable. For the whole study, the author and the I.C.C.L. are to be congratulated. William Duncan's contribution to Irish Family Law and its reform is quite enormous. He has been actively involved in a number of organisatios and currently is President of Children First and a legal advisor to Cherish. He is a lecturer in Family Law at Trinity College, Dublin and has published articles on many aspects of the subject. The I.C.C.L. has done its fair share also in the field of Family Law in its short life-span to date. It has among its reports "Children's Rights under the Constitution."

Since *The Case for Divorce in the Irish Republic* has started a debate and discussion on this most important issue, it will be interesting to see how other bodies and significantly the Government react. The Law Society had, a motion for debate before the Annual Conference in Galway on 3-6 May 1979 "That Civil Divorce should be available in Ireland." Both papers delivered were subsequently published in the *Gazette;* Professor Mary McAleese's address for the motion was published in the June edition and Sean P. Bedford's, against the motion, was in the July/August edition. The Roman Catholic Church's position as most recently expressed by Pope John Paul at Limerick is still to speak of divorce as a threat to family life. When Mr. Duncan was questioned on the appropriateness in time of the publication of this report – shortly after the Papal visit – his reply was short and sweet: "It is never inopportune to speak out and make a case when the rights of persons are in issue."

The Law Reform Commission is at the request of the government currently undertaking a study of the reform of the law of nullity. The I.C.C.L.'s study on divorce will constitute it's submission to that body. For Church and State alike, one of the conclusions drawn by Mr. Duncan is perhaps apt. "An effective response to the problem of family breakdown needs to be positive. The ban on divorce is negative. It does not prevent the problem; it does not cure it; it confuses its causes; it helps to conceal its extent and worst of all it imposes unnecessary suffering by limiting the freedom of a minority of unsuccessfully married people."

I would strongly recommend this Report as necessary reading for any and every concerned citizen, whether lawyer or non-lawyer, and whether or not his or her initial viewpoint is for or against divorce.

Joseph B. Mannix.

A GUIDE TO ROAD TRAFFIC OFFENCES by James V. Woods. Published privately by the Author, 1979, xxxii, 491 p. Available from 35 Hollywood Park, Naas, Co. Kildare, at £11.75 including postage.

Mr. Woods's current book on the Road Traffic Acts, their regulations and their joint treatment by the Courts both in Ireland and overseas comes with impressive credentials from a man so expertly versed in District Court practice. Written essentially as an intended aid to those practitioners who find themselves representing a client in the not so familiar environment of the District Court, the Guide should prove as sustaining in the hour of need as a nip from a hip flask on a February afternoon at Lansdowne Road.

No doubt encouraged by his success in publishing his notes to the Intoxicating Liquor Acts and the two volumes of his District Court Guide in recent years, the author has rightly anticipated the need of the younger practitioner for a courtroom aid, written in simplified form, upon which the latter can readily rely.

The format of the Guide is based upon the Road Traffic Acts. Whilst there has been little pretence at literary style, a solid reference of intermingled statutory law and regulations, case law, Court rule and procedure are contained therein.

With his great depth of District Court experience, Mr. Woods has set out in detailed manner to explain the apprehension of the wrongdoer, his prosecution, its hearing, the Court's decision and penalty together with all relevant variations on the theme. For this alone the book should be recommended reading for law students of either discipline.

Matters also dealt with in its 500 pages are the Petroleum Acts, the Road Transport Acts, PSV Regulations and the Temporary Importation of Motor Vehicles.

A useful potential of reference, which loses some of its impact due to the absence of a reference date, is the table

of regulations, bye-laws, rules and orders in force. The elimination of this omission together with the addition of a periodic noter upper which could also cover statutory law and relevant up-to-date case law would render this publication more valuable as a Court reference book, particularly if tables of statutes and case law were included as is normal practice.

Mr. Woods's speed in attempting to satisfy the obvious needs that have arisen for reliable guides in the main areas of District Court practice may have resulted in the poor final proof reading but the punctuation and spelling errors contained are not so serious as to render unintelligible the text.

It is to be hoped that in time this work will become as of much benefit to the Republic of Ireland practitioner as Wilkinson has to our colleagues in the United Kingdom.

John Hooper.

Correspondence

re: **CIVIL LIABILITY ACT, 1961**

Dear Sir,

I wish to agree very strongly with Mr. John J. Madigan in relation to his letter of the 20th November under the above heading.

It is not alone in running down cases that this kind of thing occurs. Personally I was involved in a tragic accident case in which a young man of eighteen years was killed due to negligence in the course of work. Negligence was not admitted until the day on which the case was for hearing and we found it impossible to convince our client of the fact that £1000 was the maximum payable in this day and age for the loss of a dearly loved son in particularly tragic circumstances and due to gross negligence.

In view of the fact of his age, possibility of marriage etc., damages on the actuarial side were of course small but the figure was an insult. The lady had suffered severe trauma as a result of her son's death, the fact that only £1000 could be recovered was an addition to that trauma.

Having regard to the fact that the act was passed in 1961 surely the matter should be updated and where the circumstances are out of the ordinary run of negligence and the death is due to gross negligence a higher sum should be payable than the ordinary run of negligence case. At the very minimum the overall figure should be increased to £10,000 and this should be given automatically with a limited amount left to the jury to be awarded in particularly bad cases of negligence.

Yours faithfully,

Daniel D. Shields.

Main Street,
Loughrea,
Co. Galway.
3 January 1980.

re: **SOLICITORS' REMUNERATION**

Dear Sir,

According to the recent Summary of Developments herein, the Society and its Officers have made strenuous efforts, at least since September 1974, to rationalise income to the profession. It is obvious that all their reasonable endeavours are being met with delaying and frustrating measures by certain Governmental Bodies.

The unfair treatment meted out to the profession – especially when compared with that experienced by the non-professional branches of society – can only induce counter (legitimate) measures by the more independent members of the profession, outside the province of others.

As intimated by the undersigned at the last AGM of the Society, it is appropriate that a special meeting of members be called to consider if another means of remuneration should be adopted to by-pass the present cumbersome, expensive and outmoded system of detailed charges. It is possible that a revision of scale charges might also be sought more in keeping with the current economic trends, and more fairly equated to other comparative bodies and factors.

Legal Consultative Council — a loose association of Barristers and Solicitors — has taken this initiative to ascertain the preliminary views of members. If encouraging, it is proposed convening a meeting, within the next two months. Interested members should contact the undersigned.

Yours sincerely,

T. C. Gerard O'Mahony,
Chairman Legal Consultative Council.

22 Merrion Square,
Dublin 2.
10th December, 1979.

Notices

FOREIGN LAWYERS

The Society from time to time receives inquiries from overseas lawyers – most frequently from the United States of America – as to employment opportunities in Ireland. The term of employment usually ranges between six months and two years. It is desirable that lawyers from abroad should have the opportunity of experiencing legal practice in Ireland and acquainting themselves with the Irish legal system. In return, practitioners who take such lawyers into their offices are likely to benefit from the knowledge of foreign law and the expertise which such lawyers would bring with them. Salaries are negotiable.

Practitioners who would be interested in having a foreign lawyer in their office for a limited period are asked to write to the undersigned who will put them in contact with the foreign lawyers involved. It is understood that any practitioner stating a willingness to partake in the arrangement does not commit himself or herself to taking a particular lawyer at a particular time.

Professor Richard Woulfe,
Director of Education,
Incorporated Law Society of Ireland,
Blackhall PLace,
Dublin 7.
17th December, 1979.

INTERNATIONAL LEGAL STUDIES

Many readers of the *Gazette* are aware that courses and seminars on legal topics are conducted every summer by American Universities at centres on the continent of Europe. The purpose of this notice is to convey to readers further information about the courses.

For twenty-six days from June 24th to July 19th 1980 the University of the Pacific, MacGeorge School of Law, in conjunction with Salzburg University offers a course on International Legal Studies in Salzburg with the subjects being International and Comparative Law, Conflict of Laws, Law of European Communities, International Trade and Development, Survey of the Law of Trade and Finance and Economic Institutions of Eastern Europe with focus on opportunities and method of East West Trade and finally International Protection of Human Rights. The MacGeorge School of Law offers a programme beginning on the 25th August, 1980 with five weeks of seminars again at Salzburg University in Private International Law, Public International Law, Company Law, E.E.C. Law and Comparative Law.

A programme in American Law will be offered at the University of Leyden in the Netherlands for June 30th to July 25th, 1980. The purpose of this course is to provide a general introduction to the American Legal System with emphasis on areas of particular interest to European lawyers.

The courses which are open to lawyers and, exceptionally, to advanced law students, are conducted in English.

Further details may be obtained by writing to:-
The Education Department,
Incorporated Law Society of Ireland,
Blackhall Place,
Dublin 7.

The Register

REGISTRATION OF TITLE ACT, 1964

Issue of New Land Certificate

An application has been received from the registered owners mentioned in the Schedule hereto for the issue of a Land Certificate in substitution for the original Land Certificate issued in respect of the lands specified in the Schedule which original Land Certificate is stated to have been lost or inadvertently destroyed. A new Certificate will be issued unless notification is received in the Registry within twenty-eight days from the date of publication of this notice that the original Certificate is in existence and in the custody of some person other than the registered owner. Any such notification should state the grounds on which the Certificate is being held.

Dated this 31st day of January, 1980.

W. T. MORAN (Registrar of Titles)

Central Office, Land Registry, Chancery Street, Dublin 7.

Schedule

(1) Registered Owner: James McGrath; Folio No.: 2329; Lands: Freaghduff; Area: 30a. 2r. 32p. County: Tipperary.

(2) Registered Owner: John O'Gorman (Junior); Folio No.: 20662; Lands: (1) Ballintlea South, (2) Rossmanagher, (3) Rossmanagher; Area: (1) 30a. 2r. 29p., (2) 6a. 0r. 21p., (3) 15a 3r. 27p.; County: Clare.

(3) Registered Owner: Mary Daly and Richard Daly; Folio No.: 4407F; Lands: Corporation; Area: 0a. 1r. 9p.; County: Donegal.

(4) Registered Owner: John Joseph Burbage; Folio No.: 1028; Lands: (1) Drumlish, (2) A plot of ground in the town of Drumlish with a licensed public house and out offices thereon and a store house on the opposite side of the road; Area: 0a. 2r. 13p.; County: Longford.

(5) Registered Owner: William Scanlon; Folio No.: 1723 (This folio is closed and now forms the property Nos. 1, 2, 3 comprised in Folio No. 3183F); Lands: (1) Kilkerry, (2) Gortagullane, (3) CaherMore; Area: (1) 33a. 2r. 0p., (2) 2a. 1r. 39p., (3) 4a. 2r. 28p.; County: Kerry.

(6) Registered Owner: William O'Neill; Folio No.: 264; Lands: Shrule; Area: 80a. 0r. 1p.; County: Queens.

(7) Registered Owner: John Crotty; Folio No.: 1124; Lands: Glenwilliam; Area: 48a. 3r. 7p.; County: Waterford.

(8) Registered Owners: Golden Vale Meats Limited [as to (a), (b), (c), and (d)]. Registered Owner: Golden Vale Co-Operative Mart Limited [as to (e)]. Folio Nos.: (a) 874F, (b) 2463, (c) 2464, (d) 4449, (e) 8537. Lands: (a) Rathdowney, (b) Rathdowney, (c) Rathdowney, (d) Castletown, (e) Rathdowney. Area: (a) 0a. 1r. 13p., (b) 4a. 1r. 9p., (c) 1a. 1r. 25p., (d) 0a. 0r. 0p. 11 sq. yds., (e) 0a. 2r. 28p. County: Queens.

(9) Registered Owner: Ernest David McClure; Folio No.: 40313; Lands: Kill; Area: 0a. 1r. 6p.; County: Donegal.

(10) Registered Owner: Patrick Flynn; Folio No.: (a) 8049, (b) 9544; Lands: (a) Raheely, (b) Cloggarnagh; Area: (a) 14a. 2r. 5p., (b) 12a. 0r. 28p.; County: Roscommon.

(11) Registered Owner: Edward Kelly; Folio No.: 13920; Lands: (1) Rahillakeen; (2) Rahillakeen (one undivided 4th part); Area: (1) 42a. 0r. 39p., (2) 1a. 1r. 34p.; County: Kilkenny.

(12) Registered Owner: The Macamore Co-Operative Agricultural and Dairy Society Limited; Folio No.: 10325; Lands: Ballycanew (Part); Area: 0a. 2r. 0p.; County: Wexford.

(13) Registered Owner: Richard McClay; Folio No.: 4795; Lands: Drumadooey (E.D. Birdstown); Area: 15a. 0r. 0p.; County: Donegal.

(14) Registered Owner: Hugh Lawler and Nora Lawler; Folio No.: 2950F; Lands: Courthoyle New; Area: 0a. 3r. 5p.; County: Wexford.

(15) Registered Owner: John O'Connor; Folio No.: 1834L; Lands: The Leasehold interest in the property situate in the townland of Inishlounaght situate in the Barony of Iffa and Offa East; County: Tipperary.

(16) Registered Owner: John Nolan; Folio No.: (1) 2L, (2) 210; Lands: (1) Butlerstown North, (2) Butlerstown South; Area: (1) 0a 1r. 20p., (2) 44a. 3r. 35p.; County: Waterford.

(17) Registered Owner: Kevin McConville; Folio No.: 10468; Lands: Stonylane; Area: 0a. 0r. 33p.; County: Louth.

(18) Registered Owner: Evelyn Nixon; Folio No.: 12377 (Revised); Lands: Boleyboy; Area: 45a. 3r. 12p.; County: Leitrim.

(19) Registered Owner: Denis Donovan; Folio No.: 25125 (Revised); Lands: Donoure; Area: 12a. 1r. 10p.; County: Cork.

(20) Registered Owner: Patrick O'Brien; Folio No.: 7825; Lands: Glenduff (E.D. Mitchelstown); Area: 69a. 0r. 0p.; County: Cork.

(21) Registered Owner: James Hayes and Margaret Hayes; Folio No. 449 (This folio is revised and is now comprised in folio 4649F); Lands: Knockroe (Mason); Area: 11a. 2r. 31p.; County: Limerick.

(22) Registered Owner: Daniel Gorman; Folio No.: 3387; Lands: Graigue; Area: 7a. 1r. 10p.; County: Longford.

(23) Registered Owner: William Michael Aherne; Folio No.: 15616; Lands: Ballinvarrig; Area: 37a. 2r. 33p.; County: Cork.

(24) Registered Owner: William Carey; Folio No.: 49272; Lands: (1) Derreens, (2) Derreens (one undivided 5th part) (3) Derreens Island (one undivided 5th part), (4) Derreens (one undivided 5th part); Area: (1) 21a. 2r. 24p., (2) 1a. 2r. 28p., (3) 8a. 2r. 20p., (4) 1a. 3r. 31p.; County: Mayo.

(25) Registered Owner: Laurence Curtin; Folio No.: 6457; Lands: Ballintober South; Area: 100a. 1r. 38p.; County: Limerick.

(26) Registered Owner: Michael Doyle and Mary Doyle; Folio No.: 162 (Revised); Lands: Ballydaniel; Area: 48a. 0r. 26p.; County: Cork.

(27) Registered Owner: Thomas (otherwise Tom Joe) McLoughlin; Folio No.: (1) 20238 (2) 18346; Lands: (1) (a) Carroward, (b) Ballyduffy, (2) Ballymore (part); Area: (1) (a) 84a. 3r. 4p., (b) 14a. 1r. 14p., (2) 13a. 0r. 27p.; County: Roscommon.

(28) Registered Owner: Mortimer O'Sullivan; Folio No.: 34815; Lands: (1) Dromkeen, (2) Dromkeen, (3) Dromkeen; Area: (1) 83a. 1r. 6p., (2) 31a. 0r. 16p., (3) 7a. 0r. 34p.; County: Cork.

(29) Registered Owner: Arlene Hogan; Folio No.: 3276F; Lands: Darrynane Beg; Area: 1a. 0r. 16p.; County: Kerry.

Notices

Newly qualified English solicitor of Irish parentage wishes to settle in Ireland and seeks employment as salaried assistant in any field but would prefer taxation/commercial work. Thomas Bluett, 15 Bath Road, Chiswick, London W.4., England.

LOST WILLS

Peter Gilbride, otherwise Kilbride, late of 92 Hollybank Road, Drumcondra, Dublin 9, Retired Garda, died on the 15th December 1979. Will any person knowing the whereabouts of a will of the above named deceased please contact Messrs P. J. Connellan & Co., Solicitors, Church Street, Longford.

Josie (otherwise) Josephine Maher, late of Rockville Flats, Dundrum, County Dublin, died on the 19th day of November 1979. Will any person knowing the whereabouts of a will of the above named deceased please contact Messrs Counahan & Swift, Solicitors, 24 O'Connell Street, Waterford.

CHANGE OF ADDRESS

Fitzpatricks, Solicitors, of Stephen Court, 18/21 St. Stephen's Green, Dublin 2 announce that as an from

21st JANUARY, 1980

their new address will be

37/39 Fitzwilliam Square, Dublin 2

Telephone and Telex Numbers will remain unchanged
i.e. 760187/763961/765674; Telex 30340 Fitz EI.

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Bank of Ireland Finance

Bank of Ireland Finance Head Office, 6 Burlington Road, Dublin 4 (785122) and branches in Dublin at Blackrock (885221), Fairview (331816) and Merrion Square (689555) and throughout Ireland at Athlone (2234), Belfast (27521), Cork (507044), Derry (61424), Dundalk (31131), Galway (65101), Kilkenny (22270), Limerick (47766), Sligo (5207), Tralee (22377) and Waterford (3591).

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Vol. 73 — 1979

LOST WILLS

ORDINARY GENERAL MEETING — GALWAY, 3 MAY 1979

PHOTOGRAPHS ON FRONT PAGE

SOCIETY OF YOUNG SOLICITORS

RECENT IRISH CASES

TOWN PLANNING

Planning Authority not estopped by representations made by an official.

The Defendant erected a building measuring 64 feet in length, 31 feet in breadth and 19 feet in height in the rere garden of a premises at Ballygall Road, Dublin. The Defendant did not get Planning Permission for the development which was commenced in 1975. During the progress of the work an Inspector from the Dublin Corporation (Complainants) Planning Department paid a number of visits to the site and according to the evidence of the Defendant's husband assured him that he could proceed with the erection of the building and that the Inspector believed that there would be no objection by the Planning Authority if he completed the building. The Inspector was later suspended from duty and subsequently dismissed.

The Dublin Corporation served an enforcement notice under Section 31 of the Local Government (Planning and Development) Act 1963 requiring the Defendant to remove the structure and subsequently brought proceedings in the District Court against the Defendant for failure to comply with the Enforcement Order. The District Justice held that by reason of the misleading representations made to the Defendant's husband by the Inspector that the Dublin Corporation were estopped from denying that the building was an exempted development and dismissed the summons. He stated a case for the High Court to determine the following question of law:

"Was I correct in holding that the Complainants, qua Planning Authority, were estopped from denying the representations made by their former employee".

Held (per McMahon, J.), having considered the English cases of *Southend-on-Sea Corporation v. Hodgson Limited* [1961] 2 A.E.R. 41; *Wells v. Minister of Housing* [1967] 2 A.E.R. 1041; *Lever (Finance) Limited v. Westminster Corporation* [1970] 3 A.E.R. 496; *Minister for Agriculture and Fisheries v. Matthews* [1951] K.B. 148; *Rhyl U.D.C. v. Rhyl Amusement Limited* [1959] 1 A.E.R. 257 and *Minister for Agriculture and Fisheries v. Hulkin* (unreported) and the Irish case of *Greendale Building Co. v. Dublin County Council* (Supreme Court 13/5/1977 - unreported, 185/1976) that if the Dublin Corporation had told the defendant that the building which her husband was erecting was an exempted development they would be acting 'ultra vires', and could not be held to have estopped themselves from asserting subsequently that Planning Permission was necessary for the development in question and, accordingly, no representation by their agent could work a similar estoppel. Insofar as the representation referred to in the question of law in the case stated included a representation that Planning Permission would be granted for the development this could not bind the Dublin Corporation to grant Planning Permission. Any undertaking by the Dublin Corporation to grant Planning Permission without compliance with the provisions of Section 26 of the Local Government (Planning and Development) Act 1963 would clearly be 'ultra vires'.

The Right Honourable The Lord Mayor Aldermen and Burgesses of Dublin (Dublin Corporation), Complainants, v. Elizabeth McGrath (Defendant) — High Court (per McMahon J.) — 17 November 1978 — unreported.

SALE OF LAND — FAMILY HOME PROTECTION ACT 1976

— Assurance void in absence of wife's consent — Doctrine of Notice.

In March 1961, the Defendant's husband purchased a house by way of lease in Artane, Dublin. He married the Defendant in July 1961 and the house became the family home. There were four children of the marriage which proved an unhappy one. The Defendant claimed that the husband's improvidence, drinking and physical cruelty to her caused her to leave home with her four children in October 1973. She got a tenancy from the Dublin Corporation firstly in a house in Kilbarrack and later, in June 1976, in a house in Coolock.

On leaving the Family Home the defendant went to the FLAC Law Centre in Coolock because she wanted to have custody of the children and to be free of interference from the husband. On the 20 November 1974 a written Separation Agreement was executed by the defendant and her husband which made no provision for any payments by the husband for the maintenance of the wife or children and was silent as to the family home.

On the 2 August 1976 the husband entered into an agreement to sell his interest in the Artane house to the Plaintiff for £6,400. The Family Home Protection Act 1976 had come into force on the 12 July 1976 and both the husband's solicitors and the plaintiff's solicitors were aware of its provisions. The Plaintiff's solicitors, by letter of 10 August 1976, requested that the Defendant's consent to the sale (assignment) be endorsed on the purchase deed, "unless there is an official Separation Deed, in which case we require a copy of same". On the 11 August 1976 the husband's solicitors wrote in reply:

"Our client and his wife have been separated for some years. Our client's wife has been housed by Dublin Corporation and is therefore no longer relying on the Artane house as her family home. We understand that a Separation Deed has been entered into but we did not act for either party at the time and do not have a copy of the Agreement. We understand from our client that he has never had a copy of the Agreement and that the same is with FLAC. We understand that Mr. P.M. of this organisation was dealing with the matter. We did in fact try to make contact with the Coolock Branch of FLAC for the purpose of obtaining a copy of the Agreement but this we understand is at present closed for holidays. We do not have the address or telephone number of any other branch and cannot trace any in the telephone directory. In view of the fact that the premises are not now a family home and your client is the purchaser for full value, we cannot see how your client is concerned with the matrimonial situation".

The husband was at that stage in Canada (but was back in Ireland by the 16 August 1976) so his solicitor could not get the Defendant's address from him. The Plaintiff's solicitors did not wait for the Defendant's husband to return nor for the FLAC centre to re-open but prepared a statutory declaration stating that since the execution of the Separation Agreement the wife had not relied on the Artane house as her family home and that "by virtue of said Separation Agreement has now no

interest therein". The husband executed the Statutory Declaration and the sale was closed on the 17 August 1976.

In April 1977 the Plaintiff having improved the Artane house agreed to sell it for £10,800. The purchaser's building society solicitors sought proof that Section 3 of the Family Home Portection Act ("the Act of 1976") had not been breached, but the Defendant refused to give a retrospective consent. The Plaintiff sought an order under Section 4 of the Act of 1976 dispensing with the Defendant's consent. The High Court (per Doyle J.) held that the Defendant's consent was not necessary and the defendant thereupon appealed to the Supreme Court.

The question for determination by the Court was whether the Plaintiff was an assignee "who in good faith acquired an estate or interest in the property", as provided by Section 3 (6) of the Act of 1976. Having reviewed the history of the doctrine of notice and noted the extension of the doctrine of Constructive Notice effected by the amendment of Section 3 of the Conveyancing Act 1882 by Section 3 (7) of the Act of 1976, the Court considered whether on the facts of the case the Plaintiff ought reasonably through her solicitor have ascertained the fact that the Defendant had a prima facie valid proprietary interest in the family home which the Defendant's husband was selling. The Court, noted that the Statutory Declaration prepared by the Plaintiff's solicitors was inaccurate in fact and unfounded in law, having been prepared without a sight of the Separation Agreement, and that the Plaintiff's solicitors had allowed themselves to be fobbed off with the excuse that the Separation Agreement could not be supplied because of the FLAC Law Centre holidays.

Held (per Henchy J.) that the true facts both as to the contents of the Separation Agreement and as to the existence and nature of the Defendant's claim would have come to the Plaintiff's knowledge if such "enquiries and inspections had been made as ought reasonably have been made" and that what the Plaintiff acquired was not acquired in good faith. The assurance by the Defendant's husband to the Plaintiff was therefore void.

Sandra Somers v. Sheila Margaret Weir — Supreme Court (per Henchy J., with Griffin and Parke JJ.) — 14 February 1979 — unreported.

CONTRIBUTION — CIVIL LIABILITY ACT 1961

Failure to serve third party notice does not necessarily preclude independent claim for contribution under Civil Liability Act 1961.

The Plaintiffs manufactured pharmaceuticals and chemicals in a factory in Innishannon, Co. Cork and the plant at the factory included fermenting tanks which were supplied to the Plaintiffs by the Defendants. In December 1975 an accident took place in the factory which injured one of the Plaintiffs' employees who brought an action for damages against the Plaintiffs alleging that by reason of the negligence and breach of statutory duty of the Plaintiffs, a cover blew off one of the fermenting tanks and caused his injuries. That action was settled before hearing in July 1977, and Judgment was entered against the Plaintiffs by consent for £17,500 damages and costs.

The Defendants were not aware of the accident or of the action by the injured employee until they received a letter in August 1977 from the Plaintiffs' Solicitors claiming indemnity on the ground that the cause of the accident was a design fault in the tank. The Defendants rejected the claim, relying on Section 27(1)(b) of the Civil Liability Act 1961 which they contended required that any claim against them should be made by third party procedure during the currency of the injured person's action.

When the Plaintiffs issued a Plenary Summons against the Defendants claiming damages for negligence and breach of contract in the design, supply and installation of the fermenting tank, the Defendants brought a motion claiming an Order under O. 12, r. 16, of the Rules of the Superior Courts 1962 setting aside the service of the Plenary Summons. It was agreed between the parties that the matter be dealt with on the basis that the Plenary Summons included a claim for contribution and that the application be brought under O. 19, r. 28 of the Rules of the Superior Court to strike out the Plenary Summons on the ground that it disclosed no cause of action.

McMahon J. concluded that the provisions of Section 27(1)(b) of the Civil Liability Act required a Defendant to serve a third party notice where it was possible for him to do so; and he is then precluded from proceeding for contribution except under the third party procedure, and the Court has a discretion to refuse an Order for contribution if a third party notice has not been served as soon as was reasonably possible. It would not be possible for a Defendant to serve a third party notice if the evidence which might support a claim for contribution was not discovered until the injured party's action had been disposed of. In such a case a Defendant could pursue by a separate action a claim for contribution. Consequently, where the Court refused a Defendant liberty to serve a third party notice, he should be free to bring an independent action for contribution and should not be bound by the condition requiring service of a third party notice where it was impossible for him to comply with it. *(Gilmore v. Windle* [1967] I.R. 323). In this action it was admitted that the Plaintiffs could have served a third party notice in the course of the injured person's action.

Held (per McMahon J.) that the Plaintiffs were now precluded from claiming contribution but were not precluded from claiming damages for negligence or breach of contract. Those damages might be an indemnity for the damages and costs recovered by the injured person or might be that amount but reduced because of contributory negligence. The Plenary Summons however disclosed a cause of action and the motion to strike out was accordingly dismissed.

A & P (Ireland) Limited v. Golden Vale Products Limited, trading as Golden Vale Engineering — High Court (per McMahon J.) — 7 December 1978 — unreported.

SALE OF LAND — RECEIVER

Validity of Attestation of the Seal of a Company by the Receiver — Validity of Execution by Receiver of Deed as Attorney for Company.

This case arose out of an application against a refusal by the land registry to register a transfer of a Co. Cork Folio of which the Cork Shoe Company Limited ("the Company") was the registered owner and the Bank of Ireland ("the Bank"), the

owner of a registered charge.

On the 23 October 1965, the Company issued a debenture to the Bank giving, interalia, a specific charge on the lands comprised in the folio. Clause 10 of the debenture gave the Bank power to appoint a receiver with power to take possession of, collect and get in the property charged and such receiver was given power "to sell or concur in the selling, let or concur in the letting, of any of the property charged by this debenture and carry any such sale into effect by deed in the name and on behalf of the Company or otherwise to convey the same to the purchaser".

The debenture further provided that the receiver be the agent of the Company and also provided that:

> "the Company hereby irrevocably appoints any receiver or receivers appointed as aforesaid, the attorney or attornies of the Company for the Company and in its name and on its behalf and as its act and deed to execute, seal and deliver and otherwise perfect any deed, assurance, agreement, instrument or act which may be required or may be deemed proper for any of the purposes aforesaid".

On the 12 May 1975, the Bank appointed Mr. M.G. as receiver under the debenture. The instrument of appointment specifying his powers set out the powers conferred in the debenture including that referred to above.

On the 25 July 1976, the receiver contracted to sell to the Industrial Development Authority part of the lands comprised in the folio and purported to carry this sale into effect by transfer dated the 8 October 1976. Such transfer was witnessed as follow:

> "In witness whereof the common seal of the Company has been hereunto affixed by direction of the Receiver as such Receiver, pursuant to the powers vested in him as aforesaid, and the Receiver has signed his name and affixed his seal and the common seal of the Purchaser has been hereunto affixed the day and year first herein written".

Article 115 of Table A of the Companies Act 1963 applied to the use of the seal by the Company. Article 129 of the Articles of Association of the Company provided for an official company seal for use abroad under the provisions of the Companies Act 1963. Article 100 provided as follows:

> "The directors may from time to time and at any time by power of attorney under seal appoint any company, form or person or any fluctuating body of persons whether nominated directly or indirectly by the directors to be the attorney or attornies . . . ."

The Registrar of Titles was not satisfied that the Receiver had power to execute the transfer and the matter was referred to the High Court which held (per Butler J.) that:

(i) The use and control of the seal of a company by the Receiver which was not authorised by the Articles of Association was not in accordance with any valid power and thus the fixing of the seal by the Receiver was not a valid or effective sealing by the Company to witness the transfer as its deed.

(ii) A company had no power to act by attorney to execute deeds within the State.

The reasons stated for so finding was that the legislature found it necessary in Section 40 of the Companies Act 1963 to make special provision to enable a company appoint attornies and hence that, but for that Section, a company had no such power. Section 40 only permitted the appointment of an attorney to execute deeds on behalf of a company in any place outside the State. Thus a company had no power to appoint an attorney to execute deeds within the State.

(iii) The transaction could not be validated by Section 46 of the Conveyancing Act 1881.

(iv) The present transfer had not been validly executed and was thus ineffective to transfer the legal estate in the property.

From this decision of the High Court an appeal was brought to the Supreme Court. *Held* (per Kenny J.) that:

(a) The High Court was correct in (i) above.

(b) The High Court was incorrect in (ii) above. A company had power to act by attorney to execute deeds within the State. The inference drawn by the High Court from Section 40 of the Companies Act 1963 was incorrect. Prima facie any company could appoint an attorney to act on its behalf; the attorney was an agent and a company can only act by agents and had implied power to appoint agents. Whether, in any particular case the directors of a company had power to execute a power of attorney depended on the Articles of Association, and if they had no such power, the sanction of a general meeting must be obtained. The Articles of Association of the Company in force at the time of the execution of the debenture did not require that the power of attorney could be given only by the Company in general meeting.

(c) As the Receiver had executed the deed of transfer in his own name, Section 46 of the Conveyancing Act 1881 made the deed of transfer fully effective.

(d) That the deed was therefore effective to transfer to the I.D.A. the property therein described and the Registrar of Titles was directed to register its effect on the folio.

Postscript: In the course of this judgment in the Supreme Court Kenny J. advised how a deed should be executed by a Receiver in exercise of the type of power of sale given him by the debenture in the case. Kenny J. said the receiver should proceed as follows:—

(1) By writing the name of the Company and underneath this writing words that indicated that the name of the Company had been written by the Receiver as Attorney of the Company under the power of attorney given him by the debenture.

(2) In addition, the receiver should execute the deed in his own name.

Kenny J. pointed out that (1) above brought the execution within the words of the debenture itself and (2) gave the Receiver the advantage of Section 48 of the Conveyancing Act, 1881.

Folio 43689, Co. Cork, Registered Owner: Cork Shoe Company Limited — Application of Industrial Development Authority: Dealing Number S1603/78 — Supreme Court (per Kenny J., with O'Higgins C.J. and Parke J.) — 9 November 1978 — unreported.

REDUNDANCY PAYMENTS ACTS 1967/71

A former employee of an employer who sold his business to a Company has no claim for redundancy payments against such former

employer, where that employee was offered and accepted employment with the Company. Any liability for redundancy payments in respect of the entire period of employment passed to the Company.

Note: The Employee (Clarke) was employed at the Employer's (O'Dwyer) premises since 1967. The Employer sold the premises to the Company in 1972 and on the 22 June 1972 a Representative of the Company asked the Employee to take up employment with the Company immediately on the takeover. It was then also stipulated that the Company was only taking on the Employee on condition that the Company was not responsible for the period of the Employee's service (1967/1972) with the Employer in the event of future redundancy and the Employee accepted employment on these terms. The Employee then claimed to be entitled to redundancy payments on the termination of his employment with the Employer. The claim was refused by the Employer and when the Employee appealed to the Redundancy Appeals Tribunal that Body (for the Minister for Labour) referred the following questions to the High Court by way of Special Summons:-

1. Was the Employee dismissed by the Employer or
2. Was liability within the terms of the Redundancy Payments Acts 1967/71 for the entire service of the Employee passed to the Company as continuous service.

The provisions of Sections 7 and 9 of the 1967 Act were considered as were Sections 20 (as amended by Section 5 of the 1971 Act) and Section 51 — the latter being the Section providing that an agreement to exclude the provisions of the Act shall be void. Section 9(2) of the 1967 Act provided:-

"9. (2) An Employee shall not be taken for the purposes of this part to be dismissed by his employer if his Contract of employment is renewed or he is re-engaged by the same employer under a new Contract of employment, and,

(a) in a case where the provisions of the Contract as renewed or of the new Contract as to the capacity and place in which he is employed and as to the other terms and conditions of his employment, so not differ from the corresponding provisions of the previous Contract, the renewal or re-engagement takes effect immediately on the ending of his employment under the previous Contract, or . . ."

Reference was also made to the following authorities:-

Lloyd v. Brassey [1968] 3 W.L.R. 526, [1969] 2 W.L.R. 310.
Woodhouse v. Peter Brotherhood Ltd. [1972] I.W.L.R. 401; [1972] 3 W.L.R. 215.
Evender v. Guildford City Association [1975] 3 W.L.R. 251.
Ubsdel v. Paterson [1973] 1 All E.R. 685.
Camelo v. Sheerlyn Productions Ltd. [1976] I.L.R. 531.

It was noted that under Section 19 and Schedule 3 of the 1967 Act if the Employee was taken not to have been dismissed by the Employer and the Company renewed the Contract or re-engaged him under a new Contract on terms and conditions which did not differ from those applicable to the earlier Contract with the Employer then the employee would on becoming redundant be entitled to redundancy payments from the Company based on the entire period of employment from 1967 onwards. Again it was noted that the stipulation of the 22 June 1972 (relating to previous employment from 1967) in so far as it excluded the provisions of the Acts was void. *Per McWilliam J.* "Section 51 (of the 1967 Act) does not confine its scope to reductions in or the avoidance of Redundancy payments. It applies to the operation of any provision of the Act".

Further, it was noted that Section 9(2) of the 1967 Act quoted above applied: *Per McWilliam J.* "There was a change of ownership of the business within the meaning of Section 20 and the Employee's Contract of employment was terminated in connection with that change so as to bring the provisions of the section into operation. The Company, as the new owner within the meaning of the section, re-engaged the Employee under a new Contract of employment so that, under sub-section (2) of Section 20, Section 9(2) took effect as if the re-engagement had been a re-engagement by the Employer".

Hence on the basis that the terms and conditions applicable to the employees' employment did not change when the Company became involved in 1972.

Held (McWilliam J.) that the answers to the questions posed by the Tribunal were as follows:-

(a) The Employee was not dismissed by the Employer in 1972 within the meaning of the Redundancy Payments Acts.
(b) The liability for redundancy payments in respect of the entire period of employment passed to the Company.

Minister for Labour v. Clarke, O'Dwyer and Aughrim Taverns Ltd. — The High Court (McWilliam J.) — 11 February 1977 — unreported.

Summaries of judgments prepared by Henry St. John Blake, John F. Buckley, Mary Finlay, John M. O'Connor and edited by Michael V. O'Mahony.

RECENT IRISH CASES

ADMINISTRATIVE LAW

Discretionary power to be exercised constitutionally – Judicial review of exercise of discretion.

The first named Plaintiff was a company concerned with family planning in Ireland and was a publisher of a booklet entitled "Family Planning". The second-named Plaintiff was the director of that company and a medical practitioner. The first five named Defendants were members of the Censorship of Publications Board ("the Board").

The facts giving rise to this case were that on the 24 November 1976 the Board made an order prohibiting the booklet "Family Planning" on the grounds that it was "indecent or obscene". This action was commenced to have that order set aside on several different grounds. These are not all now of concern as the High Court (per Hamilton J.) held that the claim could be decided on one basis only namely, as was admitted, that prior to the making of the prohibition order the Board had not communicated with or heard the Plaintiff. The Supreme Court only considered this basis of the decision of Hamilton J. and no other claims of the Plaintiff.

Section 7 of the Censorship of Publications Act 1946 ("the Act") empowers the Board to prohibit a book if it is of opinion, inter alia, that it is indecent or obscene. Section 6 (3) provides "when examining a book under this secion, the Censorship Board may communicate with the author, editor or publisher of the book and may take into account any representation made by him in relation thereto."

Hamilton J. held that in order that the Board exercise their powers fairly and judicially in accordance with the principles of natural justice and in particular the requirements of judicial procedure as laid down by the Supreme Court in *East Donegal Co-operative Livestock Mart Limited v. Attorney General* [1970] I.R. 317 that before making a prohibition order under Section 7 of the Act the Board was bound under Section 6 (3) of the Act to notify the author, editor or publisher of the book that it was being examined and was bound to afford such people an opportunity to make representations. Accordingly, the High Court declared the prohibition order made null and void.

The decision of Hamilton J. was appealed to the Supreme Court. The majority judgment was given by O'Higgins C. J. with whom Henchy, Griffin and Park JJ. concurred, and Kenny J. delivered a separate concurring judgment.

Held (per O'Higgins C. J.) that:

(1) Section 6 (3) of the Act is not mandatory and confers a discretion on the Board to avail or not to avail of the powers thereby given. This was made clear by the use of the word "may" in the sub-section.

(2) The Act being a post-Constitution statute is presumed to be constitutional. Following the earlier decisions of the Supreme Court in *East Donegal Co-Operative Livestock Mart Limited v. Attorney General* [1970] I.R. 317, and other cases, this presumption of constitutionality carries with it the consequent presumption that powers of a discretionary nature conferred by such a statute are not intended to be arbitrary powers and are only to be exercised in a constitutional manner. Hence, the discretionary power to communicate with the author, editor or publisher conferred by Section 6(3) of the Act must be exercised in a manner which is just and fair, which requires, at the very least, an exercise of the power at a time and in circumstances which is fair and proper to do so.

(3) The particular circumstances surrounding the publication of the booklet "Family Planning" were such that this was a case in which the power to communicate ought to have been exercised and such representations as might have been made by the Plaintiffs ought to have been taken into account.

(4) The exemption from the obligation to observe the rule of 'audi alteram partem' did not apply to this case as it was not possible in the circumstances to hold that if the publishers had been given the opportunity of giving the Board the information that was adduced by them in the High Court the booklet would have been banned for being "indecent or obscene."

(5) For the reasons stated above, and not for that given by Hamilton J. in the High Court the decision that the prohibition order was bad was upheld and the appeal dismissed.

Kenny J. in his separate concurring judgment also held that the prohibition order was bad but not for the reason stated by the High Court. He also differed slightly in his reasoning from that of the Chief Justice. He agreed that the power conferred by section 6 (3) of the Act was discretionary. In his opinion the discretion was to be exercised as follows: the Board should consider whether they would invite representations and should in all cases do so unless this is impossible (e.g. if no name or address appears in the book) or the book was so clearly indecent or obscene that in its opinion no representations could have the effect of altering its view of persuading a court of law to disagree with its decision.

He further held that the Board making a prohibition order is exercising limited functions of a judicial nature and is subject to the control and supervision of the High Court and so the exercise of any discretion of the Board may be reviewed by that Court to ascertain whether there was only one way in which the discretion could be exercised.

In relation to this particular publication he held that if the members of the Board had considered (as they should have) whether they would communicate with the first-named Plaintiff Company and take into consideration any representations made by it, they could have come to one conclusion only namely, that they would give the Company an opportunity to make representations to them and if they had, their decision might have been different. Accordingly, the failure to give the first-named Plaintiff the notice referred to in Section 6(3) of the Act made the Order of the Board of the 24 November 1976 void.

The Irish Family Planning Association Limited and Joan M. Wilson v. The Honourable Judge Noel Ryan, Joan Ryan, Peter Prentice, Eoin Moore, Patricia Egan (Members of the Censorship of Publications Board), the Attorney General and Ireland – Supreme Court, per O'Higgins C. J. with Henchy, Griffin, and Parke JJ. concurring, and Kenny J. concurring in a separate judgment – 27 July 1978 – unreported.

CONSTRUCTION OF WILL

Power of Appointment under Will frustrated by conversion of subject matter. Proceedings were brought by the Plaintiff as executor.

The Testator devised and bequeathed his land and chattels to his nephew (the Plaintiff) in Trust for such child of his as he should " in his absolute discretion consider best suited to possess the lands and pursue the occupation of farmer" and he gave his said nephew the right to appoint by deed or will in favour of such child when that child attained 25 years; and until such appointment he gave his said nephew full powers of management and control. The Testator made no disposition in default of appointment and gave the residue of every kind to his nephews and nieces.

During his lifetime the Testator owned lands in Co. Carlow. After his death the Land Commission commenced proceedings for acquisition and, notwithstanding objections by representatives of the Testator, compulsorily acquired the lands.

The Plaintiff had five children all under the age of 25 years and no appointment had been made by the Plaintiff. Under the circumstances, the Plaintiff could not carry out the Trusts of the Will in the manner directed by the Testator and sought directions of the Court as to the proper application of the sale proceeds.

McWilliam J. commented that had the property been compulsorily purchased before the death of the Testator, the gift would have been adeemed and the purchase price would have passed under the residuary clause *(Galway's Will Trusts* [1950] Ch. 1).

He cited cases *(Lawes v. Bennet* (1875) 1 Cox 167; *re Carrington* [1932] 1 Ch. 1; *Jones v. Batley* [1910] 1 I.R. 110 and *Miley v. Carty* [1927] I.R. 541) which turned on the failure of the donee of the power to appoint the property into which the subject matter of the power had been converted and commented that they seemed to favour the principle of ademption where specific property had been converted before the directions of the Testator creating a power could be carried into effect.

However, in the present case, McWilliam J. felt that a simple gift of this property to one of the Testator's grand-nephews would hardly have been adeemed by the compulsory purchase before the executor had given his assent to the devise and that the correct approach was to try to ascertain the intention of the Testator and not to endeavour to adapt a rule of law or construction to fit the facts. He had little doubt but that the main consideration in the mind of the Testator was that the land should be owned and worked by some one of his own family and of his own name. The lands having been sold they could not be appointed to one of his grand-nephews and the Testator's object could not be achieved.

McWilliam J. referred to the case of *Robinson v. Moore* [1962-63] Ir. Jur. Rep. 29 in which Dixon J. reviewed the law regarding the effect of a Will where property is given by that Will with a power to appoint to other people but no appointment is made and there is not provision in the Will for a default of appointment. In considering the alleged "rule" that "if there is a power of appointment among certain objects, but no gift to those objects, and no gift over a default of appointment, the Court implies a Trust for or a gift to those objects equally, if the power be not exercised", Dixon J. concluded that the correct approach was to enquire whether there was any clear indication that the Testator intended the objects of the power or some of them to take not only under the power but also if the donee failed or neglected to execute the power.

Held (McWilliam J.) that there was no such indication and if there was any indication, it was that the Testator was more anxious to benefit the older generation to whom he gave the residue and that the proceeds of the sale of the lands pass under the residuary clause in the Will.

Patrick J. Tuite v. Mary Tuite & Ors. High Court (per McWilliam J.) — 3 November 1978 — unreported.

SALE OF LAND – SPECIFIC PERFORMANCE

Letter from Vendor's estate agents to Vendor confirming terms of agreement for sale constitutes a note or memorandum in writing for the purposes of Statute of Frauds.

The Plaintiff, who was a director of a building company, had, prior to the events which gave rise to the proceedings, purchased from the Defendants part of the Defendants' lands at Monkstown ("the front lands"). He was anxious to purchase the remainder of the lands ("the back lands") and kept in contact with the Defendants' Estate Agents. At some time prior to the 7 December 1977 the Plaintiff offered H.W. of the Defendants' Estate Agents £175,000 for the back lands. The Chairman of the Board of the Defendant Company indicated to the Defendants' property adviser, M.L., the terms on which the Defendants would be prepared to sell and M.L. kept in contact with H.W. Between 7 and 19 December, 1977, the Plaintiff had a number of discussions with H.W. and eventually agreed to purchase the back lands for £175,000 on the terms that the date for the closing would be six months from the date of contract, that the deposit payable would be £30,000, and that the Plaintiff would pay interest on the balance of the purchase money at the rate required by the Defendants.

Following the completion of this Agreement H.W. wrote to M.L. in the following terms:—

> **"Hall School - Lands at Rere**
>
> "Further to our telephone conversation this morning I confirm that we have agreed terms, subject to contract, for the sale of these lands to Mr. Paddy Kelly of Berkeley Homes Ltd., who were the purchasers of the front lands. The principal terms to be included in the contract for sale are as follows:—
>
> "Proposed purchaser: Hickey Beauchamp Kirwan & O'Reilly, (In Trust).
>
> "Proposed price: £175,000.
>
> "A non-returnable deposit of £30,000 to be paid on exchange of contracts, the balance to be paid not later than 6 months thereafter with interest at 12% from the contract date until the closing date.
>
> "I am sending a copy of this letter to Mr. Haugh of A. & L. Goodbody, solicitors for the Vendors, and perhaps you could kindly confirm instructions to him on behalf of the Committee".
>
> Yours sincerely,
>
> H.W.

There was some difficulty in the preparation of the map and the Christmas holidays intervened. Eventually the contract was sent out on the 13 January 1978 which was a Friday, with an accompanying letter which said:—

> "On the instructions of our clients, this offer remains open for acceptance by your clients for a period of seven days only from the date of this letter and we are instructed that, if the contract is not back with us within the said period of time, duly executed, the offer is deemed to be withdrawn".

It did not reach the Plaintiff's solicitors until the following Tuesday, the 17 January 1978 and was then forwarded by them to the Plaintiff who was working in Cork and it did not reach him until after the period of the seven day ultimatum had expired. Although he had sent word to the Vendors on the 25 January 1978 that he was willing to sign the contract the Vendors said that by failing to sign and return it within the seven days of the 13 January 1978 he had forfeited his right to buy the land.

The Plaintiff brought proceedings for specific performance of the contract and in the High Court, Hamilton J. granted an order for specific performance. The defendants appealed to the Supreme Court.

Held (per Henchy J.) that the letter of the 19 December 1977 from H.W. to M.L. constituted the necessary note or memorandum in writing required to comply with the Statute of Frauds. It contained not only all the essential terms of the contract but also a recognition that a contract had been made. Since the (High Court) Judge, having heard all evidence, held that the oral agreement recorded in that letter was a completed agreement in the sense that nothing further was left to be negotiated, the words "we have agreed terms subject to contract" must be taken to mean that a contract had been made subject to it being formalised in writing.

Held further that the delay in signing the contract was not the Plaintiff's fault. The Defendants allowed from 19 December 1977 to 13 January 1978 to pass before even sending out a contract. When the solicitors sent it out they coupled it with a requirement that it be signed and returned within seven days which in the circumstances was less than the period within which this requirement could even be communicated to the Purchaser. A Court exercising an equitable jurisdiction could not allow a vendor by such an unreasonable and unilateral act to escape its obligations.

Patrick Kelly v. Park Hall School Limited — Supreme Court (per Henchy J. with Kenny and Parke JJ.) — 7 December 1978 — unreported.

SALE OF LAND — SPECIFIC PERFORMANCE

Sale of Land — Specific Performance — Agreement Typed on Auctioneers' headed notepaper deemed to be "Note or Memorandum in Writing".

The third and fourth-named Defendants ("the owners") were in 1976 the proprietors of a house and 120 acres near Mallow, Co. Cork. They had given an equitable mortgage of the house and lands to the second-named Defendants ("the Northern Bank") and subsequently gave a legal mortgage (dated 14 November 1975) and a power of attorney (dated 11 February 1975) to the first-named Defendants ("Intercontinental") under which Intercontinental, who were at all times aware of the equitable mortgage held by the Northern Bank, could sell lands.

In 1975 the owners were being pressed by their creditors and decided to sell the lands by auction. The auction was conducted by O'Keeffe & O'Sullivan Limited ("the auctioneers") in November 1975 when the highest bid was £86,000, which the owners would not accept. The Plaintiff, who had attended the auction, was anxious to buy the lands and in January 1976 went to see the auctioneer who asked £150,000 for the lands but it was subsequently agreed on Friday, 30 January 1976 that the auctioneers would put an offer of £110,000 to the owners and get their authority to sign a contract. On Saturday, 31 January 1976, the auctioneers telephoned the Plaintiff and said "You are the owner of Park House. The farm is yours." It was arranged that the Plaintiff would come into the Auctioneers' Mallow office on the following Monday, 2 February 1976, to sign the contract and to pay the deposit. On Monday, 2 February 1976, the auctioneers decided to draw up a written contract and get it signed by the Plaintiff. It was dictated to a secretary who typed it on the auctioneers' headed notepaper and it read as follows:

> **O'Keeffe & O'Sullivan Limited, Auctioneers Valuers & Estate Agents**
>
> I, Patrick Casey, Gurrane House, Dunoughmore agree to purchase Park House and lands for £110,000.00 subject to contract and title. I agree to pay £25,250.00 as deposit.
> **(signed) Patrick Casey.**
>
> **Directors: A. B. O'Keeffe, J. L. O'Sullivan.**

The names of the two auctioneer directors on the heading were printed. The words "subject to contract and title" had not been used during the meeting on Friday, 30 January 1976 or the telephone conversation on Saturday, 31 January 1976. The Plaintiff signed this document and then gave the auctioneers a cheque for £2,250 but asked them not to present it for some time as he wanted to make arrangements for a loan to enable him to have funds so that the cheque would be paid when presented and that he could complete the purchase. The auctioneers then gave the keys of the property to the Plaintiff who retained them and produced them at the High Court hearing. The document signed by the Plaintiff was not signed by the auctioneers. Subsequently, the Plaintiff on his solicitor's advice went to the auctioneers who had the cheque and on the back of the cheque the auctioneers at the Plaintiff's request wrote the words: "Subject to title and contract; Deposit on Park House, Mallow, Co. Cork," and the Plaintiff and Mr. O'Sullivan of the auctioneers signed their names. The Plaintiff had not succeeded in getting a loan to meet the cheque for the deposit up the 20 February 1976 and the auctioneers had made enquiries as to whether the cheque would be paid when presented and had been informed that there were no funds to meet it and no arrangements made to deal with it. On the 20 February 1976 the auctioneers, who wanted the sale to go through, suggested that the amount of the deposit be reduced

to £11,000 and the Plaintiff accepted this offer whereupon the Plaintiff drew a cheque for £11,000 payable to the auctioneers and gave it to them and the auctioneers had the words: "Deposit on Park House, Mallow, subject to contract and title", typed on the back of it and the Plaintiff and Mr. O'Sullivan of the auctioneers signed their names underneath. The solicitors acting for the Northern Bank and Intercontinental never sent the contract to the Plaintiff's solicitor and when another prospective purchaser offered £190,000 for the property those defendants refused to complete. The High Court (per Costello J.) had held that a valid contract existed between the Plaintiff and the owners and had ordered specific performance of it. The Defendants appealed to the Supreme Court.

Held (per Kenny J.) that:

(1) the trial Judge was correct in his conclusion that the conversations on Friday, 30 January 1976, and on Saturday, 31 January 1976, constituted a contract by the Plaintiff to buy and by the owners to sell the property to the Plaintiff for £110,000. The words "subject to contract and title" were not introduced into the transaction until 2 February 1976 when an oral contract for the sale had already been made. The Court referred to the case of *Law v. Robert Roberts & Co.* [1964] I.R. 292, on this point.

(2) In principle, when the party to be charged has written or dictated a document on or on to paper which has his name printed on it he should be regarded as having adopted a printed name as his signature and so should be regarded as having signed the document. The Court referred to a passage in Wylie's *Irish Conveyancing Law* (1978 Ed.), at page 354, and to the English case of *Tourret v. Cripps* (1879) 48 L.J. Ch. 567, and the Irish case of *Dyas v. Stafford* (1882) 9 L.R. Ir. 520. The Court held that the document of 2 February 1976 was a sufficient note or memorandum signed by the party to be charged which complied with the Irish Statute of Frauds (7 William III, C. 12, S. 2).

With reference to the Northern Bank and Intercontinental and their confirmation of the contract between the Plaintiff and the owners, the banking Manager of Intercontinental learned in April 1976 that the Plaintiff was claiming that he had a contract to buy Park House and lands from the owners at £110,000 but that nothing was being done to complete the sale. Intercontinental were concerned about their security and the banking manager decided to find out if the Plaintiff was still ready to pay £110,000 and if he was he decided to sell the lands to him under the powers in their mortgage and power of attorney. Subsequent correspondence showed conclusively that the Manager of the Northern Bank was authorised by Intercontinental to offer the lands to the Plaintiff at £110,000 and when the Plaintiff called to the Northern Bank on the 18 May 1976 and told the Manager that he, the Plaintiff, still wanted to buy the lands at this price the the Manager of the Northern Bank dictated a letter addressed to the Manager of Intercontinental which read: "I hereby accept the offer to purchase the property known as Park House and lands at Mallow, Co. Cork containing 120 acres, 1 rood, 30.7 perches for a consideration of £110,000," and the Plaintiff then signed this letter and his signature was witnessed by the Manager of the Northern Bank who subsequently telephoned the banking Manager of Intercontinental and read him this letter of the 18 May. The banking Manager of Intercontinental ex pressed his approval of what the Manager of the Northern Bank nad done and of this letter. Intercontinental then instructed their own solicitors to prepare a contract for sale of the property and on 8 June 1976 those solicitors wrote to the Plaintiff's solicitor and the first two paragraphs of their letter read as follows:

> "We are instructed by our clients (Intercontinental) that they have accepted an offer of £110,000 from your client, Patrick Casey .... Our clients are selling as mortgagees pursuant to the powers on that behalf contained in an Indenture of Mortgage dated 14 November 1975 and a power of attorney dated 11 February 1975."

While Intercontinental's solicitors were treating the Plaintiff's letter of 18 May 1976 as an offer and not as an acceptance of an offer (as it was) it established the existence of a contractual relationship between the Plaintiff and Intercontinental. The contract was subsequently signed by the Plaintiff but was not completed by Intercontinental after they were informed of the subsequent offer of £190,000. Intercontinental felt that they were bound to sell at the best price available and that £110,000 had ceased to be that.

Held further (per Kenny J.) that:

(3) Intercontinental were in error in thinking this as on 18 May 1976 it was the best price and on that date they made an offer to the Plaintiff to sell at that price and he accepted it. A mortgagee who enters into a contract for a sale at a price which all the circumstances and valuations show, is, at the date of the contract, the best price available is not discharged if a higher price is offered after the contract is made.

(4) That the High Court Judge was correct in holding that a valid oral contract for the sale of lands at £110,000 was made in May 1976 between the Plaintiff and Intercontinental. The Order of the High Court which decreed specific performance of the contract between the Plaintiff and the owners and, while finding that a valid contract was made between the Plaintiff and Intercontinental, did not make an order for specific performance of it "at present", was the correct order to make, as there cannot be two orders for specific performance against two defendants.

Patrick Casey v. Irish Intercontinental Bank Limited, The Northern Bank Limited, Paul O'Connell and Conleth Dunne, Supreme Court (per Kenny J., with Henchy and Parke JJ.) – 13 February 1979 – unreported.

Summaries of judgments prepared by John F. Buckley, Mary Finlay, Colum Gavan Duffy, Peter Quinlan and edited by Michael V. O'Mahony.

RECENT IRISH CASES

COMPANY

Receivership — Dispute as to priorities between encumbrancers — Order extending time for delivery of particulars of mortgage or charge by a company for registration — Companies Act, 1963, Section 106 — Meaning of expression "without prejudice to the rights of parties acquired prior to the actual time of such registration" in common form of Order.

This was an application made to the High Court under Section 316 of the Companies Act, 1963 ("the Act") by a receiver to determine an issue as to priorities between two encumbrancers which arose in the course of a receivership of a Company.

The Company, Clarets Limited ("the Company"), carried on a hotel and restaurant business in premises at Kenilworth Square, Dublin. The premises had been purchased by the Company from the first named Defendant, Thomas G. McGann ("McGann"), leaving a substantial part of the purchase money unpaid. On 28 February 1975 the Company executed a mortgage in favour of McGann over the premises at Kenilworth Square to secure the unpaid balance purchase money.

Particulars of the mortgage were not delivered to the Registrar of Companies for registration within 21 days of the creation of the mortgage as required by Section 99 of the Act. On an application by McGann to the High Court on 29 July 1977 an Order was made under Section 106 of the Act extending the time for registering the mortgage and particulars, in the prescribed form, were duly registered in the Companies Office on 23 August 1977. However, in the period between the execution by the Company of the mortgage to McGann and McGann's registering such mortgage under Section 99 of the Act the Company had on 17 January 1977 executed a mortgage debenture in favour of Stanchart Bank (Ireland) Limited ("the Bank") to secure accommodation granted by the Bank to the Company. Particulars of the mortgage debenture were duly delivered under Section 99 of the Act. The mortgage debenture contained a special clause providing that the Bank's security was subject to the rights of the prior mortgagee, McGann.

In the course of the receivership of the Company the premises at Kenilworth Square were sold by the receiver. The Bank now contended that its claim against the proceeds of sale took priority to McGann's claim. The Bank's contention was based on the form of the Order made by the High Court on 29 July 1977 under Section 106 of the Act extending the time for registering McGann's mortgage which included the following statement:

> ". . . but this Order to be without prejudice to the rights of parties acquired prior to the actual time of such registration . . ."

The High Court (per Costello J.) explained that this was the common form of the Order in use since the beginning of the century (i.e. under the earlier Companies Acts), and referred to *Re Joplin Brewery Company Limited* [1902] 1 Ch. 79. In the present case it had been expressly agreed between the Company and the Bank that the Bank's mortgage debenture was subject to McGann's first mortgage. Thus, the Bank's rights were at all times subject to those of the prior encumbrancer. Therefore the right to appoint a receiver, and enforce their security by sale of the Company's premises were made subject to McGann's rights under his mortgage. The effect of the Court's Order of 29 July 1977 under Section 106 of the Act was that McGann's security became a valid one when registration (under Section 99 of the Act) was actually effected "without prejudice to the Bank's rights under their mortgage debenture". The Court was then required to consider what *rights* the Bank had acquired prior to the actual registration of particulars of McGann's mortgage.

Held (per Costello J.) that the Bank's rights were limited or qualified ones in that they were subject at all times to those of McGann under his mortgage. The Bank were bound by the words of their agreement and could not obtain a priority which they had expressly agreed they would not have. Therefore the mortgage debenture of 17 January 1977 created by the Company in favour of the Bank did not rank in priority to the mortgage of 28 February 1975 given by the Company to McGann and that the security which McGann obtained under his mortgage ranked in priority to that of the Bank.

The decision of the Court of Appeal in *Re Monolithic Building Company* [1915] 1 Ch. 643 referred to by Kenny J. in *Interview Limited* [1975] I.R. 382 at 396 was distinguished.

In the matter of Clarets Limited (in Receivership) and the Companies Act, 1963, Alex J. Spain (Receiver) v. Thomas G. McGann and Stanchart Bank (Ireland) Limited. — High Court (Costello J.) — unreported — 22 November 1978.

EQUITY

Sale by a Cestui Que Trust to a trustee of a remainder interest — The duties of a trustee in such a case.

The Plaintiff was a beneficiary under his uncle's Will of two properties in Finglas, Dublin, one a dwellinghouse to which he became absolutely entitled and the other an 11 acre field in which field the deceased gave a life interest to his brother (the Defendant) with the remainder interest to the Plaintiff. It is about the sale of this remainder interest that this case is concerned.

In 1968, the Plaintiff, via an intermediary, offered (without success) to sell his remainder interest in the property to the Defendant. The Plaintiff then directly re-offered to sell his interest to the Defendant and the Defendant agreed to purchase the interest for £1,500. A contract was prepared by the one solicitor and executed by both parties in August 1968. The transaction itself was not completed until August 1973. The Plaintiff sought to have the sale set aside, firstly relying upon the equitable doctrine of undue influence and secondly, on the ground that the Defendant, being not only a life tenant of the field but also one of the trustees of the Will, had enfringed the equitable principles which applied to transactions between a cestui que trust and a trustee and that the bargain was an unconscionable one and was vitiated by the equitable rules relating to such bargains.

The Plaintiff's medical history and financial circumstances were examined. The Plaintiff's doctor gave evidence that he was satisfied that the Plaintiff was suffering from

alcoholism in 1972 and in early 1974 was diagnosed as an alcoholic, although the doctor was of the opinion that the Plaintiff had been suffering from this complaint for some two or three years and, furthermore, that he was suffering from anxiety depression. There was, however, no evidence that these conditions existed at the time the contract was signed in August, 1968. Also, notwithstanding that the Plaintiff had a steady job and an income from the yard attached to the dwellinghouse where he resided in addition to some £2,000 from the deceased's Estate, it was clear that he was in need of money. However, it was equally clear that the Plaintiff in no way suggested to the Defendant that he was in urgent need of money nor that the Defendant sought to take advantage of the seller's infirmity or his straitened financial circumstances.

The Court, in considering the question that the transaction between the Plaintiff and the Defendant was a sale by a cestui que trust to a trustee, referred to the following statement from Lewin on Trusts (16th ed. pp. 697/698):

> "While a purchase by a trustee conducting the sale, either personally or by his agent, cannot stand, a purchase by a trustee from a cestui que trust of the interest of the latter in the trust may stand, if the trustee can show that the fullest information and every advantage were given to the cestui que trust. However, a purchase by a trustee from a cestui que trust is at all times a transaction of great nicety, and one which the Courts will watch with the utmost jealousy and will set aside if the consideration was insufficient".

It is thus clear that the onus of proving the bona fides of the transaction was on the Defendant and one had to ascertain whether any unfair advantage was taken by the Defendant in his dealings with the Plaintiff. The Court found that the Defendant had paid what he considered was a fair price for the land, and the price was in fact a fair one. The Defendant had no knowledge about its value of which the Plaintiff was also ignorant, and the Defendant made no effort either to take advantage of his special position as trustee or to influence the Plaintiff's decision to sell. As to whether the Defendant owed a duty to the Plaintiff to ensure that he obtained professional advice of some sort, it was clear that when this bargain was struck, albeit in a casual and informal way, the parties envisaged that a formal contract would be required. The Defendant was, therefore, aware that the Plaintiff would have available to him the advice of a solicitor before such a formal contract was executed. Thus, the Plaintiff did have available to him the benefit of a solicitor's advice before he signed the contract. It is clear that the Defendant gave no thought to whether that legal advice was independent (i.e. from a separate solicitor), but the Court found that the solicitor in question was an experienced one and had he considered that separate advice was necessary he would have so advised the parties. The solicitor in question did not so advise and in view of the fact that he had been aware of the value of this land as sworn for probate purposes (i.e. £2,400) he did not consider the transaction an improvident one from the Plaintiff's point of view.

Held (per Costello J.) that even though the deed of transfer was not executed until August 1973 by which time the land had increased in value, this did not affect the Defendant's duty to the Plaintiff. A valid contract had been entered into in August 1968 and the Plaintiff was legally bound by it and the delay in completion did not impose any new obligations on the Defendant.

Held further that the transaction was not vitiated by undue influence. The Defendant did not attempt to influence the Plaintiff's decision and the Plaintiff had freely and with an independent will entered into the bargain with the Defendant.

Held finally, having considered the equitable principles relating to unconscionable bargains and that equity comes to the rescue whenever parties to a Contract have not met on equal terms, that the Plaintiff was not suffering from any physical or mental infirmity when the contract was entered into in 1968 and that even though by the time the transfer was executed in 1973 the Plaintiff's health had deteriorated, if the contract he had entered into was a legally valid one then this subsequent deterioration of his health would not invalidate it or entitle him to set aside a deed of transfer which it was his legal obligation to execute. In view of this and in view of the fact that the sale was not at an under-value the various attacks mounted on this transaction failed.

Frederick W. Smyth v. Thomas Smyth – High Court (Costello J.) – unreported – 22 November 1978.

PLANNING AND DEVELOPMENT

Validity of Grounds for Refusal of Permission — Premises subject to Compulsory Purchase Order under Housing Act, 1966.

On the 27 June 1978 and by a renewed application on 14 August 1978 the prosecutor (Patrick Sweeney) applied to Limerick County Council for planning permission to erect 13 dwellinghouses on a plot of land at Glin. By a decision, notification of which was issued on 22 September 1978, the County Council refused the permission for the following reasons:

> "The site formed part or all of an area in respect of which a compulsory purchase order has been made by the Limerick County Council. This proposal for development is therefore premature pending the determination of this order by the Minister for the Environment."

Limerick C.C. had purported to acquire the lands for the purposes of the Housing Act, 1966, and the prosecutor having objected to the making of the C.P.O. the Minister for the Environment had on 16 August 1978 ordered a public enquiry to be held concerning the making of the order. The prosecutor's submission was that the Planning Authority in considering an application for permission for development was confined to considerations concerning the proper planning and development of the area and that the mere making of a C.P.O. was a change of ownership only and that, without further details, the purpose for which it was intended to use the lands if the C.P.O. was confirmed did not indicate any question concerning the proper planning and development of the area. The prosecutor also relied on the fact that the terms of the refusal did not indicate that the C.P.O. was for the purpose of the Housing Acts and did not set out which of the many purposes of the

Housing Acts it was intended to use the lands for, if they were finally acquired.

Held (per Finlay P.) that the purpose of the obligation on the Planning Authority is to set out in their notification of a refusal the reasons for the decision was firstly to give the information that may be necessary and appropriate for the applicant to consider whether he has a reasonable chance of succeeding in appealing against the decision and, secondly, to enable the applicant to arm himself for the hearing of such appeal. The reasons need not be set out with the precision of a Court order nor need they necessarily contain any words of a technical nature nor refer in any formal way to any of the provisions of the Housing Acts. It was clear that the prosecutor had at no time been in doubt as to what C.P.O. was referred to in the notice of refusal. If land is acquired for any one or more of the purposes set out in Section 55(3) of the Housing Act, 1966, then quite clearly the carrying into effect of that purpose either immediately or in the future affects in general terms the planning and development of an area and it followed from this that the compulsory acquisition of land by a Housing Authority pursuant to the Housing Act, 1966, was not a mere change of ownership. Application for absolute Order of Certiorari refused.
The State (Patrick Sweeney) v. The Minister for the Environment and Limerick County Council – High Court (Finlay P.) – unreported – 12 February 1979.

SALE OF LAND

Action for Specific Performance — Discharge of Lis Pendens.

The Defendant applied to have vacated a lis pendens registered by the Plaintiffs against lands the subject matter of an action by them for specific performance of an alleged contract, for the sale of lands. The Defendant also sought to have the Plaintiffs' proceedings struck out.

The Defendant had put up lands for auction on the 18 July 1978 and the Plaintiffs gave a cheque for £95,000 by way of deposit but it was dishonoured and returned to the Defendant's solicitors by letter from their bank dated the 25 July 1978. The contract for sale contained the following provision:-

"3" The failure by the purchaser to pay in full the deposit hereinbefore specified as payable by him shall constitute a breach of condition entitling the vendor to terminate the contract or to sue the purchaser for damages or both."

On the 27 July 1978 the Plaintiffs' solicitor was notified, both by telephone and letter delivered that day, that if the deposit was not paid by 5 p.m. on that day the Defendant would terminate the contract. The Plaintiffs' solicitor did not communicate with the Defendant's solicitors either on the 27 or 28 July 1978 and the Defendant's solicitors by letter of the 28 July 1978 terminated the contract under the provisions of condition 3, (quoted above).

The Plaintiffs' solicitor alleged that on the 31 July 1978 the Defendant's auctioneers agreed to waive the necessity for payment of the deposit until the 4 August 1978. This was disputed on behalf of the Defendants. On the 4 August 1978 the Plaintiffs' solicitor telephoned the auctioneers and advised them that the deposit was available. At a meeting held that day between the Plaintiffs' solicitor and the Defendant's solicitors a dispute arose as to the interest to accrue on the deposit and the Defendant's solicitors refused to accept the deposit or renew the agreement for sale. The Plaintiffs' solicitor tendered the deposit to the auctioneers who also refused to accept it.

A plenary summons was issued on behalf of the Plaintiffs and a lis pendens registered against the property. On the 10 August 1978 the Defendants entered into a contract for the sale of the property to another purchaser for £946,000.

It was argued on behalf of the Plaintiffs that there was no jurisdiction to discharge a lis pendens without the consent of the Plaintiffs as it was argued that the Lis Pendens Act 1867 did not apply to Ireland and that in any event that Act only applied where an action was not being bona fide prosecuted and it was sought to make a distinction between not prosecuting an action bona fide or with diligence after it had been commenced and the bona fides of its institution.

Held (McWilliams J.): having referred to *McDonnell v. McDonnell* 42 I.L.T.R. 212 and *Giles v. Brady* [1974] I.R. 402 and to an Order of the Supreme Court dated 28 July 1975 in a case of *Glencourt Investments Limited* (where the Supreme Court directed a lis pendens to be vacated apparently while an appeal to that Court was still pending) and having decided that the Lis Pendens Act 1867 (Section 2) and the Judgments Registry (Ireland) Act 1871 (Section 21) were applicable, that the High Court had jurisdiction to vacate a lis pendens without the consent of the person by whom it was registered. The Court further held that there was no distinction between commencing and continuing an action bona fide and was satisfied that the expression "bona fide prosecute" covered both the institution and the continuation of proceedings. It was ordered that the lis pendens be vacated.
Patrick M. Culhane & Veronica B. Culhane v. David P. L. Hewson — The High Court (McWilliam J.) – unreported – 20 October 1978.

WILL — ANIMUS TESTANDI

Undue influence – whether a Will should be condemned on the grounds that it had been obtained by undue influence — burden of proof. Knowledge and approval — whether it was established that the deceased knew and approved of the contents of a Will – burden of proof. Suspicious circumstances.

The deceased, Patrick Kavanagh, died on 14 December, 1972, aged 75 years. A bachelor, he lived with his cousin, the Plaintiff, Annie Healy, up to the time of his death. He had carried on a successful dairy business in County Dublin until 1969 when he retired. He had been able to save quite a considerable sum of money and, in addition, he owned investment property in Walkinstown and 12 acres of valuable land in Tallaght. The Plaintiff had come to live with the deceased and his sister from the age of 23, many years before his death. She helped in the dairy business and acted as housekeeper for the deceased until he died. She was never paid any wages. A strong bond of affection existed between the Plaintiff and the deceased.

The second Defendant, Laurence Lyons, a cattle dealer, first got to know the deceased well after selling him a house in the early 1960's. He was a much younger man than the deceased.

The deceased made a Will on 22 September, 1965, in which he

appointed the Plaintiff his executrix and made her universal legatee. The deceased made a later Will on 23 February, 1971, in which he appointed the first Defendant, Con MacGillicuddy, as his executor, but the first Defendant subsequently renounced his executorship and was dismissed from the action. In this later Will the deceased bequeathed the 12 acres in Tallaght to the second Defendant subject to a life interest in the Plaintiff. He gave bequests of £2,000 to each of the Plaintiff's two brothers and left the residue of the estate to the Plaintiff. According to the Plaintiff that bequest was of no value as virtually the deceased's only asset was his valuable 12 acre farm.

The Plaintiff claimed that the second Defendant exercised undue influence over the deceased in relation to the later 1971 Will. According to her the influence which he exercised over the deceased was far from benign; he led the deceased into habits of excessive drinking; he bullied the deceased and borrowed considerable sums of money from him which he did not repay and he led the deceased into other improvident transactions. The Plaintiff also claimed that the deceased did not know and approve of the contents of the 1971 Will. The Plaintiff claimed an Order that the 1971 Will be condemned and a further Order that the 1965 Will be admitted to Probate in solemn form. By agreement no evidence was heard relating to the 1965 Will and so this judgment only related to the later one.

At the commencement of the hearing it was accepted that there was an onus on the second Defendant to establish that the 1971 Will was made in accordance with the provisions of the Succession Act 1965. At the conclusion of the second Defendant's evidence the Plaintiff claimed that suspicious circumstances in the preparation of the Will had been established in the course of the cross-examination, that they were such as to have cast on the Defendant the burden of establishing that the Will had been properly made and that this burden had not been discharged. The Plaintiff at this stage asked for a declaration against the 1971 Will but this was refused. Reference was made to *In the Goods of Corboy* [1969] I.R. 148.

Having heard all the evidence the Court (Costello J.) gave its conclusions on it as follows:

(a) The deceased was in failing health from about the year 1970. On 23 February, 1971, the second Defendant brought the deceased to his solicitor (to whom the deceased had been introduced by him early in 1971) for the specific purpose of making a Will in his favour. The solicitor wrote out a Will for the deceased and it was executed and signed by the deceased and witnessed in accordance with the provisions of the Succession Act. It was not accepted that the solicitor did not have the Will typed up merely because the deceased asked him not to do so. When he made this Will the deceased was physically feeble and his memory was not good.

In these circumstances the solicitor had a duty to caution his client and not to permit him to take precipitous action in relation to the important transaction he was entering into. He did not carry out this duty not because of the deceased's wishes but in deference to the wishes of the second Defendant.

(b) The second Defendant gradually over the years acquired domination over the Will of the deceased. He acquired this partly by virtue of force of character, partly by his domineering manner towards the deceased and partly by ingratiating himself as a drinking companion and by making the deceased dependant on him for drink and entertainment. This domination was facilitated by the declining health of the deceased. As a result of it the second Defendant was able to extract considerable sums of money from the deceased from the year 1968 onwards, money which the deceased gave to the second Defendant against his better judgment.

(c) The deceased had genuine affection for the Plaintiff. He was also conscious of the moral duty which he had for her welfare after his death arising from the services she had given him throughout his life. He failed adequately to express his affection and fulfil the duty towards her in his Will and instead he made the second Defendant the principal object of his bounty. The deceased had no strong sentiments of friendship for the second Defendant and the 1971 Will was not executed in his favour because of such sentiments. The deceased hardly knew the Plaintiff's two brothers and had no reason to make bequests in their favour. The second Defendant procured the making of the Will in his favour. In doing so, he exercised more than mere persuasion. The deceased was not a free agent when he executed the Will on 23 February, 1971. His Will was overborne by the second Defendant on that occasion, just as it has been on previous and subsequent occasions in relation to benefits conferred by the deceased on the second Defendant.

Held (per Costello J.) that:

(1) No presumption of undue influence arises in the case of Wills and the burden of proving undue influence always rests on the person alleging it. It was not sufficient to establish that a person had power unduly to overbear the Will of the testator; it must be shown that the power was exercised in fact and that it was by means of it that the Will which is being impugned was obtained. In the circumstances of this case this burden was discharged and the purported Will of 23 February, 1971, should be condemned on the grounds that it had been obtained by undue influence.

(2) When a person has been instrumental in having a Will prepared and takes a benefit under it an onus may be placed on such a person to establish that the testator knew and approved of its contents. [At the conclusion of the evidence adduced on the second Defendant's behalf in support of the Will of 23 February, 1971, Costello J. was unable to apply the principles laid down by the Supreme Court in *Corboy's Case* because at that time he was not satisfied on the evidence that the second Defendant had in fact been instrumental in framing the Will. Having heard all the evidence he was so satisfied.] In this case the second Defendant did not discharge the burden of proof on him, which was a heavy one, that the deceased when he signed the Will, knew and approved of its contents.

Accordingly, probate of the Will of 23 February, 1971, was refused.

In the goods of Patrick Kavanagh Deceased; Annie Healy v. Con MacGillicuddy and Laurence Lyons

High Court (Costello J.) – Unreported – 24 October, 1978.

Summaries of judgments prepared by John F. Buckley, Hugh M. Fitzpatrick, Deirdre Morris, E. Rory O'Connor and edited by Michael V. O'Mahony.

RECENT IRISH CASES

LANDLORD AND TENANT

Breach of covenant sufficient to sustain grant of interlocutory injunction at suit of lessor.

The Plaintiff lessor demised the Units within a Shopping Centre owned by it on foot of leases (generally in standard format) prohibiting — (save with the written consent of the lessor) — (a) assignment or subletting, or, (b) use by the lessees other than for the limited purposes specified in each instance. It was in order to obtain the best Returns from their lettings that the Plaintiff endeavoured to ensure that there was a good "tenant-mix" and it controlled the number of shops of each variety. The user provided on the demise of the premises, the subject matter of these proceedings ("the subject premises"), was that of "a General Hardware Store". The lessee's interest under the lease of the subject premises had been assigned to the first Defendant (Shalaine Modes) who carried on therein the business of a Boutique without objection by the Plaintiff or anyone else. The Plaintiff had expressly consented to such assignment, but not to the change of user.

The second Defendant (Crinion) occupied two other Units in the Centre, one of which was utilised for the retailing of toys, which business — recognised as being seasonal (Christmas time) to a substantial degree — was also carried on in a further Unit within the Centre by another party ("the second toy retailer"). The second Defendant and the second toy retailer had, in previous years, taken temporary sublettings of Units (including the Units of the first Defendant) without the Plaintiff's consent, and, likewise without consent, had used the same for the display or sale of toys. No objection seems to have been taken to these courses either by the Plaintiff or any other tenant in the Centre. In November 1978 the Second Defendant, without applying for or obtaining any consent in writing, had taken a temporary subletting from the first Defendant of the subject premises, and had commenced carrying on therein the business of selling toys in a manner which had caused the second toy retailer and another lessee of the Plaintiff to object to the Plaintiff. The proceedings had been instituted by the Plaintiff to restrain the breaches of covenants by the two Defendants.

Held (per McWilliam J.) that prima facie there had been a clear breach of the user Covenant in the lease of the subject premises and that the Plaintiff was entitled to rely on the covenant in the Lease and was entitled to an interlocutory injunction to prevent the two Defendants breaching such Covenant.

The Court did not accept as being meritorious the following contentions offered by way of defence viz. (i) that the Plaintiff's acquiescence to previous sublettings had lulled the Defendants into a false sense of security; (ii) that the Plaintiff on becoming aware of the breaches did not move with sufficient alacrity; (iii) that consent had been given verbally or impliedly by the Manager of the Centre; (iv) that the proceedings had been inspired by a profit motive and were therefore discreditable. *Shaw v. Applegate* [1978] 1 All E.R. 123 considered, but not applied, because underlying circumstances deemed to be different in that there the acquiescence of the landlord in a tenant's breach of a user Covenant had been of some years' duration.

Green Property Company Limited v. Shalaine Modes Limited and Thomas Crinion – High Court (per McWilliam J.) — 30 November 1978 — unreported.

LANDLORD AND TENANT

Landlord & Tenant Act 1931 — Continuity of Tenancy — Contracting Out.

The Respondents (Continental Oil Company) leased garage premises and equipment to Mr. L. G. C. ("the tenant") for three years from the 6 February 1970 by lease of 15 October 1970. The tenant covenanted to yield up the premises at the end of the lease. Under the provisions of Sections 19 and 20 of the Landlord & Tenant Act 1931 the tenant would not have been entitled to a new tenancy when the three year term would expire on the 6 February 1973 because the term would have "terminated" within the meaning of Section 19 three months before the 6 February 1973. During negotiations between the tenant and the Respondents, the Respondents stated that they would give a new lease for three years from the 12 February 1973 but that the tenant would have to vacate the premises from the 6 February to the 12 February 1973. Further negotiations took place to see if a method could be found by which the tenant would not acquire a right to a new tenancy but would not have to vacate the premises for that period because the tenant feared that such vacating would damage the goodwill of the business which he had built up. It was finally agreed that the tenant would be allowed to remain in the premises as a caretaker only and that a three year tenancy would commence on the 12 February 1973. The tenant signed the following written acknowledgement, which was dated the 6 February 1973 and was signed by the tenant on the 5 February 1973:

> "I, L.G.C. — do hereby acknowledge that I have been this day put into the possession of all that the premises, and equipment attached thereto, Gatien Service Station, Whitechurch Road, Rathfarnham, Co. Dublin, as caretaker by and for Continental Oil Company of Ireland (Conoco) — and that now I am in possession of said premises and equipment solely as such caretaker of and for Conoco and not under any contract of tenancy. And I hereby further acknowledge that I have undertaken and agree and I do now hereby undertake and agree with Conoco to take care of the said premises and equipment for him (sic) and to preserve same from trespass and injury and to deliver up the possession thereof to Conoco its successors, his heirs or assigns, when required so to do".

Before signing this acknowledgement the tenant knew that he would not be given a new tenancy unless he did so sign, and that the one week interval and the acknowledgement were required to prevent him acquiring rights to a new tenancy and that he was fully advised by his solicitor before signing the acknowledgement.

A new lease for three years from the 12 February 1973 was executed on the 24 July 1973 and was taken in the name of the Applicants (Gatien

Motor Company Limited) (a company formed by the tenant). The terms of the new lease were substantially similar to those of the lease of the 15 October 1970. On the 10 July 1975 the Applicants served a notice of their intention to claim relief under the 1931 Act and on the 29 March 1976 they served notice of their intention to apply to the Circuit Court for a new tenancy. In their notice they stated that their lease "terminated" (within the meaning of Section 19 of the 1931 Act) on the 12 November 1975. The Applicants succeeded in the Circuit Court and the Respondents appealed to the High Court. The Applicants argued that the tenant had exclusive possession of the premises from the 6 February to the 12 February 1973 and that he was a tenant during that week and so had been using the premises for more than three years before the 12 November 1975 next. If that first proposition was wrong the Applicants submitted that the Caretaker's Agreement i.e. the written acknowledgement dated the 6 February 1973 was made void by Section 42 of the 1931 Act.

The High Court stated a case for the decision of the Supreme Court on the following questions:

"(1) Did the said Caretaker's Agreement create a tenancy?

(2) If the said Caretaker's Agreement did not create a tenancy, is the same null and void under the provisions of S.42 of the Landlord and Tenant Act 1931 upon the ground that it indirectly deprives the applicant of its right to relief sought in these Proceedings?"

The Applicants argued that a person in exclusive possession of land must be regarded as holding it as a tenant and that the reality of the arrangement was the creation of a tenancy from the 6 February to the 12 February 1973.

The Court found that a person may be in exclusive possession of land but not be a tenant and referred to the cases of *Addiscombe Garden Estates Ltd. v. Crabbe* [1952] I K.B. 902 and *Shell Mex & B.P. Limited v. Manchester Garages Ltd.* [1971] 1 All E.R. 841. The Court did not agree that the law in the Republic of Ireland in this respect was different from that in England and referred to *Davies v. Hilliard* (1967) 101 I.L.T.R. 50, where the Supreme Court held that a person who went into occupation under a Caretaker's Agreement when terms for a proposed tenancy were being negotiated and who had paid rent and was in exclusive possession did not hold the property as a tenant but as a caretaker.

Held (per Kenny J.) on the two questions as follows:

(1) No. That the tenant was not a tenant from the 6 February to the 12 February 1973 and that the Caretaker's Agreement did not create a tenancy.

(2) No. That a tenant must have an existing right before a tenant can rely on Section 42 of the 1931 Act. The said Section 42 provides that:

> "A contract, whether made before or after the passing of this Act, by virtue of which a tenant would be directly or indirectly deprived of his right to obtain relief under this Act or any particular such relief shall be void."

The foundation of the Section is that there is an existing right to relief under the 1931 Act which the tenant has. The Applicants did not use the premises for the whole of the three years next before the 12 November 1975 and could not invoke the three years for which the tenant was in occupation because neither the Applicants nor the tenant were in occupation as tenant between the 6 February and the 12 February 1973. Even if the Caretaker's Agreement was made void by Section 42 (which the Court did not accept) the Applicants were not entitled because they had not been in possession for the necessary three year period within the meaning of Section 19 of the 1931 Act as at the 6 February 1973.

Gatien Motor Company Limited v. Continental Oil Company of Ireland Limited – Supreme Court (per Kenny J. with Griffin and Parke JJ.) – 6 April, 1979 – unreported.

MALICIOUS INJURY

Jurisdiction of Circuit Court to Award Compensation for Malicious Damage to Property where it occurs outside a "County".

The Applicant was the owner of two boats which were anchored to permanent moorings in the sea, when, as was found by the Circuit Judge, on the night of the 23 October 1972 they were maliciously set fire to and destroyed, the Applicant thereby suffering £10,000 damages. The moorings were in an inlet of the sea known as Inch Channel, which is part of the bay known as Lough Swilly, on the coast of County Donegal. The boats were floating over their moorings and the moorings were located in tidal waters below the low-tide water mark. The channel at the point in question is about one thousand feet wide, between Fahan Pier on one side and the low-water mark on the other, and the boats were moored approximately half-way i.e. about five hundred feet out from the nearest low-water mark. The land on both sides of the channel forms part of County Donegal and the nearest point on the boundary between the Counties of Donegal and Derry is over one mile distant. It was common case at the start of the legal argument that the Applicant would have to show that the damage took place within the County of Donegal in order to succeed. This was an incorrect premise on which to proceed for the reasons that appear later.

The Circuit Court stated a case for the decision of the Supreme Court on the following questions:

(1) Was the malicious act committed within the County of Donegal?

(2) Is the Applicant entitled to compensation?

In the course of his judgment Henchy J. stated that the boundaries of a County derived from and were given validity by the ordnance maps prepared pursuant to the powers conferred by the Survey (Ireland) Acts 1825 to 1870, and having examined the various statutes and having considered the provisions of the Survey (Ireland) Acts 1854 and 1857, he formed the view that land which was washed over by the tides and not reclaimed from the sea was not eligible for inclusion within the boundary of a County. The line of high tide would therefore be the County boundary on the sea coast. This was the difficulty that arose in the case of *Smyth and Fordham v. Dun Laoghaire Corporation and Dublin County Council* [1960] Ir. Jur. Rep 45 but in that case the provisions of Section 685 of the Merchant Shipping Act 1894 were not relied on but were relied on in this case.

In the course of his judgment,

O'Higgins C. J. traced the history of the Malicious Injury Code back to the Grand Jury (Ireland) Act 1836 which provided for the decision of contested applications for compensation by a judge sitting with a jury at the Assizes. This jurisdiction was transferred to the County Court by the Local Government (Ireland) Act 1898. The Malicious Injuries (Ireland) Act 1853 extended the code to all damage caused by persons engaged in unlawful assembly. There was a further extension by Section 515 of the Merchant Shipping Act 1894 to cases involving damage to vessels while afloat as a result of an unlawful assembly. The significance of Section 515 of the 1894 Act was that it provided for the recovery of compensation in respect of damage actually caused outside the County or District, by means of machinery, hitherto only used in respect of damage caused inside the County or District.

O'Higgines C. J. then referred to Section 685 of the 1894 Act which provided as follows:

"(1) Where any district within which any Court, Justice of the Peace, or other Magistrate, has jurisdiction either under this Act or under any other Act or at Common Law for any purpose whatever is situate on the coast of any sea, or abutting on or projecting into any bay, channel, lake, river, or other navigable water, every such Court, Justice or Magistrate, shall have jurisdiction over any vessel being on, or lying or passing off, that coast, or being in or near that bay, channel, lake, river, or navigable water, and over all persons on board that vessel or for the time being belonging thereto, in the same manner as if the vessel or persons were within the limits of the original jurisdiction of the Court, Justice or Magistrate.

(2) The jurisdiction under this Section shall be in addition to and not in derogation of any jurisdiction or power of a Court under the Summary Jurisdiction Acts."

O'Higgins C. J. found that Section 685 of the 1894 Act, which dealt with Courts having jurisdiction in districts situate on the coast of the sea or navigable waters, extended the jurisdiction of such Courts over any vessel lying or passing off such coasts as if such vessel were within the limits of the original jurisdiction of the Court. This meant in relation to a County that it extended such jurisdiction over the vessel as if it were lying or placed inside the County and not outside it.

Held (O'Higgins C.J. and Henchy J.) that the first question in the Case Stated should be answered in the negative but that the second question should be answered in the affirmative.

William Browne v. Donegal County Council – Supreme Court (per O'Higgins C. J. and Henchy J. with concurring judgments from Griffin, Parke and Kenny JJ.) — 9 February 1979 — unreported.

MISREPRESENTATION

Substantial mis-statement by Defendant Company of wages paid annually declared "fraudulent" misrepresentation — recovery of monies paid into Court by Underwriters on foot of void Policy, not decided.

The Plaintiffs were members of Underwriters at Lloyds and brought the Proceedings as nominees of such Underwriters. The first Defendant was an infant who instituted proceedings against the second Defendant for injuries sustained at work. The Plaintiffs took over conduct of the proceedings on behalf of their insured (the second Defendant) on foot of their employer's liability policy and authorised a lodgment of £39,050 with a denial of liability. Prior to acceptance by or on behalf of the first Defendant of the monies lodged in Court the Plaintiffs ascertained that there had been substantial mis-statements by their insured (second Defendant) in respect of the amount of wages paid and as this information was the basis for the calculation of the premium, the Plaintiffs informed the second Defendant that the policy was void and they were accepting no responsibility for claims on foot of such policy. The Plaintiffs then instituted these proceedings against the first Defendant for an Order to have the money in Court in the action between the two Defendants paid out to the Plaintiffs and for declarations against the second Defendant that the policy was null and void and that the misrepresentation was fraudulent.

Held: (per McWilliam J.) that:

(1) The contract of insurance was null and void;

(2) In absence of evidence on behalf of the second Defendant to prove the mis-statements were innocent the misrepresentation was fraudulent;

(3) An order could not be made in this action directing money lodged in Court in another action to be paid out but it would appear contrary to natural justice that the Plaintiffs could not apply to have ownership determined in the action in which the money was lodged in Court by mistake or fraud.

Duncan Stevenson McMillan and John Jervois v. Patrick Carey and W. H. Ryan Limited — High Court (per McWilliam J.) 18 December 1978 — unreported.

PRIVATE INTERNATIONAL LAW

Proper Forum to Decide Custody of Children

This case arose from the removal in March 1979 of three infant children from the custody of their mother (the Plaintiff) in Alberta, Canada, by their father (the Defendant) who brought them to Ireland.

The Plaintiff and Defendant were married in Calgary, Alberta, in April 1965, the Plaintiff being a native of Alberta and the Defendant being a native of Derry. There were three children of the marriage, born in May 1966, May 1968 and April 1970 respectively. The Defendant was a university lecturer and the Plaintiff was employed in data processing. During the course of the marriage the Plaintiff and the Defendant lived at first in Calgary, and later in New Mexico, USA, then in Durham, England, and then again in New Mexico.

Matrimonial difficulties arose and by the year 1974 the marriage appeared to have broken down. The Plaintiff left the matrimonial home in New Mexico, taking the three children with her, and returned to Alberta. She resided continuously in Calgary with the three children from that time up to the present. The Defendant continued to live in New Mexico and visited the children from time to time but they did not leave the jurisdiction

of Alberta and the Defendant at no time sought custody of them. He did, however, maintain contact with them by letter, took an interest in their education, and knew what schools they attended. The Plaintiff did not oppose this continuing relationship.

In March 1974, virtually immediately after leaving the matrimonial home, the Plaintiff applied to the Supreme Court of Alberta for a decree of judicial separation and an order granting her custody of the three children. On the 12 March 1974 she was granted an interim custody order. On the 2 December 1974 she was granted a decree of judicial separation and an order granting her custody of the three children. The Plaintiff stated that all these orders had been served on the Defendant, but the Defendant maintained throughout the proceedings that he had never been served with them.

In 1977 the Defendant applied to the New Mexican courts for a divorce. The Plaintiff, on the advice of her Canadian lawyers, did not contest the divorce, and the New Mexican court granted the Final Decree of Dissolution on the 30 March 1977. In this decree the New Mexican court granted joint custody of the three children to both parents, but ordered that the principal place of residence of the children should be with the mother. [It might well be questioned whether under the normal Private International Law rules the New Mexican court had at that date jurisdiction to deal with the custody of the children, but this question did not arise in the Irish proceedings.]

On the 1 December 1978 in a civil ceremony in New Mexico, the Defendant married his second wife who was also of Irish origin, and they continued to reside in New Mexico.

On the 16 March the Defendant intercepted the three children as they went to their different schools in Calgary and drove them across the border into the United States. He brought them to New Mexico where they remained with the Defendant and his second wife for approximately two weeks.

On the 29 March 1979 the Defendant and his second wife brought the three children to Ireland, where they took up residence with the Defendant's mother in Dublin. The Plaintiff attempted to contact the children by telephone from Canada but the Defendant refused her both custody of the children and access to them. On the 19 April 1979 the Plaintiff applied to the Supreme Court of Alberta for a further order granting her custody of the children and this order was granted.

On the 5 June 1979 the Plaintiff came to Ireland to seek custody of the children. She applied for an order of Habeas Corpus ad Subjiciendum and subsequently instituted proceedings under Section 11 of the Guardianship of Infants Act 1964. A conditional order of Habeas Corpus was granted by the High Court (Hamilton J.) on the 9 June 1979, returnable on the 13 June 1979. At the hearing Defendant argued that the Plaintiff was an unsuitable person to have custody of the children on account of the condition of her home, her alleged alcoholism, and other factors. The Plaintiff argued that the children should be returned in her custody to Alberta, which was the proper jurisdiction to deal with the custody of the children being the jurisdiction with which they had close and continued connection. Reference was made to the following authorities: *Re H (Infants)* [1965] 3 All ER 906 and [1966] 1 All ER 886; *Re E (an infant)* [1967] 2 All ER 881; *Re T (Infants)* [1968] 3 All ER 411; *S. v. S.* (1978 unreported judgment of Finlay P.); *A. v. H.* (1978 unreported judgment of D'Arcy J.).

The Court reviewed the orders concerning the custody of the children which had been made by the courts of Alberta and New Mexico, and dealt with the desirability of the discouragement by all courts of the forcible removal of minors from one jurisdiction to another in situations which amounted to kidnapping.

Held (per Hamilton J.) that the proper forum to decide questions concerning the custody of the children was the Supreme Court of Alberta and that, providing the Irish Court was assured that no direct harm would come to the children thereby, they should be returned to the custody of the Plaintiff. In order to ascertain whether any direct harm would come to the children through their being returned to Alberta in the custody of the Plaintiff, the Court directed a psychiatric examination of the children and of the Plaintiff and the Defendant.

Postscript: In the event, subsequent to the psychiatric examination, the parties reached a settlement whereby the children were to remain in the Plaintiff's custody in Canada during all school terms, but were to visit the Defendant in Ireland, where he planned to remain, during vacations. The Defendant was to make periodical payments to the Plaintiff for the maintenance of the children, and it was agreed that all future applications concerning custody and access be made to the Courts of Alberta. The terms of this settlement were noted by the High Court in its order.

Habeas Corpus application: J. M. O'D., applicant. O'D infants, O'D v. O'D. – High Court (per Hamilton J.) 13/14/22 June 1979 — unreported.

Summaries of judgments prepared by John F. Buckley, Patrick Fagan, Dermot Loftus, Catherine McGuinness, B.L. and Franklin O'Sullivan and edited by Michael V. O'Mahony.

RECENT IRISH CASES

DISCOVERY OF DOCUMENTS

What is a "document"? — O.31 r. 12 of Superior Court rules includes X-Ray plates and photographs.

The Plaintiff sought damages for personal injuries claimed to have been sustained in a motor accident on 1 January 1973. The injuries immediately after the accident appeared to be trivial but on 11 August 1973 the Plaintiff had some kind of fit or seizure and was now permantly paralysed. The Defendant's medical advisors wished to inspect the X-Ray photographs of the Plaintiff taken immediately after the accident to establish that the fit or seizure and the paralysis were not caused by the accident on 1 January 1973. The Plaintiff's solicitors refused to allow this inspection and on application for Discovery was brought before, and refused by the Master of the High Court. The Defendant appealed to the High Court which affirmed the refusal of the Master and the Defendant appealed to the Supreme Court.

Held (per Henchy J.), allowing the appeal, that the aim of the relevant Rules of the Superior Courts (Order 31) was to enable a party to learn, in advance of the trial, of the existence of the documents on which his opponent might rely at the trial; to give the party who had got discovery an opportunity of seeking production for inspection of any of those documents, and to debar the party who had made discovery from introducing in evidence at the trial such documents as he ought to have discovered. "The word 'document' therefore, should be construed so that it will comprehend the full range of things which could become part of the Court file at the end of the hearing of the proceedings in question. In that sense, the word would clearly included X-Ray films."

Per Kenny J.: "The (High Court) Judge and the Master followed what we are told has been the practice in the High Court since 1954. This practice was based on the decision of McLoughlin J. in *Lynch v. Fleming* (1953/54 Ir. Jur. Rep. 45) where discovery of X-Ray plates or photographs was refused because they did not appear to be "Capable of being interpreted as the thoughts or ideas of any person" (per McLoughlin J.). "In my opinion that decision was wrong and should not be followed. Etymologically the word 'document' is derived from the latin word 'documentum' which in turns comes from the verb 'docere'. It is, therefore, something which teaches or gives information or a lesson or an example for instruction. The main characteristic of a document is then that it is something which gives information. An X-Ray plate or photograph gives information and so is a document and the Defendant is entitled to discovery of it."

Lorraine McCarthy v. Liam O'Flynn — Supreme Court (per Henchy and Kenny JJ., with O'Higgins CJ.) — 19 June 1979 — Unreported.

FAMILY LAW — ADOPTION

Whether consent of natural moter to adoption of her child should be dispensed with pursuant to Section 3 of Adoption Act 1974.

The Plaintiff was an unmarried mother whose child was born in June 1977. The child was kept in a children's home and the Plaintiff visited her regularly until late August 1977. From the beginning of September 1977 until the beginning of December 1977 the Plaintiff ceased to visit her child and had no contact whatever with her and deliberately avoided having any contact with the social worker from the children's home then involved. Finally, on 1 December 1977, the Plaintiff met with a social worker from the Eastern Health Board (into whose hands the mother had been placed) and the Plaintiff agreed to place the child for adoption and signed a form to this effect. The child was placed for adoption with prospective parents on 19 December 1977.

In February 1978, the Plaintiff, having had second thoughts about her decision, refused to sign the final consent to adoption, and in April 1978 the child was returned to her custody. Shortly afterwards, the Plaintiff found that she could not cope with the child and brought her to a nursery and contacted the social worker from the Health Board. After some discussions, the Plaintiff informed the social worker that she had finally decided to place the child for adoption on condition that she was returned to the same prospective parents for adoption. On 2 May 1978 the child was taken from the nursery, the Plaintiff signed the final consent to adoption, and the child was delivered to the prospective adoptive parents. Soon afterwards the Plaintiff contacted the social worker from the Health Board saying that she regretted her decision, and on 18 May 1978 she wrote to the Adoption Board withdrawing her consent.

The prospective adoptive parents refused to return the child to the Plaintiff and the Plaintiff then instituted proceedings against the Health Board, through whose agency the child had purported to be placed for adoption, for return of custody of the child to her pursuant to the Guardianship of Infants Act 1964. The prospective adoptive parents, who had actual custody of the child, were added as notice parties and they applied to the Court for an Order under Section 3 of the Adoption Act 1974 dispensing with the consent of the Plaintiff to adoption and placing the child in their custody pending the decision of the Adoption Board on their application to adopt the child.

Finlay P. following the decision of the Supreme Court in *G. v. An Bord Uchtála and Ors.* (High Court per Finlay P., 19/9/78; Supreme Court, 19/12/78, both unreported) found that he had to decide the following issues, namely, whether Plaintiff had agreed to place her child for adoption within the meaning of Section 3 of the Adoption Act 1974 so as to bring into operation the provisions of the said Section 3, and, if so, whether it was in the best interest of the child that she should now remain in the custody of the prospective adoptive parents for some time and that the Plaintiff's consent should be dispensed with so as to enable the Adoption Board to make an Adoption Order if they should see fit.

In addition, Finlay P. felt that, in addition to the above matters, he would also have to decide the following issues under Sections 14

and 16 of the Guardianship of Infants Act 1964, namely, whether the Plaintiff had abandoned or deserted the child so that the Court should refuse to enforce her right to custody and, if so, whether the Court should exercise its discretion and decline to make an Order for return of custody of the child to the Plaintiff; and, whether the Plaintiff had abandoned or deserted the child or allowed her to be brought up by another person at that person's expense to such an extent that she was unmindful of her duties as a parent and, if so, whether she was now a fit person to have custody of the child.

The Supreme Court in *G. v. An Bord Uchtála and Ors.* (19/12/78, unreported) had decided that the mother of an illegitimate child has an alienable constitutional right to its custody. Following the reasoning of the Court in that case, Finlay P. decided that a valid alienation by the Plaintiff of her constitutional right to custody of the child could be effected only by means of a fully informed and free decision by the Plaintiff.

Held (per Finlay P.):

(1) That following the standards laid down by the Supreme Court in *G. v. An Bord Uchtála and Ors.* (19/12/78, unreported), the events of December 1977 constituted an agreement by the Plaintiff to place her child for adoption within the meaning of Section 3 of the Adoption Act 1974.

(2) That such agreement was an agreement capable of mutual rescission and that the events of April 1978 constituted a rescission of that agreement, so that the Plaintiff was not then a person who "has agreed to place her child for adoption" within the meaning of Section 3 of the said Act of 1974.

(3) That the events of 2 May 1978 constituted an agreement by the Plaintiff to place her child for adoption within the meaning of Section 3 of the said Act of 1974.

(4) That on the evidence before him it was in the best interests of the child that she be given the opportunity of being adopted by the prospective adoptive parents and that therefore an Order under Section 3 of the said Act of 1974 should be made dispensing with the Plaintiff's consent to adoption.

(5) That the Plaintiff had deserted (but not abandoned) her child; but that she was on the balance of probabilities a fit person to have custody of the child, that is to say, that there was nothing in her make-up which would prevent her from being capable of caring for the child.

(6) As to whether the Court should refuse to make an order for return of the child to the Plaintiff in the event of the child not being the subject of a final Adoption Order made in favour of the proposed adoptive parents, that he would not feel bound in such circumstances to refuse to make such an order.

On the basis of the foregoing, the Court made an Order pursuant to Section 3 of the Adoption Act 1974 giving custody of the child to the prospective adoptive parents for a period of six months and authorising the Adoption Board to dispense with the consent of the Plaintiff to the making of an Adoption Order in favour of the prospective adoptive parents during that period of six months; and a Declaration as between the Plaintiff and the Eastern Health Board that, in the event that the Adoption Board does not within the said period of six months make an Adoption Order in favour of the prospective parents, there were not in the absence of a change of circumstances any grounds for refusing to return custody of her child to the Plaintiff.

S. v. Eastern Health Board and Ors. — High Court (per Finlay P.) — 28 February 1979 — Unreported.

LANDLORD AND TENANT

Liability for Repair — Application of Section 55 of the Landlord & Tenant Act 1931.

Certain premises at Mountmellick, Co. Laois, were held under a lease dated the 16 September 1946 which contained a covenant on the lessors' part requiring them to "keep the roof, walls and the exterior part of the said premises in good condition and repair", and a covenant on the lessee's part to "keep the interior of the said premises in good condition and repair". The premises were old having been built some 150 years ago, were T-shaped and had been used both as an office and (in the front portion of the premises) as a dwelling. The Plaintiff and her husband resided in the upper storey of the front portion which was used as a residential flat and the remainder of the building was used by the Plaintiff's husband, with her permission, for his professional practice. No part of the premises was sub-let.

The Court rejected the proposition that the landlord was not liable for any damages arising from defects which existed prior to the service by the tenant of a notice of alleged defects. Neither *Hewitt v. Rowlands* (1924) L.T. 757 nor a passage in para. 722 of *McGregor on Damages* (13th Edition) has authority for the proposition that the Plaintiff was not entitled to damages based on the estimated cost of repair.

It had been argued that Section 55 of the Landlord & Tenant Act 1931 (which deals with damages for breach of tenants Covenants to repair and the limitations on the quantum of such damages) did not apply because the premises did not comply with the conditions contained in the definition of tenement in the 1931 Act because they were not "in the occupation" of the Plaintiff. See *McManus v. Electricity Supply Board* [1941] I.R. 371.

Held (per Costello J.) that the Plaintiff's occupation was sufficient to bring her within Section 55 and she was entitled to claim that she was "in occupation" of the premises.

Hazel Fetherstonhaugh v. Henry Victor Smith and Stephen Smith — unreported High Court (Costello J.) 12 February 1979.

Rent Review Clause — Requirement to serve Notice — Whether time of the essence of the Contract.

A Lease of the upper portion of a shop in Dublin provided as follows:

> "The said yearly rent has been charged between the parties as a fair yearly rent for the demised premises at the respective dates mentioned in paragraph 1 hereof but the Landlord shall have the right at the end of the sixth,

twelfth and eighteenth years of the said term to call for a review of the said yearly rent by giving to the tenant one quarter's notice in writing of such desire if the Landlord considers the fair rental value of the demised premises has increased".

The sixth year of the term ended on 11 February 1976 and on 16 December 1976 the Landlord's (Plaintiff's) solicitors wrote to the Tenant (Defendant) seeking an increase in the rent as from 11 May 1977. This was refused and the issues which came to the Court were:

(1) Whether a time was fixed for the service of a notice, and, if so,
(2) whether that time was of the essence of the contract.

Held (per McWilliam J.) — having reviewed the English cases of *Samuel Properties (Developments) Ltd. v. Hayek* [1972] IW.L.R. 1296; *Kenilworth Industrial Sites Ltd. v. E. C. Little & Co. Ltd.* [1975] IW.L.R. 143; *Accuba Ltd. v. Allied Shoe Repairs Ltd.* [1975] IW.L.R. 1559; and *United Scientific Holdings Ltd. v. Burnley Borough Council* [1977] 2 W.L.R. 806 — that as no time was specified for initiating the procedure, this indicated that the parties were concerned about the periods for which, and the methods by which, rent should be increased but were not greatly concerned about the time at which the procedure should be instituted.

Held further that there was no indication that any particular time for initiating the procedure was intended to be of the essence of the contract. As the Defendant had not been prejudiced by the delay in having the rent fixed the Landlord was entitled to have it fixed now as it would have been fixed at the end of the sixth year. There was no issue in this case (unlike the *United Scientific Holdings* case) as to the time from which the new rent should be payable as the parties had agreed that it should be payable from May 1977.

Ely Limited v. I.C.R. Ltd.—High Court (McWilliam J) — unreported — 3 April 1979.

LAW OF PROPERTY

Adverse possession may arise without either party (i.e. the party entitled to the property or the party in whose favour the Statute of Limitations 1957 operates to vest the interest in the property) being aware of it.

In 1920, a testator bought a farm of 153 acres of freehold lands. This farm lay north and south of the Loughrea-Kilchreest road in County Galway. The portion north of the road contained 40 acres and the portion south of the road contained 113 acres. The effect of the will of the testator, who died in 1936, was to divide his farm into three parts at the end of a ten-year trust period provided for in the will. As residuary legatee the testator's widow became entitled to the 40 acres north of the road, while the portion south of the road was divided between his two sons, the Plaintiff and the Defendant, respectively. The widow was given in addition a right of residence and support on whichever portion of the sons' divisions she should choose at the end of the trust period.

The ten-year trust provided for the working of the farm as a unit by the Defendant, as manager under the direction of the trustees and for the lodging of all profits, derived from the working of the farm, in a bank account in the joint names of the widow and the Defendant. The terms of the will were carried out for the period of the trust. After the expiration of this period, the Plaintiff transferred his division of the lands to the Defendant by a transfer which became effective in 1954. In that year also the joint account came to an end and since then and up to the commencement of this action, the Defendant farmed all the lands as the apparent owner. From the death of the testator, the widow continued to reside in the family home which was on the Defendant's divide. She was provided for and maintained thereon by the Defendant until 1968 when she went to a home where she died in March, 1971.

By her will the widow appointed the Plaintiff her executor and sole residuary devisee and legatee. As such, the Plaintiff's claim was that the lands north of the Loughrea-Kilchreest road (40 acres) are his property and he seeks to recover them from the Defendant. The Defendant claimed that he had acquired title to these lands and that the Plaintiff's claim was barred by the Statute of Limitations 1957, in particular Section 13(2) and Section 18(1).

Section 13(2) of the Statute of Limitations provides:

"The following provisions shall apply to an action by a person (other than a state authority) to recover land.

(a) No such action shall be brought after the expiration of twelve years from the date on which the right of action accrued to the person bringing it or, if it first accrued to some person through whom he claims, to that person."

Section 18(1) provides:

"No right of action to recover land shall be deemed to accrue unless the land is in the possession (in this section referred to as adverse possession) of some person in whose favour the period of limitation can run."

Held (per Kenny J.) in dismissing the Plaintiff's appeal and upholding the decision of the High Court, that

(i) The ignorance of the widow and of the Defendant that the lands north of the road belonged to her did not prevent the Statute of Limitations 1957 applying and did not prevent the Defendant's being in adverse possession of these lands. In Wylie's Irish Land Law at p. 857 it was stated: "It is also established that the adverse possession may take place without either party being aware of it".

(ii) The Defendant had as a matter of fact been in adverse possession of the lands since 1954 and the Plaintiff's claim to the lands north of the roads was therefore statute-barred.

Thomas Murphy v. Laurence Murphy — Supreme Court (per Kenny J., with concurring judgment by O'Higgins CJ., and Parke J.) — 25 July 1979 — Unreported.

RULES OF CERTIORARI

"Audi Alteram Parte" ("hear the other side") properly observed.

The Prosecutor (Duffy) enlisted in the Irish Navy in 1977 as a petty officer for a period of four years. Under one of the regulations under the Defence Acts 1954 and 1960 the prosecutor could be discharged if his commanding officer directed his discharge for the stated reason of "not being likely to become efficient". Some months

later, on 10 February 1978, the commanding officer of the Naval Service directed the prosecutor's discharge. Two weeks later, on 23 February 1978, the prosecutor was brought before the commanding officer of the Naval Service at Haulbowline, and was told he was being discharged and the reason given for his discharge was that he had failed to acquire the necessary degree of efficiency. His commanding officer took steps to ensure that the decision to discharge was not implemented for at least seven days so that the prosecutor could make any representations he wished. He made no representations. The discharge came into effect on 5 March 1978. Some months later he instituted Certiorari proceedings to quash his discharge on the grounds that: (a) he was efficient; (b) he was not informed of the reason for his discharge until after his discharge; (c) he was denied natural justice through not being given an opportunity of knowing or dealing with the case against him.

Held (per Henchy J.) that:

(i) All of the evidence showed that the Prosecutor was discharged because of a chronic and incurable failure to achieve efficiency. He had been warned from the beginning of his career that it was necessary to obtain a watchkeeper's certificate and he was well aware that he had signally failed to achieve the necessary efficiency to obtain such a certificate and that all the officers connected with him were satisfied that he would never qualify for that Certificate.

(ii) He had been repeatedly told that because of his lack of skill and want of efficiency his chance of being kept on would disappear unless there was a dramatic improvement in his performance. When the decision was made to discharge him he was told he was about to be discharged, and it was directed that the discharge was not to take place for at least seven days so that he could make any representations he liked.

(iii) Therefore he was fully informed of his proven lack of efficiency, he was given adequate opportunity of meeting the case for his discharge. The rule of "Audi Alteram Partem" was therefore properly observed.

The Prosecutor argued that he should have been informed of the case against him and have been given an opportunity of meeting it before the decision to discharge him was first made on 10 February 1978.

Further held (per Henchy J.), however, that the crucial step was not the decision to proceed to discharge him, but the actual discharge on 5 March 1978. The Prosecutor had the opportunity to be heard and had been given a fair chance to forestall the actual discharge.

Accordingly the appeal of the Minister for Defence was upheld and Order of Certiorari discharged.

The State (Duffy) v. Minister for Defence — Supreme Court (per Henchy J. with Kenny and Parke JJ.) — 9 May 1979 — Unreported.

Summaries of judgments prepared by John F. Buckley, George Gill, Joseph B. Mannix, Franklin J. O'Sullivan, Michael Staines and edited by Michael V. O'Mahony.

RECENT IRISH CASES

COMPANY LAW

Debenture issued by company in favour of major creditors — debenture created separate charges over different assets including book debts — charge on book debts undefined — whether charge included future book debts — whether charge fixed or floating — company insolvent at time of creation of charges — Section 288 Companies Act, 1963.

This was an application to the High Court pursuant to Section 280 of the Companies Act, 1963 by the official liquidator of Lakeglen Construction Limited ("the Company") to determine a question arising in the winding up of the Company.

The facts of the case, which were not in dispute, disclosed that on 24 November, 1977 the Company had executed a debenture in favour of a group of major creditors in return for their forbearance in enforcing immediate payment of the debts due to them by the Company. The debenture, in which the Company's holding company also joined, contained a number of sub-clauses which purported to create charges over various types of assets of the Company and its holding company and included a sub-clause which read as follows:-

> "3(b) The Company and the holding company, as beneficial owners, hereby charge in favour of the major creditors all their respective book debts and all rights and powers of recovery in respect thereof to hold the same unto the major creditors absolutely".

The debenture provisions did not however define the nature of the charge over "book debts".

The winding-up of the Company commenced on 13 March, 1978 within four months of the execution of the debenture. In the winding-up proceedings the question of whether the charge at clause 3(b) of the debenture created a fixed charge or a floating one over the book debts of the Company became material. If the charge was a floating charge it would be invalid under Section 288 of the Companies Act, 1963 since it was admitted that at the time of the creation of the debenture the Company was insolvent. If it was a fixed charge it would not be so invalidated.

Although the nature of the charge on book debts was not defined this was not so in the case of all the other forms of security created by the debenture. Under the very same clause, i.e. clause 3, the Company, at sub-clause (a), *assigned* all its fixed and movable plant, machinery and equipment, fixtures, implements and utensils to the major creditors *absolutely;* at sub-clause (c) charged, *by way of first fixed charge,* its goodwill and uncalled capital for the time being; and at sub-clause (e) charged, *by way of first floating charge,* its undertaking and assets whatsoever and wheresoever both present and future. The controversy arose by reason of the failure of the debenture explicitly to state whether the charge in clause 3(b) was a floating one or a fixed one.

In a reserved judgment the Court (per Costello J.) pointed out that there is no statutory definition of the term 'floating charge'. The Courts have however indicated certain tests by which a security can be identified as a floating charge or fixed one. The problem of construction in this case could best be dealt with by looking at the different consequences which flow when a charge on book debts is a floating one and when it is a fixed one.

In *Houldsworth v. Yorkshire Woolcombers Association Limited* [1903] 2 Ch. 284, Farwell J. had said that if the security (in respect of book debts) was to be treated as a fixed or specific charge then the Company had no business to receive one singly book debt after the date of the charge; but, on the other hand, if it was intended that the charge was to remain dormant until some future date, and the Company was in the meantime to be permitted to receive the book debts and use them until that date, then the security would contain the true element of a floating charge. In the Appeal which followed to the House of Lords, the Lord Chancellor, in agreeing with the interpretation put on the document by the lower Court, said —

> "In the first place you have that which is in a sense I suppose must be an element in the definition of a floating security, that it is something which is to float, not to be put into immediate operation, but such that the Company is to be allowed to carry on its business. It contemplates not only that it should carry with it the book debts which were then existing, but it contemplates also the possibility of these debts being extinguished by payment to the Company, and that other book debts should come in and take the place of those that had disappeared. That, my Lords, seems to me an essential characteristic of what is properly called a floating security (see (1904) A.C. at p. 257)".

Accepting, as it did, that these were the tests to be applied in the present case in determining whether the charge was a floating one or a fixed one the Court posed the question — "When they executed the debenture did the parties intend that in relation to its book debts the Company was free to receive them and bring new book debts into existence as if the debenture had not been created until such time as the debenture holder became entitled to intervene in the Company's affairs? In its examination of the question the Court considered the following points to be of significance —

(a) The Company was a trading company;
(b) The debenture holders (the major creditors) expressly agreed that the Company was to be permitted to carry on its business;
(c) In normal course of affairs it would obviously create difficulties for a trading company if it was required to hand over to its mortgagees its book debts as it received them from time to time.

It was the view of the Court that when permission to trade is given in a debenture and the debenture contains no restrictions on the Company using its book debts in the course of business, an authority to receive and use such book debts is more readily inferred than is an obligation to hand them over to the debenture holder. In the present case there was nothing in the arrangement between the parties which would tend to displace this inference. On the contrary there was support for it in sub-clauses 2(c) and 2(d) of the debenture document. Under these provisions, the

Company was required to demand and, if necessary, enforce payment of specified debts; to lodge the proceeds of any such collections to its bank account; and to give the major creditors full access to its books and records. But nowhere was it suggested that the Company *pay over* the debts so collected to the major creditors. The absence of such an obligation supported, rather than weakened, the inference that it was intended that the Company was to be entitled to retain book debts as they were paid and to create new ones from time to time. In other words the Company was entitled to deal with its book debts in the ordinary course of its business until such time as the major creditors became entitled to intervene in the Company's affairs. The debenture, the Court concluded, must be so construed.

The Court having dealt, as above, with the inferences to be drawn from the provisions of the debenture, continued its construction of the charge on book debts contained in clause 3(b) by applying the three tests of a floating charge as suggested by Romer L.J. in the Court of Appeal in the *Yorkshire Woolcombers Association case* [1903] 2 Ch., at p. 295), namely —

1. Is it a charge on a class of assets of the Company present and future?
2. Is that class one which, in the ordinary business of the Company, is changing from time to time?
3. Is it contemplated by the charge that, until some further step is taken on behalf of those interested in the charge, the Company may carry on its business in the ordinary way as far as that particular class of assets is concerned?

In applying these tests to the charge at clause 3(b) of the debenture under consideration the Court was satisfied —

1. That the charge was a charge over moneys due or to become due to the Company from both existing and future debtors.
2. That the charge was a charge on a class of assets which in the ordinary course of the Company's business would be changing from time to time.
3. That the debenture contemplated that the Company should carry on its business in the ordinary way, and receive payment from its debtors from time to time, without regard to the charge over the book debts until some future event happened which would justify intervention by the debenture holders in the Company's affairs.

A submission made on behalf of the debenture holders that the charge on book debts was divisible as between existing book debts and future book debts and that sub-clause 3(b) created a fixed charge on existing book debts whilst sub-clause 3(e) created a floating charge over future book debts, i.e. book debts coming into existence at a future time, was rejected by the Court.

Held (per Costello J.) that the debenture was invalid by virtue of the provisions of Section 288 of the Companies Act, 1963 to the extent to which it purported to charge the book debts of the Company in favour of the creditors to whom it was issued.

In the matter of Lakeglen Construction Limited (In Liquidation) and In the matter of the Companies Act, 1963 — High Court (per Costello J.) — 20 December, 1978 — Unreported.

CRIMINAL LAW

Jurisdiction of District Court to try minor offences. Extent of Section 2(2) of Criminal Justice Act, 1951. Purpose of Section is to prevent accused being deprived of his right to trial by jury upon a non-minor offence. Purpose not necessarily defeated by inadequate summary of facts upon which a District Justice formed the opinion that an offence constituted a minor offence.

On 18 July, 1978 the Prosecutors, both members of the Gadra Siochana, appeared before the District Court charged with assault occasioning bodily harm. Each elected to be tried in the District Court and in reply to the District Justice the solicitor for the Director of Public Prosecutions stated that the assault alleged was one in which the victim had received a swollen face but was not a bad assault. The case was heard on 15 and 20 December, 1978, and during the course of the hearing it was alleged that the Prosecutors had pursued the injured party in a motor car and forced him into their motor car and then assaulted him to compel him to reveal the whereabouts of his brother, that the injured party's brother was compelled to give one of the Prosecutors £5 and that in the course of the motor journey threats of violence were made against the injured party. On 20 December, 1978, the Prosecutors were each convicted of the offence charged and each sentenced to six months imprisonment.

On 21 December, 1978, the Prosecutors applied for and obtained conditional Orders of Certiorari against the District Justice on the ground "that the said District Justice did not conduct any enquiry as to whether the facts alleged constituted a minor offence and did not form the opinion that the facts alleged did constitute a minor offence". The Prosecutor's original affidavit was controverted by the District Justice who showed cause. The Prosecutors filed further affidavits stating that no proper or adequate general statement of the facts of the case was heard by the District Justice before he embarked on the hearing and that the facts alleged could not possibly be considered a minor offence. They were allowed to argue this further ground.

The argument centred on the provisions of Section 2(2)(a) of the Criminal Justice Act, 1951, which permitted an indictable offence (such as each of the Prosecutors was charged with) to be tried summarily in the District Court provided two conditions were fulfilled, namely,

(1) the Court was of opinion that the facts proved or alleged constituted a minor offence fit to be so tried and
(2) the accused on being informed of his right to be tried with a jury does not object to being tried summarily.

The High Court referred to the decision of Butler J. in *The State (Nevin) v. Tormey*, [1976] I.R. 1 which held that it was not sufficient for the District Justice to hear the evidence and then, if satisfied that it was a minor offence, to convict; but the District Justice must, before embarking on the trial of the offence and as a necessary preliminary to jurisdiction, have formed the opinion

of the minor nature of the offence; and he may do so by obtaining from the prosecution a general statement of the facts of the case.

Held (per McMahon J.) that:

(1) The purpose of Section 2(2) of the Criminal Justice Act, 1951, was to prevent a District Justice from depriving an accused of his right to trial by jury on a non-minor offence. If, however, a District Justice based his opinion on an inadequate statement of the facts and it appeared to him during the course of the trial that the offence was a non-minor one then clearly it was the duty of the Court to discontinue the trial (citing the decision of Henchy J. in *The State (Holland) v. District Justice Eileen Kennedy*, [1977] I.R. 193.

(2) Following *Conroy v. Attorney General & Ors.* [1965] I.R. 411 that the major test which a District Justice should apply in relation to the question whether an offence was a minor offence was the appropriate punishment to be imposed for it. In the present case the District Justice imposed half the maximum sentence and clearly considered it to be a minor offence. The Prosecutors' affidavits disclosed no evidence which would compel the District Justice to come to the conclusion that the case was one fit to be tried on indictment only. Cause shown allowed.

The State (McDonagh) v. District Justice O'hUadaigh and The State (Herlihy) v. District Justice O'hUadaigh, — High Court (per McMahon, J.) — 9 March, 1979 — Unreported.

LAW OF PROPERTY

Married Women's Status Act 1957 — Lands purchased in the joint names of husband and wife declared under the Act to be owned by them in equal beneficial shares.

The husband and wife were married in London in 1966. Two years later, the wife's mother, Mrs. A., purchased a house there and had it put in the joint names of her daughter and her daughter's husband. Mrs. A. gave evidence that her intention was that the house was to be the joint property of her daughter and her husband; and that she was aware that her daughter's husband did not have any capital or assets, and that she did not want him to be dependent on his wife.

The husband and wife lived in this London house until 1973 when they decided to come and reside in Ireland. The house was sold and, after discharging a jointly raised mortgage and an overdraft raised in his sole name by the husband, the net proceeds of sale came to £31,000.

A farm of land in County Cork was jointly purchased for £22,500. Of this sum, £20,000 was provided out of the balance remaining from the London sale and £2,500 by Mrs. A. to her daughter.

Unhappy differences subsequently arose. The wife left the farm in 1977 and returned to London. The husband continued to reside at the farm, having 'de facto' custody of the three children of the marriage.

The wife, as Plaintiff, now claimed a declaration that she was entitled to the sole beneficial ownership of the farm of which she and her husband were registered as joint owners.

On behalf of the wife, it was argued that in respect of the husband's half-share in the London property there was a resulting trust to Mrs. A. and that even if there was evidence of an intention to benefit the husband such intention must be construed to do so only for the duration of the marriage; the marriage having broken up, that intention ceased and the resulting trust was superimposed.

Held (per Finlay P.) that following *Fowkes v. Pascoe* [1875] 10 Ch. App. 343, the evidence of Mrs. A. clearly rebutted a presumption of a resulting trust and the putting by Mrs. A. of a half share in the London property in the name of the husband was an irrevocable gift by her to her son-in-law. From the sale of the London property held in equal shares beneficially by the husband and the wife there was derived the substantial monies then invested in the farm. On the authority of *Pettitt v. Pettitt* [1969] 2 W.L.R. 966 there was no room on the evidence for any conclusion that on the break-up of the marriage different trusts were superimposed upon the original gift. No agreement could be implied at the time of the £2,500 gift from Mrs. A. to her daughter which should disturb the equality which was apparently the entire concept of the purchase of the farm in succession to the London property.

Declaration that the farm was owned by the husband and the wife in equal beneficial shares.

B. v. B. — High Court (per Finlay P.) — 25 July 1978 — Unreported.

EVIDENCE — NULLITY

It is not in accordance with the proper administration of Justice to cast aside the corroborated and unquestioned evidence of witnesses still less to impute collusion or perjury to them, when they are not given an opportunity of rebutting such an accusation. To do so is, in effect, to condemn them unheard and is contrary to natural justice.

In a petition for nullity before the High Court, the ground relied on was the non-consummation of the marriage because of the husband's impotence. At the hearing the wife gave full and detailed evidence to the effect that from the date of the marriage in April 1971, until she and the husband finally ceased to live together 6½ years later, they never succeeded in having sexual intercourse because of the husband's incapacity. Her evidence was corroborated by a general practitioner, who gave evidence that the husband had come to see him about his impotence early in 1976, and by a consultant physician to whom the husband was then referred and who, because he considered the complaint of impotence to be due to psychological factors, referred the husband to a consultant psychiatrist, who was not called as a witness, but whose medical reports were referred to. The same general practitioner, who had seen the wife in October 1975, gave evidence that he was of the opinion that she was then still a virgin. The husband, who was represented by Counsel, gave evidence admitting that, notwithstanding the best efforts of his wife and himself to act on the advice and guidance given to them by the consultant psychiatrist, consummation of the marriage had never been effected, and that the failure was due to his non-physical or psychological incapacity.

It had never been suggested to the husband or to the wife during the hearing that they had acted collusively in the matter before the

High Court; nor was it suggested to the general practitioner that he or the consultant physician had been misled into a wrong conclusion as to the husband's impotence, and, therefore, as to the non-consummation of the marriage. The judge's note of the evidence amounted to an unrebutted and unquestioned case for the granting of a decree of nullity.

When reserved judgment was delivered, the judge rejected the wife's case and dismissed the petition stating that he was not satisfied that consummation had not taken place; that he was not satisfied as to the bona fides of the parties; also, that he had little doubt but that the parties had mutually agreed if possible, to have their marriage annulled; and that he considered the attitude of the husband was to assist the case, made by the wife; and that, in effect, he (the trial judge) held that he was not satisfied that the husband and wife had not acted collusively and had not given perjured evidence. The petitioner appealed to the Supreme Court.

Held (per Henchy J.) that having regard to the uninimity of the evidence given and the conduct of the case generally, it was not open to the trial judge to refuse a decree of nullity for the reasons he had given. Per Henchy J.: "It is not in accordance with the proper administration of justice to cast aside the corroborated and unquestioned evidence of witnesses, still less to impute collusion or perjury to them, when they were not given an opportunity of rebutting such an accusation".

A decree of nullity was ordered by the Supreme Court on the grounds that the marriage was not consummated due to the husband's incapacity and that this was the only verdict open.

M. v. M. — Supreme Court (per Henchy J. with Kenny and Parke JJ.) — 8th October, 1979 — Unreported.

SALE OF LAND

Family Home Protection Act, 1976 — Husband and Wife joint vendors — whether need for separate consent in writing of spouse where that spouse has already contracted to sell as joint vendor.

The Defendants, who were husband and wife, held their dwellinghouse at Lucan, Co. Dublin, on a long lease as joint tenants. In July 1978, they both signed a contract to sell the house to the Plaintiff for £18,500. Subsequently the Defendants refused to complete the sale on the grounds that the contract was void under Section 3(1) of the Family Home Protection Act, 1976 ("the Act") as the wife had not consented to the sale in writing prior to the contract being signed. The Plaintiff brought proceedings for an Order for specific performance of the contract which order was granted by the High Court (Butler J.). The Defendants appealed to the Supreme Court.

Section 3(1) of the Act provides as follows:

> "Where a spouse, without the prior consent in writing of the other spouse, purports to convey any interest in the family home to any person except the other spouse, then, subject to subsections (2) and (3) and Section 4, the purported conveyance shall be void".

The Contract in question was a "conveyance" by reason of the definition in Section 1(1) of the Act and subsections (2) and (3) of Section 3 and Section 4 of the Act were not applicable.

Held (per Henchy J.) that there was a flaw in a literal interpretation of Section 3(1) of the Act in that it assumed that it was intended to apply when both the spouses are parties to "the conveyance". The basic purpose of Section 3(1) was to protect the family home by giving a right of avoidance to the spouse who was not a party to the transaction, and it ensured that protection by requiring, for the validity both of the contract to dispose and of the actual disposition, that the non-disposing spouse should have given a prior consent in writing. Section 3(1) could not have been intended by Parliament to apply when both spouses joined in the "conveyance". In such event no protection was needed for one spouse against an unfair and unnotified alienation by the other of an interest in the family home. Per Henchy J.: "Section 3(1) is directed against unilateral alienation by one spouse. When both spouses join in the "conveyance", the evil at which the subsection is directed does not exist".

The Court referred with approval to the principles of statutory interpretation laid down by Lord Reid in *Luke v. Inland Revenue Commissioners* [1963] A.C. 557 at p. 577 as follows:

> "To aply the words literally is to defeat the obvious intention of the legislation and to produce a wholly unreasonable result. To achieve the obvious intention and to produce a reasonable result we must do some violence to the words. This is not a new problem, though our standard of drafting is such that it rarely emerges. The general principle is well settled. It is only where the words are absolutely incapable of a construction which will accord with the apparent intention of the provision and will avoid a wholly unreasonable result that the words of the enactment must prevail".

The order for specific performance of the contract was approved.

N. v. M. and M. — Supreme Court (per Henchy J.) with Kenny and Parke JJ.) — 23 October, 1979 — Unreported.

Summaries of judgments prepared by Laurence F. Branigan, John F. Buckley, Joseph B. Mannix, E. Rory O'Connor, Garrett Sheehan and edited by Michael V. O'Mahony.